OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 13 December 1990 *

Mr President,
Members of the Court,

1. The action brought by Ricoh Company Ltd (hereinafter referred to as 'Ricoh') is based on a number of submissions and arguments which are to a considerable extent supplementary or similar to those relied on by Canon Inc. in Case C-171/87, particularly as regards determination of normal value and comparison thereof with the export price. I shall thus be able to deal with those matters fairly briefly.

2. Furthermore, with respect to the submissions concerning the injury, the Community interest and calculation of the anti-dumping duty, Ricoh has put forward arguments which coincide with those of the applicants in Cases C-175/87 (Matsushita), C-176/87 (Konishiroku), C-177/87 (Sanyo) and C-179/87 (Sharp) and which I shall discuss in detail in the present Opinion.

3. Before starting my analysis of those submissions made by Ricoh on matters of substance I must first make it clear that I support the arguments advanced by the Council concerning the *admissibility* of some of Ricoh's claims.

4. In the first place, in its judgment of 14 March 1990, *Gestetner* v *Council and Commission* (Case C-156/87, [1990] ECR I-781), the Court again refers to its earlier decisions [1] according to which

'a regulation imposing different anti-dumping duties on a series of traders is of direct concern to any one of them only in respect of those provisions which impose on that trader a specific anti-dumping duty and determine the amount thereof, and not in respect of those provisions which impose anti-dumping duties on other undertakings' (paragraph 12).

Therefore, Ricoh's main claims for the annulment, in its entirety, of Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan [2] (hereinafter referred to as 'the definitive regulation' or 'the contested regulation') must be dismissed as inadmissible and it is necessary to consider the merits of the subsidiary claims seeking its annulment only in so far as it applies to Ricoh.

5. Secondly, since the Court has no jurisdiction when carrying out a review of legality under Article 173 of the Treaty to address injunctions to a defendant institution, [3] Ricoh's claims that the Court

* Original language: French.

1 — See the judgments of 7 May 1987 in the ball-bearings cases, Case 240/84 NTN Toyo Bearing v Council [1987] ECR 1809, paragraph 6; Case 255/84 Nachi Fujikoshi v Council [1987] ECR 1861, paragraph 7; Case 256/84 Koyo Seiko v Council [1987] ECR 1899, paragraph 6; Case 258/84 Nippon Seiko v Council [1987] ECR 1923, paragraph 7.

2 — OJ 1987 L 54, p. 12.

3 — See for example Case 312/84 Continentale Produkten Gesellschaft v Commission [1987] ECR 841, paragraph 22, and Cases 142 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 13.

should order restitution of the anti-dumping duties collected must also be declared inadmissible.

6. This brings me to the submissions on matters of *substance* which Ricoh makes with a view to the annulment of Regulation No 535/87 in so far as it applies to Ricoh, in other words to the extent to which it imposes on plain paper photocopiers (hereinafter referred to as 'PPCs') manufactured by Ricoh a definitive anti-dumping duty of 20% and provides for the definitive collection of the amounts covered by the provisional anti-dumping duty at the rate of 15.8%, as imposed by Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan [4] (hereinafter referred to as 'the provisional regulation').

7. The first four submissions all relate to the problems of determining normal value and comparing it with the export price. The applicant alleges infringements of Article 2(3)(a) and 2(7) in some instances and of Article 2(9) and 2(10)(c) in others of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community [5] (hereinafter referred to as 'the basic regulation').

8. On closer examination, however, it becomes apparent that the arguments expounded are very often the same, that they are intended to prove the alleged illegality of the manner in which the normal value was determined or was compared with the export price, and that some of them are presented as alternatives to others. The reason for this is to be found, on the one hand, in the applicant's view that Article 2(3)(a) must be read in conjunction with Article 2(9) (see paragraph 32 of the application) and from the fact that its criticisms all essentially relate to the treatment of certain expenses incurred by its Japanese subsidiaries — which it wishes either not to be included in the normal value as determined on the basis of Article 2(3) or else to be deducted from it as allowances under Article 2(10)(c).

9. I shall therefore examine all those various submissions together.

A — Determination of the normal value and comparison thereof with the export price

10. It seems to me that Ricoh's arguments may be summarized as follows:

(1) the Council failed to use an identical or comparable method to establish the normal value and the export price;

(2) by adopting as the normal value the prices charged to the first independent purchasers on the Japanese market and by refusing to deduct from it certain selling expenses and the administrative

4 — OJ 1986 L 239, p. 5.

5 — OJ 1984 L 201, p. 1.

and general expenses incurred by Ricoh's Japanese subsidiaries, the Council determined the normal value at dealer level or even at end-user level and not at the ex-factory level, although the export price, by contrast, corresponded to the ex-factory level by virtue of the fact that pursuant to Article 2(8)(b) of the basic regulation all the costs and profits of Ricoh's Community subsidiaries were deducted from the price at which the imported product had been sold for the first time to an independent purchaser in the Community;

(3) by thus using as the normal value the prices charged by Ricoh's Japanese subsidiaries to the first independent purchasers, without then making the appropriate deductions from those prices, the Council, it is claimed, also incorrectly applied Article 2(7), which may not be applied in such a way as to give results radically different from those which would have been obtained if the Council had considered that the transfer prices between undertakings, that is to say between Ricoh and its sales subsidiaries, could be used as a reference for the purposes of Article 2(3);

(4) by refusing to take account of the discount granted by Ricoh's subsidiaries for the trade-in of an old PPC, the Council did not determine the normal value of the new product at the level of the 'price actually paid or payable', as required by Article 2(3)(a);

(5) by not granting the allowances requested for those trade-in payments and for certain other direct selling expenses incurred by Ricoh's Japanese sales subsidiaries, the Council also infringed Article 2(10)(c).

11. In view of the conclusions which I reached in Case C-171/87, *Canon*, none of those arguments can be upheld.

12. I would refer first to the principle whereby the methods for calculating normal value and the export price are independent from each other, as stated in the judgments of the Court of 7 May 1987 in the 'ball-bearings' cases [6] and also to the consequence of that principle, namely that

'the validity of the comparison provided for in Article 2(9) cannot therefore be conditional on calculation of the normal value and the export price by identical methods'. [7]

No argument can therefore be based on the simple fact that certain elements are included in the normal value and not in the export price, in so far as the rules laid down for the determination of each of the two items were complied with. It also follows that the fact that certain types of expenses were deducted from the export price constructed in accordance with Article 2(8)(b) is not sufficient to compel the institutions to make similar adjustments to the normal value for the purposes of the

6 — Cases 240, 255, 256, 258 and 260/84, [1987] ECR 1809, 1861, 1899, 1923 and 1975.

7 — See Joined Cases 277 and 300/85 Canon v Council [1988] ECR 5731, paragraph 37.

comparison provided for in Article 2(9) and (10).

13. I would also point out that it is clear from the judgment in *Canon*, cited earlier, that the prices paid by the first independent purchaser may be properly regarded as the prices actually paid for the product in the exporting country or country of origin in the ordinary course of trade and may therefore be used pursuant to Article 2(3)(a) for determination of the normal value (see paragraph 12). It also follows from that judgment that in the case of division of production and sales activities within a group made up of legally distinct, but economically related, companies — an arrangement also set up by Ricoh in the Japanese market —

'it is precisely by taking account of the first sale to an independent purchaser that the normal value at the "ex-factory" level can be correctly established' (paragraph 41).

14. Ricoh's argument that in the present case the normal value was established at a level other than the 'ex-factory' level, at which the export price was established, thus has no basis. Moreover, since both the normal value and the export price were established at the 'ex-factory' level, it follows that no adjustment had to be made under Article 2(9) and (10)(c) to take account of supposed differences of level of trade.

15. As I explained in my Opinion in Case C-171/87, the fact that the prices paid by the first independent purchaser could properly be regarded as having been charged 'in the ordinary course of trade' within the meaning of Article 2(3)(a) renders wholly irrelevant the dispute as to the applicability and the consequences of any application of Article 2(7) according to which 'transactions between parties which appear to be associated or to have a compensatory arrangement with each other' may be regarded as not 'in the ordinary course of trade'.

16. Moreover, Ricoh's contention that the application of Article 2(7) should not yield results radically different from those that would be obtained if the transfer prices between the manufacturer or exporter and its subsidiaries were adopted in order to determine the normal value would, if upheld, deprive that provision of any useful effect in practice since its very purpose is to enable the institutions not to take account of transfer prices or to take account of them only under certain circumstances.

17. As regards the submission that the Council infringed Article 2(3)(a) by not using as the normal value the net prices actually paid by independent customers but instead the gross prices, including the discounts granted for the trade-in of an old PPC, I should point out that I have already indicated in my opinion in Case C-171/87 that the grant of a trade-in discount does not involve any real reduction in the sale price of the new product but in general merely reflects the value that the used product represents for the person receiving

it. That value in fact therefore forms part of the price 'actually' paid or payable for the new product. In the present case, in the absence of a second-hand market for PPCs in Japan, that value corresponds not to the re-sale value of the used PPCs but to the advantages which the manufacturer gains from their removal from the market, as described by the Council at the end of the second paragraph of recital 13 of the contested regulation.

18. Finally, we also saw in my Opinion in *Canon* that the finding that those advantages represent a value distinct from the sales of new PPCs entitled the Council to take the view that the trade-in discounts in question are *not directly* linked with the sales in connection with which they are granted, with the result that it was likewise not obliged to make an adjustment under Article 2(10)(c) of the basic regulation, which expressly provides that the allowances to be made for differences in conditions and terms of sale are to be 'limited to those differences which bear a direct relationship to the sales under consideration'.

19. As regards the other expenses referred to by Ricoh, namely travel, communication, announcement, sales aid, entertainment and company car expenses, they form part — even in the applicant's view — of the general and administrative expenses in respect of which, as a rule, differences do not give rise to allowances under Article 2(10)(c). Moreover, those differences could give rise, by way of exception, to an adjustment only if they satisfied the general condition of bearing a direct relationship to the sales under consideration, and expenses incurred regardless of whether a sale is made do not satisfy that condition.

20. Finally, in view of the fact that the rules applicable to the establishment of the normal value or of the export price are different from those applicable to the comparison of them and that the aim of Article 2(9) and (10) is to define the adjustments which may be made to the normal value or export price after they have already been calculated according to the methods laid down for that purpose, [8] it is also possible to dismiss the view advanced several times by the applicant (see paragraphs 28, 36 and 49 of the application) that the refusal to consider the expenses in question as direct selling expenses which are deductible under Article 2(10)(c) is incompatible with their inclusion in the normal value in those cases where the normal value was constructed pursuant to Article 2(4), which covers cases where the product is sold in the country of origin at a price lower than the cost of production. [9] Whilst Article 2(3)(b)(ii) provides expressly that the constructed value is to be determined by adding cost of production and a reasonable margin of profit, and the production cost in its turn includes a reasonable amount for selling, administrative and other general expenses, Article 2(10)(c) allows them to be deducted only exceptionally and only to the extent to which those expenses bear a direct relationship to the sales under consideration on the market in question. The purpose of constructing normal value is to determine the selling price of a product as it would be if it were sold in its country of origin or in

8 — The same point is made in the ball-bearing cases supra, in particular NTN Toyo Bearing, paragraph 16.

9 — In paragraph 48 of its defence, the Council states that the normal value was constructed pursuant to Article 2(3)(b)(ii) and not, as the applicant suggests, Article 2(4). That difference of opinion seems to me, however, to be somewhat artificial since the two provisions are related, in that in the event of Article 2(4) being applied, involving construction of the normal value, the latter is arrived at in accordance with Article 2(3)(b)(ii).

the exporting country [10] whereas the adjustments provided for in Article 2(10)(c) are intended to rectify the normal value thus calculated on the basis of objective factors which reflect the particular features of each market, have a varying impact on sales conditions and consequently affect price comparability. [11]

B — The injury

21. In the observations which it submitted jointly with the applicants in Cases C-175, C-176, C-177 and C-179/87, Ricoh challenges the Council's findings concerning the injury caused to the Community industry by Japanese PPC exports with regard to the following aspects: the definition of the Community industry, the concept of like product, the factors on the basis of which the injury was determined and the causal link between the dumped imports and the injury thus determined.

22. For the reasons already indicated in my Opinion in Case C-171/87 *Canon* v *Council*, like the Council (see paragraphs 2 and 3 of the rejoinder in the present case) I consider that in evaluating the injury suffered by the Community industry it is more logical to consider in the first place what constitutes a 'like product' within the meaning of Article 2(12) of the basic regulation, and only afterwards to check whether the 'Community industry' manufacturing the like product in question has been correctly defined having regard to Article 4(5) of that regulation.

23. Accordingly, I shall deal with those two points in the reverse order to that followed in the Report for the Hearing. Moreover, I can be fairly brief since I have already expressed my views on the concept of like product in my Opinion in Case C-171/87, and in its judgment of 14 March 1990 in Case C-156/87 *Gestetner* v *Council and Commission* [1990] ECR I-781, the Court has already dealt with a submission alleging an incorrect definition of Community industry.

24. Finally, I consider that I can examine in the same part of this Opinion the other two aspects, namely the factors used in determining the injury and the causes thereof, which are closely linked.

1. *Definition of the concept of like product*

25. In my abovementioned Opinion I explained why I believe that the Council was entitled to consider that PPCs in adjacent segments, from personal copiers up to those in segment 5 of the Dataquest classification, are like products within the meaning of Article 2(12) of the basic regulation.

26. I also share the Council's view that it is not always clear whether Ricoh would have preferred total segmentation of the PPC market, with as many categories of products as there are different PPC segments, or whether it is calling for a division into two categories, namely that of 'small photo-

10 — This point is made in the judgments of 5 October 1988, in particular in Canon, supra, at paragraph 26.

11 — This point is made in the ball-bearing cases, in particular in paragraph 32 of Nachi Fujikoshi, supra.

copiers' — those which can produce up to 40 copies per minute — and that of machines with a higher copying speed (see pages 11 and 12 of volume II of the application). The impression is also given that the reasons for which Ricoh wishes to place the threshold at 40 copies per minute are not connected with the physical and technical characteristics of the machines but derive from the finding that it was only in the market for large PPCs that any significant Community industry existed and that Japanese photocopiers predominated only in the market for small PPCs (see in particular pages 11, 12 and 23 of volume II of the application). Is it not for the same reason, namely that during the reference period there was only limited Community production of photocopiers producing up to 30 copies per minute, that is to say those belonging either to the category of personal photocopiers or to segments 1a, 1b or 2, that Ricoh does not ask for any distinction to be drawn within that group of categories, even though it states that

'the physical differences and "un-likeness" between copiers in adjoining segments are particularly striking when one considers personal copiers and copiers in segment 1a' (see page 34 of volume II of the application)?

27. Those considerations must not, however, prevail in determining what is to be understood by 'like product' which, according to Article 2(12) of the basic regulation is either

'a *product* which is identical, i. e. alike in all respects, to the product under consideration',

or

'another product which has *characteristics* closely resembling those of the product under consideration'.

In any event, Ricoh has still not stated for what particular reasons relating to the characteristics of PPCs other than the copying speed it proposes the threshold of 40 copies per minute in order to distinguish between 'small' and 'large' photocopiers. I take the view that it is legitimate to consider that a machine which does the same work as another, even if it does so at a greater speed, displays characteristics closely resembling those of that other machine.

28. It will also be seen that if copying speed is taken as the distinguishing criterion, there are overlaps between the various segments defined by Dataquest (see page 11 of volume II of the application). Thus in fact PPCs producing between 40 and 45 copies per minute may belong either to segment 3 (31 to 45 copies) or to segment 4 (40 to 75 copies). (Moreover, those producing between 70 and 75 copies may belong either to segment 4 or to segment 5, which extends from 70 to 90 copies.) Overlaps also exist between personal photocopiers and those in segments 1a and 1b, the first producing up to 12 copies per minute and the second up to 20 and from 15 to 20 respectively.

29. Finally, regardless of whether the definition of the 'market under consideration' adopted by the Commission in the context of a proceeding for the application of

Article 85 of the EEC Treaty is such as to be binding on the Council when the latter defines the 'like product' in an anti-dumping proceeding, it must be stated that in Decision 88/88/EEC of 22 December 1987 on joint venture agreements between Olivetti and Canon (Official Journal 1988 L 52, p. 51), cited by Ricoh, the Commission opted neither for total segmentation of the PPC market nor for a division of the market on the basis envisaged in this case by Ricoh. Moreover, whilst it may be true that the Commission distinguished three representative markets, namely those extending from the personal photocopier up to segment 2, from segment 3 to segment 4 and from segment 4 to segment 6 respectively, it did not fail to note that that did 'not preclude a certain interchangeability between these three segments'.

30. The fact that the interchangeability between the various market segments is less than that existing within a given segment does not show, contrary to Ricoh's contention, that real segmentation exists but, on the contrary, it shows that there are no clear boundaries between the various segments and that PPCs belonging to one of them may very well be replaced by one or more PPCs belonging to different segments.

31. That fact is also implicit in various passages of Ricoh's application, in particular where it states that

'until the emergence of the new generation of copiers in Japan, European customers had to choose between a large, fast plain-paper copier; a small, inferior coated-paper copier; or a slow plain-paper copier like the Rank Xerox 660 which gave poor quality copies but did use plain paper and which had an extensive service network to back it up' (see page 11 of volume II of the application),

or that following the appearance of small photocopiers on the Japanese market,

'instead of (or as well as) buying one huge, ultra-fast copier situated in a central print-shop, a Japanese firm could procure several or many small copiers to be distributed throughout the company's premises' (page 6 of volume II of the application).

32. As regards the argument that the range of Japanese exports penalized by the anti-dumping duty is wider than that of the PPCs manufactured in the Community (see pages 3 and 33 and 34 of volume II of the application), it is not relevant in circumstances such as those of the present case in which it has been established that, during the reference period, there was a Community industry, albeit small, in all the segments in which there were Japanese exports, namely in all the segments from the personal copier to PPCs in segment 4. Although there were differences between any one of the numerous imported Japanese models and the limited number of Community models displaying comparable technical characteristics, it was ultimately necessary to take account of them, as the Council pointed out (see paragraph 90 of its defence) when making the price comparison which the institutions had to carry out to determine the existence and the extent of price undercutting. That is what they did in

the present case, as is apparent from recital 41 et seq. of the contested regulation, and that is what they also did in the Japanese electronic typewriter cases, as is apparent in particular from the judgment of the Court in *Canon*, cited earlier, in which the Court did not question the similarity of the products concerned, even though there was a wide variety of models and there were considerable differences between the technical characteristics of the various models (see in particular paragraphs 14 and 66 of the judgment).

2. *The definition of Community production*

33. According to Article 4(3) of the basic regulation, Community industry means

'the Community producers as a whole of the like product or ... those of them whose collective output of the products constitutes a major proportion of the total Community production of those products except that:

when producers are related to the exporters or importers of the allegedly dumped or subsidized products the term "Community industry" may be interpreted as referring to the rest of the producers;

...'

34. Let me point out straight away that it clearly follows from that provision that since the like product has been correctly defined in the present case as including the whole range of PPCs, from personal copiers to those of segment 5, the view expressed by the applicant that the Community industry in the 'small' photocopier category was limited or indeed virtually non-existent and that, for that reason among others, no Community manufacturer could properly claim to have suffered injury from imports of 'small' photocopiers from Japan, cannot be regarded as being of decisive importance to the definition of the 'Community industry' and cannot therefore — in any event, not by itself — compel the exclusion of certain manufacturers from that industry.

35. The other arguments put forward by Ricoh in support of its claim that Rank Xerox, Océ and Olivetti should not have been included in the 'Community industry', which are based on the fact that those Community manufacturers had links with Japanese exporters and themselves effected imports from Japan, are essentially the same as those which the Court has already rejected in its judgment in *Gestetner*, cited earlier.

36. As regards the earlier decisions cited by Ricoh, in which, it is claimed, the institutions took an approach different from that adopted in the present case, I would point out that in *Gestetner* the Court denied the existence of any practice on the part of the institutions whereby a manufacturer who has links with the exporters or importers or is himself an importer of the allegedly dumped or subsidized product was automatically excluded from the circle of

manufacturers constituting the 'Community industry' within the meaning of Article 4(5) of the basic regulation. It is true that it did so on the basis of the documents before it and the oral argument presented to it, that is to say by reference to the previous cases expressly mentioned by the applicant in *Gestetner* (paragraph 44 of the judgment). But the Court's finding is nevertheless still applicable to the present case. First, the four cases cited by Gestetner are also among those cited by Ricoh. Secondly, what was true in those cases is also true in the other cases; whenever the institutions excluded or refused to exclude a Community manufacturer from the Community industry, they did so in the exercise of the discretion which they enjoy and are required to exercise 'on a case-by-case basis, by reference to all the relevant facts' (paragraph 43 of the *Gestetner* judgment). (Moreover, the fact must not be overlooked that in the case of Rank Xerox, we are talking about a Community company which has a substantial capital holding in a Japanese manufacturer and not about a Japanese manufacturer which controls a production subsidiary in the Community.) In those circumstances, those other cases likewise cannot constitute evidence of a practice which the institutions are bound to follow in the future.

37. Finally, I consider that Ricoh's reference to Article 13(10) of the basic regulation is entirely irrelevant to this case. In the first place, that provision was not incorporated in the basic regulation until after the contested regulation was adopted, namely by Council Regulation (EEC) No 1761/87 of 22 June 1987 (Official Journal 1987 L 167, p. 9), the so-called 'screwdriver' regulation. In the second place, Article 13(10) gives authority in certain circumstances for an anti-dumping duty to be imposed on products assembled or manufactured in the Community from components or original materials from the exporting country or countries in question: its purpose is therefore unrelated to the question of defining Community industry.

3. *The existence of injury attributable to dumping*

38. Ricoh challenges the institutions' analysis of the various factors which they used in determining the injury and considers that the Community industry did not in fact suffer any injury. It also maintains that the low level of activity of Community manufacturers in the sector of small photocopiers was attributable not to imports from Japan but to other factors, in particular their own initial decision not to undertake the manufacture of such photocopiers. It thus challenges, by reference to the factors adopted by the institutions, the very existence of any injury and, then, arguing that the injury, as determined, was caused by other factors, it denies the existence of any causal link between the dumped imports and the alleged injury.

39. It will be recalled, as the Court pointed out in paragraph 49 of its judgment in *Canon*, cited earlier, that Article 4(1) of the basic regulation, which incorporates the wording of Article 3 of the GATT Anti-Dumping Code, provides that

'there is no injury unless the dumped imports are causing or threatening to cause, "through the effects of dumping", material injury to an established Community industry, and injuries caused by other factors must not be attributed to the dumped imports'.

Moreover, Article 4(2) of the basic regulation enumerates the various factors of which the examination of injury must take account. They are the volume of dumped imports (subparagraph (a], the prices of those imports (subparagraph (b] and their impact on the Community industry.

40. It is clearly apparent from the wording of the latter provision that in this area the institutions enjoy a wide margin of discretion, the exercise of which involves often very complex economic analyses. In the first place, Article 4(2) expressly provides that no one or more of the three factors can necessarily give decisive guidance. Secondly, as the Court also pointed out in *Canon* (paragraph 56), the factors listed in Article 4(2)(c), which must enable the impact which the dumped imports have had on the Community industry to be measured, is merely indicative and the institutions are therefore free to base their judgment only on those factors which they consider most relevant.

41. The recitals of the contested regulation show that the institutions carried out a detailed examination of the factors concerned. The Council devoted part (i) of Chapter H, entitled 'Injury', to an examination of the volume of imports, part (ii) to that of their prices and part (iv) to that of their impact on the Community industry.

42. As regards the increase in the *volume of Japanese imports*, Ricoh claims that it occurred in parallel with the expansion of the 'new' market for small photocopiers, from which the Community industry itself also profited considerably. It is true that it is stated in recital 34 of the contested regulation that

'sales and rentals of new machines in the period under review manufactured by the Community producers Rank Xerox, Océ, Olivetti, and Tetras increased from 62 000 units in 1981 to 108 000 units in 1984, a rise of 74%'.

However, their market share fell from 21% in 1981 to 11% in 1985, whereas the share of the Community market held by machines manufactured by Japanese exporters increased from 70% to 78% in the same period (recital 33). In those circumstances, the institutions were entitled to consider that Japanese imports, which increased by more than 120% between 1981 and 1984, had caused injury to Community manufacturers by preventing a more favourable trend in their sales and rentals. [12]

12 — The same point is made in paragraphs 57 and 58 of Canon, supra.

43. With respect to *price undercutting*, Ricoh has not advanced any argument capable of showing that the institutions' findings in that regard were vitiated by a manifest error. On the contrary, it relies on those findings, which appear in particular in recitals 48 and 49 of the contested regulation, to reach the conclusion that the Japanese products were not cheaper than those sold by the Community industry but were technically superior. In so doing, Ricoh disregarded the fact, however, that the institutions based their own conclusion to a large extent on a particularly widespread form of price undercutting which manifested itself not in the form of lower prices but in the sale by Japanese exporters of much more sophisticated models at prices which were the same as or slightly lower than those of simpler models sold by Community manufacturers (see in that connection the second paragraph of recital 47 and the end of recital 49). In my opinion, in the circumstances of the present case, it was not only reasonable but also necessary to take account of price undercutting of that kind. Indeed, the Council explained in recital 44 of the contested regulation that

'Japanese-manufactured models generally had more features than competing CECOM models'

and that

'the Commission, when selecting pairs of models for comparison, was obliged frequently to choose a CECOM model less endowed with features to compare with a Japanese-produced model with similar basic characteristics'.

A comparison between the imported models and the Community models most similar to them, based only on prices and excluding those technical differences, would not therefore have reflected such real price difference or difference in commercial value as existed between the various models, taking account of the fact that

'in general a more highly featured model should be at a higher price by virtue of its additional functions' (see the end of recital 44).

44. The fact that the institutions did not quantify the exact level of such undercutting, because it was impossible for them to evaluate the additional features of the Japanese models (see the fourth indent of recital 49), does not affect their finding as to its existence. Moreover, that finding seems to me to be sufficient for the purposes of analysing the injury elements, and 'quantification' would be called for only to the extent to which the institutions wished to take account of the level of undercutting in determining the amount of the anti-dumping duty. However, it is apparent from recital 110 of the contested regulation that it was precisely because of the unquantifiability of the undercutting found to exist that

'the Commission decided that it would be inappropriate in the context of this proceeding to include an element in the duty calculations to take account of the type of price undercutting determined in the proceeding'.

45. In view of the foregoing, Ricoh likewise cannot rely on recital 86 of the contested regulation, in which the Council denies that the substantial market share held by Japanese importers was attributable to the technical superiority of their machines 'except in respect of their multiple features' to support their claim that there was no undercutting, merely competition: in the present case the undercutting derives precisely from the selling of such machines with more 'features' at prices that were no higher than those of less highly featured machines. As the Council rightly emphasises, that practice cannot be regarded as fair competition (see paragraph 128 of its defence).

46. Finally, Ricoh's assertion that

'the Info-Markt study *suggests* that the price of the Community models should *generally* have been higher than that of comparable Japanese models because Community models are often designed for the rental market and consequently *generally* have a longer life cycle' (see p. 29 of volume II of the application and the second paragraph of page 32 of the Report for the Hearing),

seems to me to be too vague and unsupported by any evidence. Moreover, even if the fact is disregarded that a longer life cycle is synonymous with greater reliability and that such reliability is indicative of superior technical quality — of which Ricoh claims the Community machines are devoid — it must be noted first that

'rental revenues attributable to machines constitute [only] an estimated 35% of Community producers' turnover from machines'

and, secondly, that price comparisons were made only between selling prices (see recital 46 of the contested regulation) and did not therefore cover machines intended exclusively for rental.

47. As regards *the impact which low-priced imports had on the relevant industry*, the institutions noted in particular, together with a substantial decrease in the Community industry's market share — with which I dealt earlier in relation to the volume of Japanese imports — a drop in profitability. Ricoh does not challenge the figures given in recital 81 of the contested regulation but it criticizes the institutions for relying, when considering the profitability of Community producers' activities, only on sales and rentals of 'their own-manufactured machines classified in segments 1 to 4' instead of taking account of their profits from all their photocopier business, in particular those deriving from the resale of OEM models bought from Japanese suppliers, from the sale of related products and the sale and rental of machines in segments 5 and 6 (see page 26 of volume II of the application).

48. According to Article 4(4) of the basic regulation,

'the effect of the dumped or subsidized imports shall be assessed in relation to the Community *production* of the *like product* . . . '.

In order to evaluate the impact which Japanese imports had on the Community industry's profitability, the Council was not therefore under any obligation to take account of the latter's profits or losses on sales or rentals of PPCs imported by them or of products other than the 'like product' as defined in the proceeding. As we have seen, the like product was defined as comprising

'all photocopying machines up to and including those incorporated in segment 5 of the Dataquest classification' (see recital 31 of the contested regulation).

With respect to segment 5, however, the Council concluded that there was no significant injury (see recital 79). It was thus no longer obliged to include segment 5 PPCs in its profitability calculations.

49. Nor can Ricoh secure any advantage by referring to recital 10 of the provisional regulation, from which it appears that in constructing the normal value the Commission took account of the profit figure for each importer's total PPC business, including therefore the sales of related products. In reaching its final conclusion, the Commission reconsidered its position and calculated the profits for each exporter only on the basis of its PPC sales. It is apparent from recital 10 of the definitive regulation that it did so to take account of the observations made by certain interested parties and because

'this approach is entirely consistent with that adopted for injury calculations relating to the Community industry'.

It would be, at the very least, unfair if Ricoh were allowed to opt for a particular method for evaluation of its own profits for construction of normal value and to reject the same method when it came to evaluating the profits of the Community industry for determination of the injury.

50. Since Ricoh has thus not succeeded in showing that, by the method employed, the profitability was 'artificially' reduced, its criticism of recital 82 of the contested regulation is, in so far as it is based on that argument, also unfounded. In that recital the Council found that:

'reduced profits threaten the ability of the Community producers to undertake the research and development expenditure necessary to develop new products to compete in the future with Japanese exporters on the Community market and to promote their products through advertising and sales promotion expenditures at levels sufficient to match those of their competitors'.

For the reasons which I have given, namely that determination of the injury and therefore of profitability must be carried out

only by reference to production of the like product, that conclusion is likewise not affected by the fact that the general situation of Community producers was healthy and their income from other activities was in the main sufficient to cover the expenses in question.

51. Ricoh is also critical of the fact that the institutions attributed to low profitability other difficulties such as, in particular, Community producers' inability to benefit from increased economies of scale (see recital 83 of the contested regulation). In its view, that insufficiency of economies of scale derived from the fact that, because of the technical difficulties encountered by them, the Community producers were late to commence production of small photocopiers capable of competing with Japanese products.

52. However, that argument overlooks the fact that the larger PPCs also form part of the 'like product' as defined in the present proceedings and that dumped imports of small Japanese photocopiers were thus also capable of causing injury to the Community industry producing larger PPCs.

53. Moreover, it is not contested that there had existed in the Community since the end of the 1960s and throughout the 1970s, during which period the Japanese exporters began launching several small photocopiers onto the market, an industry producing low-volume copiers, namely the Rank Xerox Model 660, classified in segment 1.

54. As to Ricoh's assertion that the Community industry did not until a very late stage develop new low-volume machines able to compete with the Japanese models, the Council devoted recitals 85 and 86 of the contested regulation to that issue. It stated in particular that although internal and technical difficulties within Rank Xerox in developing a new model could justifiably be cited as a major contributory cause to the company's problems in the past, that was no longer the case in and after 1982 and 1983 when those problems were resolved and the new models were brought onto the market. Since Ricoh confined itself to referring to past difficulties, but without producing any evidence to show that the Council's assessment of those difficulties was incorrect, the Council's refusal to accept them as a cause of injury may be regarded as justified.

55. Finally, as far as Océ and Olivetti are concerned, whilst it is true that they relied extensively on OEM imports from Japan, they nevertheless did so, as the Court pointed out in paragraph 47 of its judgment in *Gestetner*, *supra*, only after their attempts to market their own low-volume PPCs had failed because of the depressed market prices imposed by Japanese imports.

56. It follows from all the foregoing considerations that none of the submissions and arguments put forward concerning errors in the determination of the injury can be upheld.

C — The Community interest

57. It will be remembered that pursuant to Article 12(1) of the basic regulation, anti-dumping duties may only be imposed, *inter alia*,

'where the facts as finally established show that . . . the interests of the Community call for Community intervention . . . '.

58. Ricoh claims that the evaluation of the Community interest by the institutions was distorted by the fact that, first, they included in the 'Community industry' companies which depended on and profited from imports from Japan and, secondly, they did not take account of the limited nature of the Community industry in the sector of small photocopiers. But, we have just seen that the institutions were justified in including Rank Xerox in the 'Community industry' and in regarding all PPCs, and not just 'small' photocopiers, as 'like products', and therefore Ricoh's arguments in that regard cannot be upheld.

59. Furthermore, Ricoh has not shown that by attaching more importance to the interests of Community producers than to those of OEM importers, such as Gestetner and Agfa-Gevaert (see recital 93 of the contested regulation), or by considering that the advantages accruing to the Community industry from the imposition of anti-dumping duties clearly outweighed any negative effects of that decision, in particular with regard to the prices to be paid by consumers (see recital 99), the Council committed a manifest error in its exercise of the considerable discretion which it enjoys in evaluating Community interests.

60. The arguments alleging incorrect assessment of the Community interests must therefore also be dismissed.

D — Calculation of the anti-dumping duty

61. Ricoh claims that the determination of the anti-dumping duty at the rate of 20% is contrary to Article 13(3) of the basic regulation, by virtue of which the amount of the anti-dumping duty may not exceed what is necessary in order to remove the injury. However, it does not seem to me that any of the arguments which it expounds in support of that submission can be upheld.

62. Ricoh states in the first place that the 12% margin considered by the institutions as necessary in order to ensure a reasonable profit or income from the sale of photocopiers is excessive in view of the fact that small machines are always sold at a profit margin lower than that for each of the other areas of photocopier business.

63. However, the Council had already expressed its views on that matter in the contested regulation, confirming the point of view of the Commission, which saw

'no reason why, as the exporters appear to be suggesting, profits should be made only on consumable supplies' (see the end of recital 105 of the contested regulation).

The Council had explained earlier that the rate of 12% adopted was required

'to enable the Community producers as a whole to:

— safeguard their position on the market in the future by permitting them to undertake adequate research and development expenditure and to promote their products,

— provide for a reasonable rate of return commensurate with the risk of developing new products and allow for a reasonable return to shareholders' (first paragraph of recital 103).

For the institutions it was therefore a question of ensuring that Community producers received sufficient income to encourage them to invest in the optimization and manufacture of photocopiers, so that they were logically able to disregard any profits obtained from the subsequent sale of consumables or, more generally, other areas of photocopier business. It must also be pointed out that the institutions used that logic in rejecting the complainants' arguments and refused to allow them a profit of 18% on the ground that

'this figure incorporated the higher profits generally made on consumables and . . . therefore was inappropriate for machines alone' (recital 104 of the contested regulation).

64. In those circumstances Ricoh should not have confined itself to repeating its view in general terms but should have shown in what way the institutions' approach was incorrect or unreasonable.

65. Moreover, Ricoh, which limited its arguments to small photocopiers, did not indicate by what percentage the rate of return on them should be lower than 12% or *a fortiori* to what extent that lower rate of return on small photocopiers would have affected the anti-dumping duty imposed, having regard to the method of calculation described in recital 107 of the contested regulation which, as I concluded in my Opinion in Joined Cases 133 and 150/87 *Nashua*, was a comprehensive method

'based on the cumulative injury caused by a representative percentage . . . of all exports to the Community of dumped products by Japanese companies, not on the injury caused by each individual exporter' (paragraph 103 of the Opinion — see also the third paragraph of recital 112 of the contested regulation).

66. Ricoh's second argument, namely that the anti-dumping duty was calculated on the basis of the increase in price judged necessary to eliminate price undercutting which, in fact, did not exist, fails, as a

matter of logic, with the collapse of the premise on which it is based. We saw earlier that there was undercutting by the Japanese exporters, even though to a considerable extent it took

'the form of the sale of more highly featured models at prices comparable to or below those of lesser-featured models sold by Community producers' (recital 49 of the contested regulation).

Then, as I also pointed out earlier, because of the difficulties of quantifying that particular form of undercutting, no factor was included to take account of it in the calculation of the anti-dumping duty (see in that regard recital 110 of the contested regulation).

67. Ricoh's third argument, referring to the allegedly 'incomprehensible' nature of the 'precise' description of the method of calculating the rate of duty contained in recital 107 of the contested regulation, likewise cannot be upheld. In the first place it is too vague and Ricoh did not even respond to the express request made by the Council at the end of its defence that Ricoh indicate what it regarded as 'incomprehensible'. In that connection it must also be pointed out that Ricoh did not criticize the calculation method in question as being 'incomprehensible' when details thereof were given to it, for the purpose of making observations, prior to the adoption of the contested regulation. In addition, paragraphs (i) to (vii) of recital 107 give a 'precise' — to use Ricoh's expression — description of all the stages in the calculation made by the institutions. In view of the fact that the contested regulation is, in principle, legislative in character, and that it is impossible to include all the details of an anti-dumping investigation in the statement of the reasons on which a regulation is based, [13] I consider that it was unnecessary also to give details there of the arithmetical formula and the figures that enabled the institutions to fix the anti-dumping duty at the rate of 20%. The confidential nature of some of the figures also precluded them from doing so.

Conclusion

Since none of the submissions made by the applicant is, in my opinion, well founded, I propose that the Court dismiss the application in its entirety and order Ricoh to pay the costs, including those of the interveners.

13 — See paragraph 46 of the judgment in Canon, above.