REPORT FOR THE HEARING
in Case C-171/87 *

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* Language of the case: English.

I — The applicant's business

Canon Inc. (hereinafter referred to as 'Canon') is one of the most successful manufacturers of plain paper copiers ('PPCs') in the world. This success is based on several factors, the most important of which are original technology and products supported by patents, low-cost production and the creation and development of new markets.

The photocopiers which were investigated in this case were manufactured by Canon and sold to national distributors in which Canon holds shares, which are responsible for marketing the product in all the countries concerned (Japan, the United Kingdom, France and Germany). In the case of Denmark, Ireland and Greece, Canon sells first to an export coordination company, Canon Europa NV, located in Amsterdam, which then exports to independent national distributors in those three countries.

Canon draws attention to the fact that it is not merely an exporter of PPCs originating in Japan but also accounts for an important part of the Community industry producing photocopiers. It observes that in terms both of units produced and of employment in manufacturing it was, at the time of the investigation, the second or third largest producer in the EEC.

Canon also states that it has established production facilities for its NP series of copiers at Giessen in Germany and for its PC series of copiers at Liffré in France. Canon Giessen and Canon Bretagne obtain most of their parts and components from a large number of European and Japanese suppliers unrelated to Canon. Canon's European production includes the manufacture of production parts, accessories and consumables. Photosensitive drums, the heart of the machine, are produced in Europe.

Canon also observes that its contribution to the European photocopier industry is not limited to manufacture and that all the European producers use its technology in their machines. It mentions that it has offered to supply technology and manufacturing opportunities to Tetras, a French producer.

Finally, Canon emphasizes that since its corporate philosophy is that it should contribute positively to the markets in which it does business, by establishing manufacturing facilities and by licensing its technology to local producers, it has been reluctant to enter into agreements with OEMs (Original Equipment Manufacturers — importers which sell imported products under their own brand names) because such agreements imply that essential manufacturing and technology remain in Japan. Nevertheless, having entered into such agreements when necessary, Canon states that, according to Dataquest figures, it supplied 44% of the PPCs sold by the Italian manufacturer Olivetti in Europe in 1985. Canon adds that, in pursuance of its corporate strategy, it has recently established a joint venture with Olivetti in Italy to cooperate in the development of new technology.

Finally, Canon states that, despite being one of the largest manufacturers of PPCs in the EEC, it does not support the methods by which the Community institutions reached the results for the anti-dumping duty imposed on Canon's imports in this case.

CECOM, intervening in support of the Council's conclusions, observes, with respect to the corporate philosophy described by Canon, that the facilities which it established at Giessen and Liffré are merely assembly plants. According to CECOM, Canon merely sends them completely knocked down photocopiers consisting of copier components from Japan.

With respect to the joint venture set up with Olivetti, CECOM states that it serves Olivetti's intention of regenerating, through the combination of complementary technologies and the achievement of economies of scale, the manufacture of those copiers that have been severely affected by the price undercutting strategy deployed by various Japanese manufacturers, including Canon, between 1976 and 1987. CECOM considers that without the imposition of anti-dumping duties Canon would never have been prepared to cooperate with a European photocopier manufacturer.

II — Facts and procedure

A — *The facts*

In July 1985, the Committee of European Copier Manufacturers (CECOM) lodged a complaint with the Commission that imports of certain PPCs from Japan were being dumped and were causing injury to the Community industry. The five companies in whose names the complaint was lodged — Develop, Océ, Olivetti, Tetras and Rank Xerox — have also been distributors for many years of photocopiers manufactured in Japan.

The anti-dumping procedure initiated by the Commission on the basis of Council Regulation No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984 L 201, p. 1) led to the imposition by Commission Regulation No 2640/86 of 21 August 1986 (Official Journal 1986 L 239, p. 5) of a provisional anti-dumping duty of 15.8% on Canon.

On 23 February 1987 the Council, on a proposal from the Commission, adopted Regulation No 535/87 imposing a definitive anti-dumping duty of 20% on imports of PPCs manufactured in Japan by Canon (hereinafter referred to as 'the contested regulation').

Canon states that throughout the procedure it exchanged considerable amounts of information with the Commission containing facts and figures relating to the complaints with which the application is concerned.

B — *Written procedure and conclusions of the parties*

Canon's application was received at the Court Registry on 9 June 1987.

By orders of 3 February 1988, the Court granted leave to the Commission and CECOM to intervene in support of the defendant's conclusions.

The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, pursuant to Article 95(1) of the Rules of Procedure, to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry. The Council was asked to give a written reply to a question and did so within the time-limit set.

The *applicant* claims that the Court should:

(i) annul Articles 1 and 2 of Regulation No 535/87 in so far as they impose an anti-dumping duty on the applicant;

(ii) order the Council to pay the costs.

The *Council* contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

CECOM, intervening, claims that the Court should:

(i) dismiss the application;

(ii) order Canon to pay the costs, including those of CECOM as intervener.

III — Submissions and arguments of the parties

A — *Determination of the normal value*

1. *Infringement of Article 2(3) of Regulation No 2176/84 in so far as the institutions did not select a normal value which would permit a fair comparison*

Canon claims that the Community institutions should have constructed the normal value at a level of trade comparable to that which they adopted in constructing the export price. Since they constructed that price at the level of sales by Canon to its subsidiaries, they should, in determining the normal value, have taken account of a similar level within Japan, that of sales by Canon to Canon Sales Company (hereinafter referred to as 'CSC'), about half of whose capital belongs to shareholders unrelated to Canon and which also sells products supplied by other Japanese companies and by European and American companies.

The institutions determined the normal value on the basis of the prices invoiced by CSC by reference to sales which were not comparable regarding quantities, conditions and terms of sale and level of trade:

	Export price	*Normal value*
Quantities	Large quantities associated with sales to national distributors	Smaller quantities associated with sales by a national distributor to local dealers
Conditions and terms of sale	Conditions and terms of sale relating to sales by Canon Inc. to subsidiaries	Conditions and terms of sale relating to sales by a subsidiary of Canon Inc. in its sales to local dealers
Level of trade	Ex Canon Inc.; Ex factory	Ex subsidiary of Canon Inc.; Ex branch office or subsidiary

Canon maintains that even after the allowances made under Article 2(10) of Regulation No 2176/84 the normal value and the export price are not comparable: the normal value includes expenses of a type which were excluded from the export price.

In Canon's view, it follows that the condition laid down in Article 2(3)(a) for domestic sales to be considered, namely that they should be comparable, is not fulfilled and that therefore the institutions should have relied, pursuant to Article 2(3)(b), on the comparable price for exports to a third country or on the constructed value.

The *Council* states that, in order to determine the normal value, it took into consideration the price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country, as provided for in Article 2(3)(a) of Regulation No 2176/84 (recitals 5 et seq. of the contested regulation and 6 et seq. of Regulation No 2640/86.

The Council did not consider it appropriate to take account of internal transfer prices between different parts of the same group of companies since in its view the transfer of goods within a group of companies (with different legal entities, but under common control, and forming one economic unit) does not constitute sales in the ordinary course of trade within the meaning of Article 2(3). Where such a group of companies is found to form one economic unit, as in the present case, the first sale in the ordinary course of trade only takes place when the goods are sold, for the first

time, to an independent buyer who is unrelated to the economic unit.

The allegation of a refusal to consider the evidence submitted by Canon is rejected by the Council; the Commission established that certain of Canon's functions, in particular those of its sales department, which are essential for the achievement of sales on the internal market, were performed not only by Canon but also, to a considerable extent, by its sales subsidiary CSC, in which Canon has a majority holding. It was established that Canon did not itself sell to independent customers in Japan but that all sales were effected by CSC alone. Moreover, most, if not all, the expenses incurred on such sales were borne by CSC.

The fact that CSC also performs other functions does not undermine the conclusion that CSC had the role of a sales department for Canon and bore the corresponding sales, general and administrative expenses (hereinafter referred to as 'SGA expenses') (the expenses relating to CSC's sales having, in this case, been apportioned between the PPCs and the other products).

In that connection, the Council recalls that in its judgment in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731, the Court considered that the economic entity includes both the production side and the normal sales operations and in particular that CSC is financially controlled by Canon and is entrusted by Canon with tasks that are normally the responsibility of an internal sales department of the manufacturing organization.

As regards the application of Article 2(7) of Regulation No 2176/84, on the basis of which it is permissible to depart from the principle set forth in Article 2(3)(a), the Council contends that that provision was not applied. However, even if that article had been applied to the internal transfers in the case under consideration, that would not have prevented the institutions from determining the normal value on the basis of Article 2(3)(a), the price actually paid or payable in the ordinary course of trade being that paid by the first independent buyer from CSC. In the view of the Council, Article 2(7) merely provides that certain transactions 'may be considered as not being in the ordinary course of trade' but it does not provide that in such cases normal value can only be established on the basis of Article 2(3)(b). Moreover, Article 2(3) contains no provision requiring the institutions to apply Article 2(3)(b) whenever Article 2(7) is applicable.

Consequently, where certain sales take place in the ordinary course of trade on the domestic market and they allow a proper comparison (if required, after the appropriate adjustments) Article 2(3)(a) may be applied.

The Council was therefore entitled to determine normal value on the basis of prices charged by CSC to independent buyers for sales in the ordinary course of trade on the domestic market. In its judgments in the 'ballbearings cases' the Court accepted that the prices paid by independent buyers to sales companies on the

domestic market serve as a basis for determining normal value.

With regard to whether CSC's sales permit a proper comparison, the Council considers it to be a question of fact to be decided in the light of all the circumstances. It is clear that it is the sales which must permit the comparison and that adjustments can be made to the prices to enable the adjusted prices to be compared directly. Moreover, the sales to be used need not necessarily be at the same level of trade (under Article 2(9) comparisons are *normally* made at the same level of trade). Finally, to the extent to which the difference of level of trade still affects price comparability, after the other adjustments under Article 2(9) and (10), it may be subject to an allowance.

In the present case the institutions concluded that CSC's sales in Japan and those of Canon's subsidiaries in the Community permitted a proper comparison. The normal value was therefore comparable with the export prices, subject to the adjustments provided for in Article 2(9) and (10) of Regulation No 2176/84. When it gave a decision on that question, the Court held (in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731) that the requirement of comparability laid down in Article 2(3)(a) is satisfied provided that the normal value and the export price are both determined by reference to the first sale to an independent purchaser. The comparison must therefore be between the figures arrived at in that way, subject to the allowances and discounts expressly provided for in Article 2(9) and (10).

2. *Incorrect determination of the constructed value in view of the addition of certain expenses which were eliminated for the construction of the export price and the addition of inappropriate profit margins*

Canon maintains that when constructing the normal value for all of Canon's OEM sales and for three of Canon's own-brand models the institutions included all CSC's expenses, whereas the export price was constructed at a level which did not include comparable expenses but only production costs, Canon's SGA expenses and a profit margin. Thus, for example, in order to construct the export price all advertising expenses relating to European markets were subtracted, whereas all advertising expenses for the Japanese market were added to the constructed value. It follows that the institutions constructed a normal value which is not comparable with the export price.

Canon also claims that for the products sold under Canon's own brand (hereinafter referred to as 'products A, B and C'), the normal value was artificially inflated by the use of profit margins which were not appropriate to the products concerned.

With respect to two of the products sold under the Canon brand ('products B and C'), Canon contests the institutions' view that the sales of them were not in the ordinary course of trade and claims that Article 2(4) of Regulation No 2176/84 is not applicable to such sales. Low-price sales

to dispose of remaining stocks (in the case of product B) and sales below cost at the time of commencement of a product (in the case of product C) must be treated as being in the ordinary course of trade even if they were made at a loss.

In Canon's opinion, the conditions laid down in Article 2(4) of Regulation No 2176/84 show that sales should not be disregarded merely because they were made at a loss.

Canon observes that when the United States anti-dumping legislation was amended in order to introduce the same standard as that later set out in Article 2(4)(b) of Regulation No 2176/84, the United States Senate Finance Committee stated:

'Under the amendment, whenever the Secretary has reasonable grounds to believe or suspect that sales below cost are being made, he would investigate to determine whether such sales are in fact below cost. If he determines that sales below cost have been made, such sales would be disregarded in determining foreign market value if they (1) have been made over an extended period of time and in substantial quantities; and (2) are determined by the Secretary not to be at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade. These standards would not require the disregarding of below-cost sales in every instance, for under normal business practice in both foreign countries and the United States it is frequently necessary to sell obsolete or end-of-model year merchandise at less than cost' (Senate Report No 93-1298, 93rd Congress, 2nd Session, at 173 (1974].

In the case of the third product sold under the Canon brand (product A), Canon observes that it was sold in substantial quantities in Japan at the time of the investigation and at profit margins which were certainly not abnormally low. Those sales were in conformity with the rule established in the Electronic Typewriter (ETW) case (Commission Regulation No 3643/84, Official Journal 1984 L 335, p. 43) fixing at 5% of exports to the Community the threshold below which sales on the domestic market should not be taken into account in calculating the normal value (the 5% rule). According to Canon, the Commission wrongly decided that the model did not meet the 5% rule because it determined that threshold on the basis of all sales to the Community, including OEM sales. In Canon's view account should only have been taken of exports under the brand name of product A and not OEM sales.

The *Council* contends that the normal value for the three models sold by Canon was constructed in accordance with Article 2(3)(b)(ii) of Regulation No 2176/84 (recital 8 et seq. of the contested regulation). It states that the reason for which it included in the normal value the SGA expenses borne by CSC for its PPC sales on

the domestic market is that CSC had the functions of Canon's sales department.

With regard to the argument that comparable expenses of the European sales subsidiaries were not included in the export price, the Council observes in the first place that determination of the normal value and of the export price and the comparison of those prices are separate issues and that the methods for calculating each of the terms of the comparison are different and independent (Case 258/84 *Nippon Seiko* [1987] ECR 1923, paragraph 14 et seq.).

Canon then observes that it has an export department of which the costs are included in the export price; those costs should not be confused with the SGA expenses of the subsidiaries in the EEC, which were deducted when the export price was reconstructed. It having been established that some of the SGA costs relating to the domestic sales department were actually borne by CSC, it would be wrong in the Council's view, not to include a reasonable amount of such SGA expenses in the construction of the normal value. That value should be as close as possible to the price charged on the domestic market.

If the normal value and export prices were at different levels of trade — which in the Council's view they are not — the question would arise whether such difference would affect price comparability and whether after all other adjustments which were made an additional adjustment for level of trade was justified.

Finally, with respect to the profit margin included in constructing normal value for three of Canon's models, the Council states that the institutions used the average profit — that is to say the amount in excess of the costs of production, including a reasonable amount of SGA expenses — actually realized by Canon, which was based on all sales of those models sold, on average, at above cost of production (including SGA costs). Contrary to what Canon asserts, sales at a loss were included for each of the models for which an average profit was calculated if, overall, the model was sold at a profit.

As regards product B mentioned by Canon, the Council merely observes that it is irrelevant to this case since its sales were *de minimis* and were not used in calculating Canon's dumping margin.

As regards product C, the Council states that there is nothing in Canon's argument to show that the Council abused the discretion conferred on it by Article 2(4) of Regulation No 2176/84. Canon did not dispute that that model was sold at a loss during the investigation period and the Council therefore took the view that those sales were not in the ordinary course of trade. In reply to the argument that a product is normally sold at a loss at the beginning of its product life, the Council states that the reference period in this case is sufficiently extended to determine whether the product is sold profitably or at least at a price which enables the cost of production to be covered. If that is not the case, the institutions are free to disregard the sales

and to construct the normal value, including the profit normally realized.

Finally, the Council observes that the adoption of Canon's approach would lead to a dumping margin only minimally different from the margin of 26.6% actually arrived at.

With respect to product A, the Council concedes that, as Canon assumes, the Commission determined the 5% threshold on the basis of all sales to the Community, inadvertently including sales to OEMs. The Council states that, during the procedure, Canon was informed of the method used and did not comment. Nevertheless, the Commission is at present taking the necessary steps to correct that error. A provisional calculation, of which the Council was informed, shows that there is only a small effect on Canon's dumping margin. Thus, the correction will not make it necessary to change the duty level.

B — *Determination of the export price*

Canon contests the determination of the export price for sales to Ireland, Denmark and Greece, claiming that the Community institutions should not have applied Article 2(8)(b) of Regulation No 2176/84 and constructed the export price by deducting all the costs borne by Canon Europa and a profit margin of 5%. For sales to two OEM buyers, Canon challenges the deduction of an arbitrary amount of 5%. It states that the imports carried out by its subsidiaries in various Member States of the Community are not covered by the present ground of annulment.

Canon Europa, established in Amsterdam, is a Canon subsidiary which coordinates the distribution of Canon products to most countries in Europe, Africa and the Middle East and did not act as the importer of any photocopier at the time of the investigation. For sales of PPCs imported by independent distributors in Ireland, Denmark and Greece, and by two OEM buyers, the product was invoiced by Canon Europa. The latter maintains a customs warehouse in the Netherlands; products are shipped there by Canon in Japan and then they are exported by Canon Europa to EEC or non-EEC countries. In the case of sales to OEM buyers, the PPCs never entered the bonded warehouse but were shipped direct to the OEM buyers from Japan. Canon states that the Commission investigators did not carry out a full examination of the facts concerning Canon Europa and therefore the Council's conclusions regarding its role are not based on an investigation and are incorrect.

According to Canon, Article 2(8)(b) is not applicable to sales by Canon Europa to the three independent national importers. By its terms, that provision can only apply when the product has already been imported before being resold to an independent buyer; it cannot therefore be applied to Canon Europa, which has not imported PPCs and whose sales are not resales of imported products. The product was sold

for the first time to an independent customer before importation.

The purpose of the export price reconstruction mechanism, indicated by the Council in the 'Housed Bearing Units' case (Council Regulation No 374/87, Official Journal 1987 L 35, p. 32, recital 14) — 'It should be remembered that the aim of this mechanism, which applies in particular where there is a link between the exporter and the importer, is to enable a price at the Community frontier to be established which is not influenced by the relationship between the producer/exporter and its associated exporter' — is reflected in the terms of Article 2(8)(b) which only provides a basis for allowances for costs incurred between importation and resale. Canon Europa's costs cannot be regarded as costs incurred between importation and resale since Canon has never imported the product. Its functions, particularly the processing of orders and invoicing, are typical of an export department not of an importer.

Moreover, Canon considers that the Commission accepted its position in Regulation No 2640/86 (recital 16) in which it stated that 'in those cases . . . the price paid for the product by the importer should be the export price and allowance be made in accordance with Article 2(10)(c) of Regulation No 2176/84 for any difference in conditions and terms of sale with the comparable normal value'.

Canon observes that the mere fact that certain expenses are incurred within the Community is not sufficient to give rise to the application of Article 2(8)(b). If the same costs were incurred by a Canon subsidiary in Sweden or Japan the Council could not contend that those costs were incurred in the EEC and that they should be deducted from the price paid by the first independent customer regardless of which company in the exporter group bore them.

Likewise, Canon could have arranged for the functions in question to be carried out by a subsidiary established in Japan, as do a large number of its competitors, and in that case its costs would not have been deducted from its prices charged to customers in the Community on the basis of Article 2(8)(b). Canon refers to the *Iron or Steel Sheets and Plates* case (Commission Decision 2247/87 ECSC of 28 July 1987, Official Journal 1987 L 207, p. 21) in which the Commission accepted that a subsidiary established in the United States which was responsible for exports of a Mexican product to the EEC should be treated as part of the same economic unit and not have its costs deducted on the basis of Article 2(8)(b). There is no reason to provide worse treatment for those companies which have decided to locate part of their export sales operations within the EEC.

As regards sales to OEM buyers, Canon states that although the Council did not apply Article 2(8)(b) it did make an arbitrary deduction of 5% from the prices charged by Canon Europa, a deduction not supported by Article 2(10). Even if the Council had constructed the export price in

accordance with Article 2(8)(b) of Regulation No 2176/84, as it contends, Canon maintains that for the reasons set out above with respect to national independent importers that provision is not applicable to OEM sales.

The *Council* states that it is apparent from the context of recitals 15 of the contested regulation and 16 of Regulation No 2640/86 that it applied Article 2(8)(b) in determining export prices for all Canon's sales to OEMs in the Community and for sales to other independent customers in Ireland, Denmark and Greece.

In the present case the Community institutions considered that the export price to the EEC could not serve as a reference in view of the association between Canon and Canon Europa. The Council had found that for all the abovementioned sales Canon had invoiced to, and been paid by, Canon Europa and the latter in turn invoiced to, and was paid by, the independent buyers in those countries and the OEM buyers. In those circumstances, the export prices had to be constructed under Article 2(8)(b) of Regulation No 2176/84. The Council took the price actually paid to Canon Europa by the first independent buyer, whether OEM or other, and, as the regulation provides, deducted as 'costs incurred between importation and resale' the costs and profit of Canon Europa, in an amount estimated at 5% for OEM sales and 15% for other sales.

In the case of an independent importer, all the costs incurred and the profit made after the goods pass the Community frontier concern that importer. According to the Council, the same principle applies if an exporter group chooses to bear some costs within the Community by setting up a company which coordinates the export sales and invoices the customers and which, in turn, is invoiced by the exporter. Thus, all such costs — which effectively reduce the amount the exporter group receives for the product sold for export, at the Community frontier — must be deducted from the price paid by the first independent buyer, regardless of the details of the transactions otherwise Article 2(8)(b) would be deprived of its real meaning.

Finally, the Council contends that the arm's-length relationship between the independent customers and the Canon group does not mean that Article 2(8)(a) must apply automatically and that Article 2(8)(b) cannot be used for determining the export price. There is no price paid directly to Canon by the independent customers — OEMs or other — for the product sold for export to the EEC which could be taken as the export price under Article 2(8)(a).

Moreover, the application of Article 2(8)(b) does not, in the Council's view, require an

association between the exporter and the formal importer; that provision also applies if there is such an association or a compensatory arrangement between the exporter and a company within the exporter group which is incurring costs within the Community. Thus, even if Canon's European subsidiary were not to be treated as an 'importer' for the purposes of Article 2(8)(b), that provision would still apply, owing to the association between Canon and Canon Europa.

The Council also rejects Canon's argument that the application of Article 2(8)(b) in the present case is not in conformity with the purpose of that provision. That view is based on the hypothesis that that article can only apply to resales of products already imported. But according to the Council, whether the product is resold before or after it is actually imported into the Community is not decisive for the reconstruction of export prices under Article 2(8)(b) of Regulation No 2176/84. Canon Europa resold within the Community the PPCs which were sold to it by Canon for export to the Community and the institutions based their reconstruction of export prices only on resales of PPCs actually imported into the Community.

The Council submits that the purpose of Article 2(8)(b) of Regulation No 2176/84 is to arrive at the CIF Community frontier price as if it had been charged by the exporter to an independent importer. The price paid to Canon Europa by independent buyers, at whatever conditions and terms of sale, cannot be taken as the export price under Article 2(8)(a), since it is the price for resale within the Community. The export price is the price paid for export to the Community by Canon Europa. However, that price was unreliable and had to be reconstructed.

The Council considers, therefore, that it was correct to deduct from the price paid by the independent customers to Canon Europa an amount of 5% in the case of OEMs and 15% for sales to other independent customers, which may be treated as Canon Europa's cost and profit, or commission.

C — *The comparison*

Canon claims that the institutions adopted a narrow interpretation of Article 2(10)(c) of Regulation No 2176/84 in the application of allowances to the normal value, particularly with regard to all the costs incurred by CSC, the level of trade, and the other cost factors related directly to sales, namely trade-in discounts, transport costs and direct expenses incurred by sales staff in respect of sales activity.

As regards the *costs incurred by CSC*, Canon states that although the Council did not deny that there were differences in costs between normal value and export price (recital 20 to the contested regulation) it did not make any allowance to take account of those differences because they were not directly related to sales, whereas comparable costs were deducted from the export price.

On the contrary, Canon considers that CSC's SGA expenses were associated exclusively with sales on the Japanese market (salaries paid to sales supervisors and sales support staff working exclusively for sales in the Japanese market, advertising in the Japanese language and other overhead expenses associated exclusively with sales in Japan) and that the Council should therefore have deducted those costs from the normal value.

Canon then states that the export price and the normal value are at *different levels of trade*. The former corresponds to the level of sales to sales companies and the latter to the level of sales not to sales companies but by them. The institutions should have granted the allowance permitted by Article 2(10)(c) for level of trade to take account of that difference.

With respect to the *trade-in discounts* given by CSC, Canon maintains that they are directly related to sales and an adjustment to normal value should be made for them under Article 2(10)(c) of Regulation No 2176/84. According to Canon, those discounts are granted in accordance with CSC's sales conditions and are granted only on sales of new Canon machines. The discounts are expenses of CSC and relate solely to sales on the Japanese market.

Canon contests the restrictive definition attributed by the Community institutions to Article 2(10)(c) whereby the allowances envisaged in that provision are limited to the obligation inherent in a sales contract 'which may be laid down in the contract itself or in general conditions of sale issued by the seller' (Regulation No 2640/85, recital 26). Canon claims on the one hand that that article specifically mentions allowances for items such as salesmen's salaries and the level of trade which are never set out in a sales contract and, on the other, that the Court has held, in the *Ball-bearings* cases, that allowances for overhead and general expenses may be made under Article 2(10)(c) in special circumstances (Case 260/84 *Minebea* [1987] ECR 1975, paragraph 45, and Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, paragraph 47). That applies in Canon's case, its circumstances being special in particular because CSC does not sell only Canon products but also acts as distributor for the products of various wholly independent companies. Evidence as to the role of CSC was presented to the Commission but the latter refused to consider it (Annex 2 to the application).

Canon objects to the fact that the Community institutions treated the trade-in discount as a hypothetical benefit accruing to the seller which is reflected — as is apparent from recital 13 to the contested regulation — in the lack of a second-hand market, higher prices resulting in increased economies of scale and higher profit margins. With respect to the benefit deriving from 'prices . . . being held at higher levels than would have been the case had a second-hand market existed' (recital 13 to the contested regulation), Canon states that that alleged benefit is simply the higher prices of the PPCs sold in Japan and is therefore wholly reflected in the prices of

the PPCs used to calculate the normal value.

Canon also observes that the institutions refused to grant allowances for *transport costs* incurred by Canon on sales to CSC, although identical costs were deducted from the export price for Canon's sales to its European subsidiaries. Since the purpose of the allowances is to achieve a fair comparison between the normal value and the export price, there can be no basis for adopting a rule in which identical evidence of costs incurred by a manufacturer on sales to its subsidiaries is used to decrease the export price but is ignored with respect to normal value.

Finally, Canon maintains that an allowance should be granted for *direct expenses incurred by salesmen* in connection with their sales activities (the claim for an allowance was made for the following expenses: salesmen's travel expenses, car parking fees for sales vehicles, insurance for salesmen's cars and sales training), on the ground that an allowance was granted for identical expenses on the basis of identical evidence in a previous anti-dumping case concerning Canon (the ETW case cited above). The outcome of an anti-dumping investigation must not vary according to the person to whom the investigation is entrusted.

The *Council* observes that part of CSC's SGA expenses relating to the sales of other products were in fact deducted from the normal value. Those expenses included costs attributable to sales of PPCs, in particular in the case of advertising expenses.

As regards SGA expenses relating to the PPCs, the Council contends that they cannot be deducted from the normal value since they are expenses borne by a sales department of the manufacturer and must be incurred in order to achieve sales on the domestic market. Similarly, the costs of Canon's export department were not deducted from the export price. The Council recognizes that the amount of the SGA expenses incurred by Canon in respect of domestic sales may differ from the amount incurred for export sales, but, pursuant to Article 2(10)(c) those differences do not qualify for allowances.

The Council considers that Canon's argument that the export price corresponds to the *level of trade* of sales to sales companies, whereas the normal value corresponds to the level of trade of sales by those sales companies, is based on an erroneous assumption. Since Canon and CSC form an economic unit and the latter performs the function of a sales department, it makes sales at the same level of trade as Canon. The goods are sold to independent buyers for the first time by CSC, which shows that the sales by the sales subsidiary were equivalent to sales which would have been made by a sales department if the manufacturer had had one.

Moreover, the Council contends that even if there were a difference in level of trade, Canon did not show that any alleged differences still affected price comparability after the adjustment for conditions of sale hade been made; that adjustment normally eliminates the differences affecting price comparability between different levels of trade. Article 2(10)(c) recognizes this by providing that an adjustment for 'level of trade' will only be made 'in so far as no account has been taken otherwise'.

The Council states, with respect to the differences in administrative and general expenses, that Article 2(10)(c) clearly provides that normally no adjustment is to be made for such expenses. The adjustment for level of trade permitted by that provision does not override that rule. In the Council's opinion, the level of trade argument is thus not warranted.

With respect to *trade-in payments*, the Council states that it refused to make allowance for them mainly because Canon received a benefit from them (recital 13 to the contested regulation). Moreover, the expenses associated with a trade-in payment scheme form part of the SGA expenses (administrative and general expenses, not sales expenses) and are thus generally not allowable.

The benefit received by Canon is the removal of the traded-in machines from the market. Canon and all the other manufacturers of PPCs selling in Japan enjoy a cumulative benefit which results from the certainty that traded-in machines will no longer be used by anyone, which guarantees that there will be a regular and complete replacement of all the PPCs in use within a period corresponding to the average period for which the first user is willing to retain a new PPC. The trade-in payments therefore have the effect of artificially shortening the working life of PPCs in Japan. The result is a collective increase in sales of new PPCs by the manufacturers, greater economies of scale and higher profit margins.

According to the Council, the Commission received no satisfactory evidence (the burden of proof falls on the party claiming the allowance) to allow it to conclude that the trade-in payment or discount was an ordinary discount granted in addition to the various other discount schemes.

With respect to *transport costs* the Council observes on the one hand that the evidence to which Canon refers relates to the amounts incurred but does not show that those expenses were directly related to domestic sales. It also states that if transport costs are incurred before sale they are never deducted either from the export price or from the normal value, whereas if the goods are transported after being sold to an independent buyer the costs are directly related to that sale and will be taken into account under Article 2(10)(c) of Regulation No 2176/84. However, the costs of moving products between Canon and CSC, which performed functions of a sales department, are normally costs of internal movement of

goods, not costs directly related to the sales by the economic entity to independent customers.

Finally, with respect to the *other costs incurred by salesmen* in connection with their sales activities, in respect of which an allowance was granted in a previous anti-dumping case concerning Canon, the Council submits that each case has to be investigated on its merits as provided for by Article 2(10)(c) of Regulation No 2176/84. If the Commission took one approach for one product it is not necessarily bound to use the same approach in an investigation concerning a different product, since cost items and their relationship to sales may differ. It is incumbent on the party claiming an allowance to prove the existence of a direct link with the sales concerned, which Canon did not do.

CECOM observes, with respect to the question whether an allowance should have been granted for the so-called *trade-in discounts*, that Canon failed to establish and prove that they have a direct relationship with the sales under consideration for the purposes of Article 2(10)(c) of Regulation No 2176/84. According to CECOM the trade-in payments essentially focus on the removal of used copiers and the creation of a new placement for the 'like products' subject to the sales contract. Canon did not prove that by refusing to grant an allowance for trade-in discounts the Council committed a manifest error or clearly exceeded the bounds of its discretion.

D — *The injury*

Canon claims that the Council should, in evaluating the injury, have given full attention to the segmentation of the market, this being particularly important in analysing the photocopier industry. The institutions' decision to consider all PPCs as equivalent like products severely distorted the true situation of competition with respect to the Canon Personal Copier (PC), whereas that product created a new market and is to be distinguished from photocopiers in segment 1 for which demand did not change as a result of the presence of the PC on the market.

According to Canon, a separate analysis of the various segments shows that there was no loss of market shares by the CECOM companies in any of the segments in which they offer products. The increase in Japanese exports came within the personal copier segment which was created by Canon, in segment 2 where Rank Xerox stopped offering machines for sale and in segment 4 where the Japanese and European machines gained share from the American company IBM. It is only by grouping all machines together that the CECOM companies can suggest a loss in market share during the period 1982 to 1984.

In Canon's view, a detailed analysis of the figures shows that the complainants' market share increased:

— in the PC segment from 0 to 0.8%;

— in segment 1 from 20.2 to 21.5%; ;

— in segment 2 Rank Xerox discontinued production of the machines in 1983 and recommenced sales in the second half of 1985;

— in segment 3 Rank Xerox increased its market share from 18.5% to 29.9%;

— in segment 4 from 47.6% to 58.8%;

— finally, in segment 5, the only segment in which the Community institutions found no injury, the market share of Rank Xerox, the only complainant active in this sector, decreased from 69.7% to 69.2% owing to the increasing market share of IBM.

Moreover, Canon claims that even if the Council had treated only products in adjoining segments as like products it would have been unable to find a loss of market share or any injury. Thus:

— in the combined segments 4 and 5, the market share of the complainants increased from 53% to 63% from 1982 to 1984;

— in the combined segments 3 and 4, their market share increased from 27 to 36%;

— by contrast, in combined segments 2 and 3 and combined segments 1 and 2, their market share dropped marginally from 11 to 9% and 18 to 16% respectively, this being attributable solely to the fact that Rank Xerox discontinued production of its segment 2 machines and did not commence sales again until the second half of 1985;

— in each of segments 1 and 3 the complainants' market share increased;

— finally, even if segment 1 and the PC segment are combined, the complainants' loss of market share is only 3%.

Canon also maintains that there is no meaningful competition between products in adjacent segments. The Council attempts to justify its position by saying that there are overlaps between adjoining segments in the Dataquest classification. Canon considers on the contrary that only segments 3 and 4 overlap to a small extent. In the PC sector in particular, it notes that the average monthly photocopy volume is 400 as opposed to 2000 in segment 1 and that the PC segment's multicopy speed is fewer than 12 copies per minute whereas a segment 1 copier can handle up to 20 copies per minute.

It also considers that the Council's argument that customers have a real choice between centralized facilities (large copiers) and decentralization (smaller copiers, down to personal copiers) is incorrect in the

context of the present case. According to Canon, decentralization means that a customer would have to purchase 20 copiers from the PC segment in order to replace one segment 2 machine, a course which would be more inconvenient than purchasing a segment 2 machine, which shows that it can hardly be said that there is competition between machines in adjoining segments.

Canon also claims that the Commission did not discover any price undercutting by Canon with respect to the machines of Olivetti, Océ and Develop and that certain Canon products were sold at higher prices and others at lower prices than those of Rank Xerox. According to Canon, the findings of price undercutting with respect to Tetras were the result of failing to consider the cost per copy to a customer.

According to Canon, if the profitability of the complainants' business has declined in certain cases, that is a normal phenomenon in a 'mature market with a substantial number of competing suppliers' (recital 48 of the contested regulation).

Canon notes that on the basis of Community part value alone (with no account taken of other aspects of local added value) the Community content was much higher in all Canon's European factories than that of Rank Xerox in the United Kingdom during the investigation period.

For the *Council* the only relevant question is whether the institutions relied on wrong statements of facts or made a manifest error of appraisal in determining the like product, the elements of injury and the causal link between injury and dumped imports.

With regard to what should be considered the like product for the purposes of the procedure, the institutions had found that all PPCs, at least those in adjoining segments, should be considered 'like products'.

In view of the various elements and features of the different types of PPC, the Commission arranged for an independent agency (Info-Markt) to carry out a market survey based on the German market in order to determine which PPCs are in competition on the Community market and to facilitate comparisons between different models. It was found that there is competition between PPCs in adjoining segments. The facts established in the course of the administrative procedure had already showed that although photocopiers in adjoining segments are largely interchangeable, the segments were not clearly defined and certain photocopiers could be classified in several different segments in view of certain of their features and technical characteristics. Moreover, the Council states that during the investigation the Commission was supplied with evidence demonstrating that machines in different segments competed with each other. The evidence included offers for contracts, customers' requirements, customers' real choice between centralized and decentralized facilities, which implies that the whole range of products must be examined

in order to determine the injury; certain Japanese exporters market and promote their products in such a way as to encourage the impression that they compete with larger models; and the fact that although Personal Copiers helped expand the market for PPCs they also increased competition at the bottom end of the market.

According to the Council, what matters is whether Community producers manufacture models like those sold for export to the Community by Japanese exporters. Community-produced models existed in all segments in the reference period. There may be marginal distinguishing characteristics between Community-produced models and Japanese machines with regard to certain precise technical features that each model may have, but that is not a sufficient basis for concluding that they are not like products. Such characteristics should be taken into account only in comparing prices of the similar models.

With respect to the Canon PC, the Council states that Canon's creation of new demand for personal copiers does not mean that there can be no injury, since segment 1 photocopiers can be substituted for personal copiers. As far as the Tetras (Attaché 1) personal copier is concerned, the fact that it can achieve a daily volume of 800 to 1000 copies whereas the Canon PC achieves the same copy volume per month does not prove that the latter machine cannot be used as a substitute for other low-volume copiers, including Canon personal copiers, and that it is not in competition with those machines.

Finally, the Council states that it is incorrect that all the PPCs produced and imported by Canon were personal copiers. It exported to the Community a wide range of PPCs during the reference period, at dumped prices.

As regards the injury elements and the causal link between the injury and the dumped imports, the Council observes in the first place that market share was only one of the injury elements investigated and that there was a finding of other injury elements (price undercutting, depression of prices and of profitability).

The Council then observes that Canon does not dispute that there was an increase of market share for Japanese-made PPCs which coincided with a decrease in market share of European-made PPCs, despite growth in demand.

With respect to Canon's market share calculations, the Council observes that they do not correspond to the information obtained by the Commission during the investigation and that Canon confuses increase or reduction in sales with increase or reduction of market share. A manufacturer's market share may drop even though its sales increase. The Council also observes that the market share of Japanese producers increased in a way which would constitute sufficient grounds for injury even if the

market share of the complainants had also increased.

Contrary to Canon's claim, Community producers have almost always supplied the Community market with low-volume PPCs. It may be that Canon stimulated increased demand by charging low, dumped prices and by introducing the personal copier, but that does not justify the assertion that it helped create a separate market which would not have otherwise existed. In that connection, the Commission acknowledged (in recital 49 to Regulation No 2640/86) that personal copiers developed a new market but also that they increased competition at the low end of the existing market. Thus, the sales of personal copiers did not merely add to the size of the total market but also took sales away from larger photocopiers.

Finally, the Council states that although Japanese marketing concepts helped expand the low-volume PPC market, that does not show that imports of such low-volume copiers at dumped prices were not a cause of the injury suffered by the Community industry.

CECOM maintains that the PPC market cannot be segmented. Because of their essential physical and technical characteristics, their application and use and also the particular features of the market, all photocopiers can be described as like products. All the machines perform the same function, namely the reproduction of documents. Numerous photocopiers are functionally interchangeable.

CECOM contests the segmentation of the photocopier market proposed by Canon. It observes, with regard to Canon's personal copier and the new placement supposedly created for it by Canon, that Commission Regulation No 2640/86, confirmed by the Council regulation, states in recital 76 that in the reference period Tetra produced personal copiers and Olivetti produced a segment 1 low-volume copier. Also, Rank Xerox manufactured and offered small segment 1 and 2 copiers during that period.

Even if the market segmentation is correct, Community products have suffered serious injury as a result of Canon's imports of small photocopiers at dumped prices.

E — *The infringement of essential procedural requirements*

Referring to previous decisions of the Court (in particular the judgments in Case 24/62 *Federal Republic of Germany* v *Commission* [1963] ECR 63, and Case 203/85 *Nicolet Instrument* v *Hauptzollamt Frankfurt am Main-Flughafen* [1986] ECR 2049) *Canon* claims that the Council infringed essential procedural requirements and failed correctly to state the reasons on which the contested measure was based, thus infringing Article 190 of the Treaty.

According to Canon, Regulation No 2640/86 and the contested regulation do not contain an adequate statement of reasons on the following points:

— the comparison of sales for the purpose of determining normal value, as required by Article 2(3) of Regulation No 2176/84;

— the refusal to examine the evidence presented to it concerning the functions of CSC and in particular the fact that CSC is not the sales department of Canon;

— the refusal to accept certain selling expenses as directly related to sales and the meaning of the term 'directly related expenses'.

The *Council* submits that the statement of reasons contained in recitals 5 to 14 to the contested regulation is adequate.

As regards CSC's functions, the Council states that Canon attempted to present evidence only regarding its role and that of CSC.

The Council states that the Commission did not contest the fact that CSC performed other functions besides those of a sales department of Canon. The institutions consider that the fact that CSC performed other functions as well does not alter its position vis-à-vis Canon: it still performed functions which would normally be performed by a sales department. Consequently, the SGA expenses were apportioned.

In those circumstances, it was not necessary to review additional evidence presented by Canon since the facts were not disputed. Only the conclusions drawn from the facts by the Commission and Canon were different.

Finally, with regard to the third point, the Council considers that the statement of reasons contained in recital 26 to Regulation No 2640/86 and recital 20 to the contested regulation is sufficient.

The Council concludes that all the arguments relating to essential procedural requirements are without foundation.

IV — The Council's reply to the question put to it by the Court

In its reply of 23 May 1990, the Council expressed its views on the circumstances justifying the fact that in this case, as opposed to the case cited by Canon, the expenses incurred by the sellers did not give rise to an allowance under Article 2(10)(c) of Regulation No 2176/84.

The Council describes in the first place the conditions under which the allowance requested in the case cited by Canon — concerning electronic typewriters (ETW) — was granted (different product, different market structure from that of the PPC market, very small sales on the domestic market which were not sufficiently viable to be used for comparison purposes, a dumping margin of not less than 76%, in respect of which a duty of 35% was imposed on the basis of injury considerations) and the fact that the allowance claimed amounted to a *de minimis* figure of less than 1%.

The Council goes on to say that in the ETW cases there was no reason to study the question of an allowance. Although in that case the granting of an allowance was not exactly required under Regulation No 2176/84, the Commission none the less correctly decided that the allowance did not materially affect the dumping margin and made no difference whatsoever regarding the duty to be imposed. Strict application of that regulation would not have resulted in any material difference regarding those figures.

It was only in further investigations that the Commission's attitude evolved with respect to adjustments, in the direction of a more precise application of Regulation No 2176/84, which explains the difference between the way in which the question of allowances was dealt with in the ETW cases and in the present case.

J. C. Moitinho de Almeida
Judge-Rapporteur