on the one hand, and the prices of similar Community products not at their real level but at the level which they would have reached if there had been no dumping, on the other, where at the time of comparison the prices of the Community products have already been subject over a long period to downward pressure leading to their decline precisely on account of the dumping.

REPORT FOR THE HEARING
delivered in Joined Cases 273/85 and 107/86 *

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* Language of the Case: English.

I — Facts and procedure

The age of electronic typewriters began in 1978 when the first model of an electronic typewriter manufactured by Olivetti was launched on the market. Until then, the market had been dominated by typewriters of the traditional variety, that is to say mechanical and later electromechanical typewriters.

The spectacular breakthrough achieved by the new product completely overturned the structure of the market in typewriters. Within a short time sales of mechanical and electromechanical typewriters plunged to the lowest level ever recorded, whilst sales of electronic typewriters soared.

In 1982 European manufacturers of electronic typewriters (Olivetti, Olympia and Triumph-Adler) began to feel the ever-growing pressure exerted by Japanese competition which, in their view, was undercutting prices. According to the European manufacturers, Japanese companies were exporting ever-increasing quantities of electronic typewriters at dumping prices in order to take over the European market in that product and to drive out European undertakings.

In order to contend with what they call the Japanese 'dumping conspiracy', European manufacturers formed an association known as the 'Committee of European Typewriter Manufacturers' (hereinafter referred to as 'Cetma') which, on 15 February 1984, submitted a complaint to the Commission requesting the latter to initiate an anti-dumping proceeding against Japanese exporters.

The proceeding initiated by the Commission on the basis 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 (Official Journal 1984, L 201, p. 1) culminated in the adoption by the Commission of Regulation (EEC) No 3643/84 of 20 December 1984 (Official Journal 1984, L 335, p. 43). That regulation imposed a provisional anti-dumping duty on imports of electronic typewriters manufactured by a number of companies including Brother Industries Ltd, Canon Inc., Sharp Corporation, Silver Seiko Ltd (hereinafter referred to as 'Silver Seiko'), Tokyo Electric Company Ltd (TEC), Tokyo Juki Industrial Co. Ltd and Towa Sankiden Corporation, and terminated the proceeding with regard to Nakajima All Co. Ltd on the ground that the dumping margin established for that company was negligible.

On 19 June 1985 the Council adopted Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1), which imposed a definitive anti-dumping duty on all the undertakings that were already subject to provisional anti-dumping duty. The duty imposed on Silver Seiko was fixed at 21%. That measure was contested by all the parties concerned.

By Regulation (EEC) No 113/86 of 20 January 1986 (Official Journal 1986, L 17, p. 2), the Council declared Regulation No 1698/85 inapplicable to Tokyo Juki as from the date of its entry into force.

By application lodged at the Court Registry on 6 September 1985 (Case 273/85), Silver Seiko, with its subsidiaries Silver Reed (UK) Ltd and Silver Reed International GmbH, brought an action for a declaration that Regulation No 1698/85 is void in so far as it affects the applicant. On the same date,

Silver Seiko lodged an application for the adoption of interim measures in which it sought an order suspending the application to it of that regulation until the Court had given judgment on the main application. The interlocutory application was dismissed by order of the President of the Court of 18 October 1985.

By orders of 11 November 1985 and 19 February 1986 respectively, the Court granted the Commission of the European Communities and Cetma leave to intervene in support of the defendant's conclusions.

On hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, in accordance with 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. However, it requested the parties to provide it with certain information and to answer a number of questions. The parties complied with that request within the prescribed period.

In their actions against Regulation No 1698/85, Silver Seiko and the other applicant companies contend, *inter alia*, that the comparison between the prices of imported products and the prices of Community products was distorted by numerous errors.

By Regulation (EEC) No 113/86 of 20 January 1986 (Official Journal 1986, L 17, p. 2), the Council, acting on a proposal from the Commission, raised the definitive anti-dumping duty to 23%, taking account of the fact that the correction of the error involving the inclusion of electronic typewriters manufactured in Singapore had the effect of increasing the dumping margin established in relation to Silver Seiko's imports into the Community.

By application lodged at the Court Registry on 6 May 1986 (Case 107/86), Silver Seiko brought an action for the annulment of Regulation No 113/86. The grounds raised against this regulation are the same as those raised against Regulation No 1698/85 together with certain new grounds concerning discrimination against Silver Seiko in favour of Tokyo Juki and Nakajima and the failure to take into account evidence relating to certain errors in the model comparison upon which the institutions based the anti-dumping duty imposed by Regulation No 1698/85. In that application Silver Seiko essentially sought a review by the Court of both the initial measures under Regulation No 1698/85 and the measures as amended by Regulation No 113/86.

By a document lodged at the Court Registry on 17 July 1986, the Council raised an objection of inadmissibility against that application invoking the principle of *lis pendens* and alleging that Silver Seiko had failed to indicate in the application the grounds relied upon against the contested measure as such and did not have a sufficient legal interest in separately challenging that measure, the validity of which depended on that of Regulation No 1698/85.

Silver Seiko replied that there were reasons for taking the view that Regulation No 113/86 does not merely confirm Regulation No 1698/85, and it could not therefore risk laying itself open to the charge that it had failed to contest that regulation within the prescribed period.

By decision of 17 December 1986 the Court joined the objection of inadmissibility to the substance of the case.

By order of 3 July 1986, the Court granted the Commission leave to intervene in support of the defendant's conclusions.

On hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to assign the case to the Fifth Chamber and to join it to Case 273/85.

II — Conclusions of the parties

Case 273/85

Silver Seiko and the other applicant companies claim that the Court should:

(1) declare that Council Regulation (EEC) No 1698/85 is void in its entirety or at least in so far as it applies to the applicants;

(2) alternatively, declare Articles 1 and 2 of that regulation void or, in the further alternative, declare Article 1 of that regulation void in so far as it purports to impose a definitive anti-dumping duty upon electronic typewriters exported to and sold in the Community by the applicants and, in the further alternative, declare Article 2 of that regulation void in so far as it purports to order the definitive collection of the amounts secured by way of provisional duty by Commission Regulation No 3643/84;

(3) in any event, order the Council to pay the whole of the costs;

(4) order such other and further relief as may be lawful and equitable in the circumstances.

The *Council* contends that the Court should:

(1) dismiss the application;

(2) order the applicants to pay the costs, including the costs of the application for the adoption of interim measures.

The *Commission of the European Communities* and *Cetma* support the Council's conclusions and contend that the applicants should also be ordered to pay the costs incurred by them in their capacity as interveners.

Case 107/86

Silver Seiko claims that the Court should:

(i) declare that Council Regulation (EEC) No 113/86 is void in its entirety or at least in so far as it applies to the applicant;

(ii) alternatively, declare Article 1 of that regulation void;

(iii) order a refund of the anti-dumping duty paid on imports of Silver Seiko's electronic typewriters into the European Communities;

(iv) in any event, order the Council to pay the whole of the costs; and

(v) order such other and further relief as may be lawful or equitable in the circumstances.

The Council, supported by the Commission, contends that the Court should:

(i) dismiss the application as inadmissible;

(ii) alternatively, dismiss the application as unfounded;

(iii) in any event order the applicant to pay the costs.

III — Submissions and arguments of the parties [1]

A — *Submissions specific to these joined cases* [2]

1. *Illegal and incorrect calculation of the normal value*

Silver Seiko and the other applicants, (hereinafter referred to by the collective designation of 'Silver Seiko') contend in the first place that the determination of Japanese domestic market prices in order to establish the normal value was unlawful and incorrect. In calculating the normal value of the models sold in Japan, the Commission took as a basis the prices of Silver Business Machines (hereinafter referred to as 'SBM'), the subsidiary retail sales company of Silver Seiko.

1 — As Silver Seiko inserted in its reply certain observations which it drew up jointly with the applicants in Case 250/85, Joined Cases 260/85 and 106/86, Joined Cases 277 and 300/85 and Case 301/85, it is appropriate to summarize those observations under a separate heading which also includes the Council's response to those observations and the observations submitted by the Commission in so far as they deal with the problems raised in the joint observations. All those arguments will be set out in Section III B of this report.

2 — As regards the substance of Case 107/86, Silver Seiko and the Council refer to their pleadings in Case 273/85.

Article 2 (7) of Regulation No 2176/84 makes it very clear that, if the Community authorities consider that the prices between the associated parties are not in the ordinary course of trade, they must have recourse to the other options specified in the regulation. Moreover, the validity of that interpretation is confirmed by the Commission's own practice (see Commission Decision 84/259/EEC of 10 May 1984 in the Japanese colour photograph paper case, Official Journal 1984, L 124, p. 45; and Regulation (EEC) No 1500/83 of 9 June 1983 imposing a provisional anti-dumping duty on imports of outboard motors originating in Japan, Official Journal 1983, L 152, p. 18).

The Council states that the Commission could not take into consideration the transfer of goods within the Silver Seiko group between Silver Seiko Limited and SBM, since they both form an integral part of a corporate group in which SBM has functions substantially similar to those of a sales branch or a sales department. The applicant's argument to the effect that in such a case the only possibility was to establish the normal value in accordance with the criteria set out in Article 2 (3) (b) (i) or (ii) is not in conformity with the principles underlying Article 2 (3) (a) and (b), which indicate that the normal value should primarily be based on the actual prices of the goods on the market of the exporting country. The Commission is therefore obliged to examine whether transactions in the ordinary course of trade have taken place at all in the exporting country. SBM's sales were indeed made in the ordinary course of trade.

With regard to the precedents referred to by Silver Seiko, the decision concerning Japanese colour photograph paper shows only that the prices charged to related customers are acceptable if they correspond to market prices, but there is nothing in the

decision to suggest that the prices of a sales company may not be used. Similarly, the decision concerning Japanese outboard motors shows quite simply that the prices charged to associated companies may not be used unless they are arm's length prices.

In view of the terms in which Article 2 is couched, no specific words are necessary to authorize the institutions to use such prices, since they are clearly allowed to use any domestic sales which permit a proper comparison to be made.

Silver Seiko considers that, even if the method of calculating domestic market prices was not *ultra vires*, the prices used were not 'comparable prices' within the meaning of Regulation No 2176/84. The prices on the Japanese market are not comparable, as that market is characterized by the fact that sales of typewriters not in the Japanese language are very limited and are made exclusively at the retail level.

Moreover, that conclusion had already been adopted by the Commission in Decision 81/35/EEC of 9 February 1981 concerning chemical fertilizer originating in the United States (Official Journal 1981, L 39, p. 35).

If the Community legislation does not permit price allowances to be made in prices in order to take account of the differences between the quantities sold, it follows necessarily that those prices are not comparable. It is self-evident that it is impossible to compare prices charged in transactions involving an average of 2.11 units with transactions involving an average of 25.71 units.

The Council states that sales in Japan were not retail sales but sales to retailers and were therefore at the same level of trade since export prices were constructed on the basis of suitably adjusted selling prices charged by Silver Seiko's subsidiaries in the Community to the first independent buyer.

In the US chemical fertilizers case however, there was a clear difference in the level of trade since certain domestic sales were made through retail outlets, whilst export sales were made in bulk.

Contrary to the applicant's opinion, sales made in Japan are comparable to those made in the Community, in so far as the quantity of the products sold in Japan is sufficient and the same price rates are generally available to all actual or potential customers.

2. *Illegal, discriminatory and incorrect calculation of the profit for the purpose of determining the constructed value*

Silver Seiko contends that the 'reasonable margin of profit' of 61.27% on cost, which was used by the Community institutions, is at least six times higher than the profit margins indicated by Cetma and by Silver Seiko, the profit margin adopted by the Commission in its regulation imposing a provisional anti-dumping duty and the profit margin established for sales of products of the same sector of industry in Japan. That margin was obtained by systematically undervaluing the costs. At least three objections may be made to such a method of calculation.

In the first place, it is contrary to Regulation No 2176/84, inasmuch as the Community institutions used, for the calculation of the profit margin, prices of sales by SBM which they did not regard as sales made in the ordinary course of trade for the purpose of computing the constructed value. Secondly, the 'profits' were established at the retail sales level, that is to say they were not at the same level of trade as sales to the Community. Thirdly, since the constructed value must be related to export sales, it is incorrect to include the profits of a domestic retail sales subsidiary.

In the Commission's practice to date, the 'reasonable margin of profit' has never been found to be higher than 10%. Hence, in addition to infringing Regulation No 2176/84, the new method of calculating the profit margin is also contrary to the principle of legal certainty.

The applicants were also discriminated against in relation to other Japanese companies. Profits on domestic sales were determined for three companies which were said to have made significant sales in Japan, namely Silver Seiko (61.27%), Canon (47.91%) and Brother Industries (71.18%). Those profit margins were then used to determine the profit to be added to the constructed values for those models in respect of which sales on the domestic market were insufficient. However, in the case of the other Japanese companies whose normal value was constructed (Sharp, TEC, Tokyo Juki and Towa Sankiden), the lowest margin, which was that established for Canon, was taken as a basis.

That system manifestly discriminates against Silver Seiko (and Brother Industries). It is entirely unreasonable to rely, for a very large number of models, on the lowest margin established on the basis of sales of only two models, and to exclude from that margin the models manufactured by Silver Seiko and Brother Industries alone. The only correct method would have been to apply to models not sold in Japan the weighted average profit margin that was established for the models manufactured by Silver Seiko, Canon and Brother Industries and sold on the domestic market.

That argument takes on particular importance as a result of the Commission's decision of 12 February 1986 terminating the anti-dumping proceeding against Nakajima, a company for which the Commission accepted a profit margin which was lower than that for any other Japanese company, even though there is no difference between Nakajima's models and those sold by other companies whose sales on the domestic market are insufficient. Hence the Commision's decision in favour of Nakajima discriminated against Silver Seiko and other companies in the same situation as Nakajima. The Council still has not given valid reasons for the attitude taken by the Community institutions towards Nakajima.

Finally, Silver Seiko emphasizes that the figures taken for the calculation of its profits were incorrect. Electronic typewriters account for only 6.8% of SBM's sales. If a profit of 61.27% were calculated on sales of electronic typewriters, it would follow that SBM's entire profit was made on sales of electronic typewriters and that 93.27% of that company's sales were made at a loss, in spite of the long-standing profitability of the product sold by it. In fact, the costs deducted by the Commission from the resale price do not constitute the whole of the costs since they do not include the general expenses of its subsidiary, SBM. Contrary to the Council's contention,

certain figures which were supplied by Silver Seiko and on which the Council bases its observations manifestly related to the parent company alone.

With regard to the profit margin, the Council submits that it was correct to use the profit margin established by the Commission in the course of the investigation of domestic sales in Japan in constructing the normal value as well. There was no reason to accept other, lower, margins, as suggested by the applicant or Cetma. None of those margins is relevant in this case. Some are based simply on estimates (those indicated in Cetma's complaint) or on the data which was subsequently replaced by more detailed information (that used by the Commission in the regulation imposing a provisional anti-dumping duty), whilst others either take no account of profits generated by sales companies or include products other than those which formed the subject-matter of the investigation.

3. *Calculation of the constructed value on an incorrect basis*

According to Silver Seiko, the Commission and the Council are attempting to redefine the constructed value as a replica of a domestic sales price or, worse still, of the selling price of the subsidiary responsible for distribution, although they previously indicated that the constructed value represents the cost of an exported product. That argument is illogical because it seeks to make the domestic price coincide with the normal value, whatever method is used to determine the latter. Furthermore, the determination of the normal value at the level of the price charged by sales subsidiaries is inherently incorrect, inasmuch as it inevitably leads to very high values. The inclusion of selling, administrative and other general expenses, and of a very high 'profit' for the subsidiary, seriously distort the calculation, particularly since sales on the Japanese market were made exclusively to retailers.

The Council takes the view that the rules applicable to the constructed normal value are designed to lead, as far as possible, to a value corresponding to the normal value determined on the basis of domestic prices. The use of different methods of calculating the normal value should not lead to substantially different results.

The Community authorities have not modified their practice. In the decision concerning cotton yarn originating in Turkey, cited by Silver Seiko as an example of the Community institutions' practice in the past, the Commission was obliged, in the absence of any reliable information on the negligible volume of domestic sales, to use the costs of a subsidiary dealing with exports; however, that is an exceptional case which provides no support for the contention that the normal value is that of the exported product.

Cetma points out that the method used by the Commission is not a new development in the Community's anti-dumping legislation, but is based on a provision which has been in force ever since that legislation was adopted and which has been applied for more than 10 years without being challenged before the Court.

4. *The export price*

Silver Seiko alleges that, in the calculation of the export price, it was not the profits of

its European subsidiaries that were deducted from those subsidiaries' resale prices but a higher amount that was considered 'reasonable in the light of the profit margins of independent importers of the product concerned'.

The inclusion of the profit margins of independent importers is inconsistent with the justification for the deduction of profit margins. To deduct from the Community sales price a profit greater than that which was actually earned by the applicant's subsidiaries is tantamount to deducting part of the parent company's profit, with the result that the price at which the product would have been sold from Japan cannot be determined.

Silver Seiko further alleges that the general expenses referred to in Article 2 (8) (b) were determined on the basis of turnover, even though such expenses are essentially constant, regardless of the value of the electronic typewriter sold. The 'available accounting data' referred to in Article 2 (11) are not just the turnover, which, moreover, is not strictly limited to allocations based on revenue.

The Council states that the profit margin of the applicant's subsidiaries depends on the transfer price at which the parent company sells the product to them, and that the use of that profit margin would necessarily involve taking account of the actual export price which is *ex hypothesi* not an arm's length price. For that reason, Article 2 (8) (b) expressly refers to a 'reasonable profit margin'.

With regard to general expenses, Article 2 (11) provides that in general all cost calculations are to be based on available accounting data, normally allocated, where necessary, 'in proportion to the turnover for each product and market under consideration'. In this case, there was no reason to depart from that general rule. Although some costs may remain constant, it is obvious that more sophisticated products need a more sophisticated administrative and technical organization. An allocation of the general expenses according to the quantities sold is hardly satisfactory. Technical assistance and specialized training for salesmen, which are very important for certain kinds of electronic typewriters, are hardly required at all for cheaper electronic typewriters or for other products. There was no specific evidence to back the applicant's claim that general expenses should be allocated on the basis of quantities sold and, therefore, an allocation in proportion to turnover for each product was justified.

5. *Comparison between the normal value and the export price*

According to Silver Seiko, the comparison between the normal value and the export price was made between export prices at the ex-works level and domestic prices at virtually the distributor level. Such a comparison is neither fair nor reasonable, with the result that the fundamental legal requirement for determining the existence of dumping is not met.

Allowances for differences in the level of trade are necessary because the majority of sales in the Community are at wholesale, whereas the opposite is true on the domestic market in Japan, where the average number of units sold per transaction is 2.11. The Council wrongly attempts to distinguish a category of customers consisting of dealers, wholesalers and retailers from the category of end-users.

Allowances for differences in quantity should also have been made. There is no support in the basic regulation for the argument relied upon by the Commission in refusing to make such an adjustment, namely that allowances may be made only where a percentage discount is granted.

Finally, allowances should have been made for differences in the terms and conditions of sale. Such an adjustment should have been made for the interest costs relating to stocks sold by SBM and for the interest cost of sums receivable in respect of electronic typewriters sold in Japan. Contrary to the Council's view, those costs are directly related to sales on the domestic market.

Finally, Silver Seiko points out that the comparison was made not on a transaction-by-transaction basis but on the basis of averages calculated over different time periods. By using different averaging techniques which do not involve comparing the normal value and the export price at the same time, it is inevitable that in some cases sales of non-dumped products will be included in the calculation. The comparisons between the two markets should have been made on the basis of averages covering the same period.

The Council emphasizes that the comparison was made at the ex-works level, which does not preclude certain expenses incurred at a stage beyond the actual production stage from being incorporated into the normal value, as required by Regulation No 2176/84.

Moreover, Silver Seiko is mistaken in alleging that sales made by its subsidiaries in Japan were at the 'retail level'. In point of fact, the applicant's subsidiaries sell primarily to small dealers, which themselves constitute retail outlets. Accordingly, sales of that kind are essentially wholesale sales.

With regard to price discounts for quantity sales, the Council submits that it was unclear in this case whether the discounts offered to the only customer who purchased a large number of electronic typewriters on the Japanese market were also made available to other customers in the same situation. In the absence of price lists or other evidence of a pattern of quantity discounts, it was impossible for the Community authorities to determine whether the charging of different selling prices to different customers is the result of different marketing situations within the exporting country.

Finally, the Council points out that allowances were made for differences in credit terms. The additional allowances requested for the interest costs of inventory and of credit given to customers could not be granted inasmuch as those expenses did not, contrary to the principles referred to in Recitals 24 and 25 in the preamble to Regulation No 1698/85, bear a direct functional relationship to sales on the domestic market.

With regard to Silver Seiko's criticism that the comparisons were not made at the same time or on a transaction-by-transaction basis, the Council emphasizes that the export prices and the normal value relate to the same 12-month period. Moreover, the transaction-by-transaction method of calculation yields precisely the same results as the method based on average values.

6. *Injury*

According to Silver Seiko, the existence of material injury to 'an established Community industry' should be excluded in so far as certain Community manufacturers themselves imported the products which were allegedly dumped. Those manufacturers should either be deleted from the list of complainants altogether or excluded from the determination of injury. They cannot be considered as having been injured by imports from which they have profited. Furthermore, unless they are excluded, it might prove difficult to distinguish the injury caused by those complainants to other Community manufacturers.

The Council points out that Article 4 (5) of Regulation 2176/84 allows the institutions to protect Community producers with substantial production in the Community even if part of their range of models is imported from producers in non-member countries, including producers found to be engaged in dumping. The Council relies on the wording of that article as showing that in certain circumstances (such as those referred to by the applicant) the term 'Community industry' is not necessarily confined to those Community producers who have not imported dumped goods.

Silver Seiko considers that the injury has not been analysed in accordance with Article 4 (2) of Regulation No 2176/84, which provides that a determination of injury must take a number of factors into account, including the volume of dumped imports, the prices of such imports and the consequent impact on the Community industry concerned, no one or even more than one of which can necessarily give decisive guidance.

Neither in the regulation imposing a provisional anti-dumping duty nor in Council Regulation No 1698/85 has there been an adequate examination of injury involving the factors listed above.

For instance, the Community institutions have never indicated that they examined the evidence provided by Silver Seiko concerning the increase in the volume of Japanese imports which, according to the applicant, has not been significant in relation to production or consumption in the Community. That increase should be assessed in relation to Community production and consumption, rather than in absolute terms. There is no mention whatsoever of the fact that the Community market increased by 79% over the period under consideration. Similarly, no account was taken of the fact that, having regard to imports of Japanese electronic typewriters by Olivetti, the market share held by Japanese exporters in 1981 was at least 44.1%, and was therefore higher than the 39.7% share which they held in 1983-84.

Similarly, the issue of import prices and the undercutting of the prices of Community manufacturers was not examined in depth. The information provided by Silver Seiko and other parties to the investigation showed that the Community market in electronic typewriters was depressed before the appearance of Japanese imports on the market.

Price undercutting was not established for the entire Community market. Moreover, the Commission had compared the Japanese

models sold to wholesalers and retailers with the European models which were sold to end-users as well. Finally, the Japanese companies were inactive on the European market until the end of 1981 and, before that time, European manufacturers had already competed on the market by undercutting one another's prices.

Silver Seiko also contends that there has not been a sufficiently accurate evaluation of the impact of dumping on the Community industry concerned which could relate only to the one undertaking which did not import Japanese electronic typewriters, that is to say Triumph-Adler. All the evidence indicates that Triumph-Adler was doing admirably well during the period taken into consideration by the Commission for the purposes of its investigation. Even a profit margin of less than 10% may be excellent, as is clear from the 3.1% profit made by Olivetti in 1982, which was considered excellent by the company chairman himself.

The Council points out that the volume of imports of electronic typewriters originating in Japan increased from 145 277 units in 1982 to 368 722 units in the financial year ending on 31 March 1984, which represents an increase in the share of the market held by Japanese exporters from 28 to 39.7%. As far as price undercutting is concerned the Council states that the retail prices of dumped imports generally undercut the prices of Community producers. There were instances where there was no undercutting but generally price undercutting ranged between 11.4 and 30% and in some cases it reached 45%.

Silver Seiko further submits that the so-called 'target price' system used by the Commission and the Council is an inadequate basis for the determination of injury.

In the first place, it led to a determination of injury also covering those European undertakings which had themselves imported Japanese electronic typewriters. Secondly, it does not fully analyse the factors referred to in Article 4 (2) of Regulation No 2176/84. Thirdly, by placing almost exclusive reliance on the target-price system, the Community institutions infringed the terms of Article 4 (2), which provides that decisive guidance cannot be derived from any one or even several of the factors which must be taken into account. Fourthly, the calculations of the target prices were incorrect and grossly inaccurate, particularly in view of the excessive profit margins attributed to the Community undertakings.

The Council for its part states that there is no requirement that the factors referred to in Article 4 (2) should be analysed under the target-price system itself. The requirement is only that those factors should be taken into account in the determination of injury. Target prices were used not in the determination of injury but to provide a rational basis for determining the appropriate level of duty for each individual exporter.

It follows that the applicant is wrong in alleging that the injury was established by almost exclusive reliance on the target-price system, which was treated as decisive. As appears from the contested regulation and the Commission regulation the institutions considered all the relevant elements of injury as defined in Article 4 of Regulation No 2176/84.

With regard to the alleged errors in the calculations, it should be pointed out that the calculations carried out by the Commission were based on the final position adopted by Silver Seiko during the investigation. With regard to the profit margin, it is not disputed that in the past Triumph-Adler made profits in excess of 10% on sales of electronic typewriters. If, therefore, Triumph-Adler's earlier profit margins had been used, the target prices would have been even higher.

The Commission points out, in the first place, that the duty to be imposed must be calculated in such a way as to remove the injury caused by the undercutting of Community prices. Where dumping has already depressed prices, however, it is not sufficient to eliminate the undercutting, since that would merely restore the depressed price level. The possibility of looking at the price level before the dumping began is difficult, or impossible, if the impact of the dumping has been substantial and it has been practised over a long period. To establish what the level of prices would be if dumping had not been practised would then be very complicated. The only remaining possibility is for the Community institutions to construct the price on the basis of the cost of production of the Community industry and to impose a rate of duty enabling Community manufacturers to charge prices that yield a profit margin which, having regard to all the circumstances, is considered reasonable; in other words they should construct a target price. In theory, the Community institutions could base the rate of duty on the cost of production of the most efficient manufacturer or, instead, on that of the least efficient manufacturer, and thereby accord the Community industry a greater or lesser degree of protection, according to its needs. In fact, the Community institutions took as a basis the average cost of production for all the Community manufacturers, which gives the least efficient manufacturer less protection than it needs and exerts pressure on it to become more efficient.

The next question which arises is what profit margin should be used in order to avoid injury from dumping in the future. In that regard, it should be borne in mind that the profit margin should not be fixed so as to provide compensation for injury caused by dumping in the past. Moreover, it should be reasonable, having regard to all the circumstances of the industry in question at the time. In any event, its purpose should be to remove the injury. The question whether such a margin is also likely to attract new investment should not be taken into consideration.

The criticisms directed at the use of target prices, on the ground that the Community institutions failed to take account, in fixing those prices, of the factors listed in Article 4 (2) of Regulation No 2176/84, are unfounded. Those factors are analysed not under the system of target prices but in Regulations Nos 3643/84 and 1698/85.

Furthermore, no comparison with actual prices was possible as those prices had already been depressed by dumping.

Cetma points out, in the first place, that the applicant's allegation that the Commission committed a number of errors is not explained in further detail and is therefore without any value.

The 10% profit margin used for calculating the target price is still far too low by comparison with the margin indicated by the Community manufacturers, who argued that a level of profit varying between 18 and

20% on turnover is needed for the manufacture of electronic typewriters to be viable.

That margin is justified for various reasons, such as: increased research and development costs for both hardware and software owing to shortened product life cycles; higher costs due to investments for plant automation; need for higher expenditure on advertising; costs of market growth; and higher turnover of personnel, which is a characteristic feature of this sector of industry.

Furthermore, there is no reason to restrict the target-price system to Triumph-Adler, since neither Olympia nor Olivetti imported electronic typewriters from Japan at dumping prices during the reference period.

Finally, Silver Seiko alleges that the Community institutions attributed the alleged injury to the applicant and to the other Japanese manufacturers without taking any account of factors other than dumping by the applicant which are the true cause of any injury to 'Community industry'.

The only reference to those factors is in Regulation No 1698/85, which states quite simply that no such factors were found to have contributed to the injury established. That statement is untrue. There are a number of factors which may have contributed to any injury suffered by the Community industry, namely the imports effected by Olivetti and Olympia, the fact that Triumph-Adler and Olympia were both slow in adjusting to electronics, the fact that Community industry could not keep up with the ever-growing demand, and the importation of electronic typewriters into the Community from non-member countries other than Japan. No realistic attempt has been made by the Community institutions to evaluate those factors.

If the Council's analysis in Regulation No 1698/85 had not covered only a limited period but had taken into consideration developments since 1979 and 1980, it would have shown that the volume of Japanese imports was not an important factor but was linked to the rapid expansion of the Community market and to the failure of the Community manufacturers to keep up with a sharp increase in demand.

The Council states that in fact, as is clear from Recital 32 in the preamble to Regulation No 3643/84, account was taken of imports from countries other than Japan and of the increase in demand. However, analysis of those factors revealed that they were not such as to cause injury to Community producers. The Commission also took account of the volume of Japanese production, most of which was intended for export, and of the fact that it was very probable that a large proportion of that production would be exported to the Community in the immediate future, thereby posing a threat of injury in addition to the actual injury already sustained.

The Community authorities were therefore fully entitled to conclude that, taken in isolation from that caused by other factors, the injury caused by dumping was material.

With regard to the capacity of the Community industry in question, the Council refers to the considerations mentioned earlier.

The Commission observes that the principles governing the establishment of injury require the Community institutions to distinguish between the injurious effects of dumping and the injurious effects of whatever other factors are, or are said to be, causing injury. However, the existence of injury due to other factors does not rule out the possibility that dumping is also causing injury, and an anti-dumping duty may then be imposed even if dumping is not the principal cause of the injury. It is only if the effects of other factors are wrongly attributed to dumping or if it is in fact quite impossible to determine whether the dumping has caused any injury that the finding of injury will be invalidated. The question of the structural difficulties experienced by Olympia and Triumph-Adler is therefore irrelevant to the issues before the Court unless the existence of either of the aforesaid situations is established. In this case it is necessary to ascertain whether the Community institutions had evidence which enabled them to reach the conclusions which they arrived at and whether the reasons given in the regulation are sufficient for the purposes of Article 190 of the EEC Treaty. Those conclusions were based on increased sales and increased market shares of Japanese exports to the Community, on the fact that the prices of Japanese products were lower than the prices of Community products and on a decline in the profits and the market share of Community manufacturers. Those findings have not been validly challenged and should therefore be regarded as correct.

However, the Commission considers that it may be useful to consider how it is possible to determine whether the injury undoubtedly suffered by the Community industry was at least partly attributable to dumping.

There are several reasons for concluding that dumping was causing identifiable injury in addition to the effects of other factors on Community industry.

In the first place, the injury cannot have been caused by any other problems experienced by the European companies, since even the lowest prices charged by Community manufacturers were substantially undercut in most cases by the Japanese exporters' prices.

If the injury to Community industry was attributable entirely to factors other than dumping, clear signs of those factors should moreover have become apparent before dumping began on a large scale. That was not the case on the European market where both Triumph-Adler and Olivetti were still making profits on sales of electronic typewriters in 1982.

Furthermore, only the effects of dumping can explain why the European manufacturers all experienced a broadly similar decline in revenue at the same time, whether or not they had adaptation problems. The sharp fall in the prices of the Community manufacturers must have been at least largely due to price undercutting by Japanese exporters, which occurred at the same time. Finally, it cannot be denied that

if Olivetti, the most successful of the three Community manufacturers, suffered injury owing to dumping practised by Japanese manufacturers, the other Community manufacturers must *a fortiori* have suffered injury too.

The Commission challenges the allegation that the findings concerning injury are invalidated by the fact that two Community manufacturers had themselves imported Japanese electronic typewriters and should therefore have been excluded from the determination of injury.

In general terms, it should be borne in mind that it may be entirely reasonable for a Community manufacturer either to import certain models in order to supplement its range and to sell them at prices corresponding to its own prices, or to buy dumped goods in order to protect itself and prevent them from being sold at prices which undercut its own prices.

Moreover, the fact that a Community manufacturer imported dumped goods in the past does not preclude it from complaining about injury occurring now. Moreover, such a manufacturer is injured by other imports of those products for resale at low prices just as seriously as if it had never imported those products itself. The only situation in which a Community manufacturer should be excluded from an assessment of injury is where the manufacturer in question imported the dumped goods and sold them itself at low prices, even though it was unnecessary to do so in order to compete with other dumped imports. That situation bears no resemblance to the cases now before the Court. Imports of the goods in question by Community manufacturers never exceeded 11% of total sales of electronic typewriters in the Community. The European manufacturers which imported Japanese electronic typewriters did so primarily or exclusively in order to complete their own range of electronic typewriter models, and so the imported models did not compete directly with any of their own models. Hence they did not inflict any injury on themselves. However, Tokyo Juki's exports to Olivetti at dumping prices injured Triumph-Adler, which could have supplied Olivetti with a comparable model.

Cetma maintains that, contrary to Silver Seiko's allegations, no factor other than dumped imports from Japan has caused injury to the Community's electronic typewriter industry. Imports by Olivetti and Olympia did not cause injury to Triumph-Adler, because the prices charged by those undertakings were always fair market prices. Nor is it correct to assert that Olympia and Triumph-Adler were too slow in adjusting to electronics. Olympia launched its first electronic typewriter models in 1979 and Triumph-Adler, which had already started work on electronic typewriters in the 1970s, launched a model on the market in September 1980.

Nor did the European manufacturers have any difficulty in meeting increased demand. Higher utilization of available capacity was prevented only by the undercutting of prices on the part of the Japanese exporters.

Finally, imports from other non-member countries were not dumped and did not therefore contribute to the injury.

7. Definitive collection of the provisional anti-dumping duties

According to Silver Seiko, the Council's decision on the definitive collection of the provisional duties was not adopted, contrary to the provisions of Article 11 (7) of Regulation No 2176/84, before the expiry of the period of validity of those duties and is therefore unlawful. That decision is contained in Regulation No 1698/85, which expressly stated that it entered into force on 23 June 1985, whilst Regulation No 3643/84 imposing the provisional anti-dumping duties had already expired on 22 April 1985 since the extension of those duties by Council Regulation (EEC) No 1015/85 (Official Journal 1985, L 108, p. 19) was invalid in so far as, contrary to Article 11 (5) of Regulation No 2176/84, no account was taken of the objections made by exporters representing a significant percentage of the trade involved. Moreover, even on the assumption that the period of validity of Regulation No 3643/84 was duly extended by two months, the date of expiry of the provisional duties imposed by that regulation, which entered into force on 23 December 1984, was 22 June 1985, in accordance with the method of calculation of periods laid down by the Court in its decisions. The time-limits set in the regulation imposing provisional anti-dumping duties should take precedence over the general provisions of Regulation (EEC, Euratom) No 1182/71 determining the rules applicable to periods, dates and time-limits (Official Journal, English Special Edition 1971 (II), p. 354).

In the first place, the Council contests the applicant's argument that the provisional anti-dumping duties were not validly extended. The fact that Brother Industries and Silver Seiko, exporters representing a significant percentage of the trade involved, did object does not mean that other exporters, also representing a significant percentage of the trade, did not object.

The Council further submits that, contrary to the opinion expressed by the applicant, there is no requirement in Article 11 (7) of Regulation No 2176/84 that the Council regulation on the definitive collection of the provisional duties should enter into force before the expiry of the period of validity of those duties. The applicant is confusing the entry into force of a regulation with the period in respect of which it applies.

The Council also observes that, according to the rules laid down by Regulation No 1182/71, Regulation No 1015/85 must be regarded as having expired on 23 June 1985 at midnight.

8. *Procedural irregularities*

Silver Seiko alleges that not all the applicants were granted equal access to information or an equal opportunity to defend themselves. Silver Seiko was discriminated against, by comparison with the other applicants, with respect to the timing and the amount of information disclosed, and was not given an equal opportunity to respond to the disclosure of the essential considerations upon which the Commission intended to recommend the imposition of definitive anti-dumping duties. Other companies had been given considerable information before the applicant. Contrary to the Council's contention, the applicant was given only

part of the information which it had requested regarding the volume of imports from non-member countries other than Japan.

The Council points out that formal disclosure of the level of the anti-dumping duty was made to all the applicants on the same date, and the same time-limit was set for all replies. The fact that other exporters were given information before the applicant is an inevitable consequence of the practical impossibility of arranging simultaneous meetings with all interested parties, even though the Community authorities make every effort to ensure that equal opportunities are given to all exporters to respond to information.

In so far as the applicant complains of the lack of information concerning imports from certain non-member countries, the Council points out that Silver Seiko could probably work out the answer itself. Exact figures of sales by each of those non-member countries were confidential because only one or two companies in each country were concerned.

Finally, Silver Seiko contends that its right to defend itself was violated inasmuch as its lawyer did not have access to the Commission's files.

In reply, the Council states that there is no request for information on the Commission's files to which no reply was given. However, a request for information should always be made in writing and a mutually convenient date arranged.

B — *Arguments put forward in the observations common to the applicants in Case 250/85, Joined Cases 260/85 and 106/86, Joined Cases 273/85 and 107/86, Joined Cases 277 and 300/85, and Case 301/85, and in response to those observations*

1. *Observations common to the applicants*

The applicants in the aforesaid cases, including Silver Seiko, have advanced in their replies a number of arguments common to all of them which highlight what they consider to be one of the most fundamental defects in the findings of the existence of dumping made by the Commission in this case, namely the fact that the export price and the normal value were not put on a comparable basis. According to the applicants, the high dumping margins attributed to them by the Community institutions are to a large extent the result of the unfair comparison between the export price and the normal value made by the Commission and are inconsistent with both Regulation No 2176/84 and the GATT Anti-Dumping Code on which that regulation is based.

The joint observations are divided into two parts; the first part describes the procedure followed by the Commission, and merely taken over by the Council, to calculate the dumping margin, whilst the second part seeks to show that the comparison made by the Commission is inconsistent with Regulation No 2176/84 and the GATT Anti-Dumping Code.

In their general description of the manner in which a finding of the existence of dumping is made, the applicants emphasize, in particular, the difference between the approach taken by the Community institutions, according to which the calculation of the normal value and of the export

price are two separate exercises to which different methodologies should apply, and their own point of view, namely that the purpose of those two calculations is to arrive at two figures comparison of which must be fair according to Regulation No 2176/84.

Next, the applicants observe that the Commission followed a radically different approach according to whether it was calculating the export price or the normal value. In the first case, it took care to ensure that the export price did not include any expenses incurred in the Community and, in the case of imports made through related sales companies, it deducted all the costs incurred by those companies plus a profit margin. In the latter case, a substantial part of the expenses and an element for the profit related to distribution in Japan were included in the normal value.

In other words, the Commission did not exclude from the normal value any such distribution costs incurred in Japan which were of a kind corresponding to distribution costs incurred in Europe that were not included in the export price with which the normal value was generally compared.

That methodology necessarily yields a high apparent dumping margin even though the exporter sells his products, at the same level of trade, at a higher price in the Community than in Japan and makes the same profit on his export sales as on his domestic sales.

The applicants submit that in adopting that methodology the Community institutions infringed the fundamental requirement that the export price and normal value should be put on a comparable basis, contrary to the provisions of Article 2 of Regulation No 2176/84, which are based on those of Article VI of GATT and of the GATT 1979 Anti-Dumping Code to which the second recital in the preamble to that regulation expressly refers. That requirement is fundamental because it is obvious that a finding that the export price is less than the normal value is justified only if it is based on a fair comparison between the two.

Contrary to what is contended by the Community institutions, the unfair comparison between export prices and domestic market prices made in this case is neither required nor permitted by Article 2 (10) of Regulation No 2176/84.

That provision lays down that 'due allowance shall be made in each case, on its merits, for differences affecting price comparability' and indicates the 'guidelines' which are to be applied for the purpose of determining the necessary allowances.

It would appear from the wording of the provisions of Regulation No 2176/84, of GATT and of the GATT 1979 Anti-Dumping Code that the aforesaid provision is intended to ensure a fair comparison between the export price and the normal value.

To begin with, the Community institutions misinterpreted the expression 'conditions and terms of sale' in Article 2 (10) (c). The reference in that provision to 'commissions or salaries paid to salesmen' shows that the expression 'conditions and terms of sale' cannot be as limited in scope as the Council maintains and cannot refer only to the obligations which may be laid down in the

contract of sale or in the general conditions of sale but must also cover the factual conditions of, and surrounding, the sale in question.

Hence the restrictions contained in the aforesaid provision were, according to the applicants, misinterpreted by the Community institutions.

The limitation of allowances to differences which bear a direct relationship to the sales under consideration and the exclusion of any allowances for differences in overheads and general expenses are designed to relieve the Commission, in general terms, of the burden of allocating between domestic trade and exports the general costs of a single organization that is concerned with both domestic and export trade. However, neither of those restrictions applies to a case such as this, where the dispute centres on the failure to allocate to domestic trade the 'indirect costs' of organizations, specifically the Japanese sales companies, that were concerned exclusively with domestic trade.

With regard to differences which bear a direct relationship to the sales under consideration, it should be emphasized that selling the products in Japan entails certain costs that are specifically attributable to the distribution of those products in that country.

Similar considerations apply in the case of overheads and general expenses. A differential allocation of common overheads is irrelevant in the present case.

Further, the expression 'differences in the level of trade' in Article 2 (10) (c) of Regulation No 2176/84 has been misinterpreted, inasmuch as all local marketing and distribution costs were excluded from the export price, whilst significant costs of that kind were included in the normal value. Accordingly, the export price and the normal value were not compared at the same level of trade.

The 'guidelines' should not be applied where their application would lead to an unfair comparison and the list set out therein is illustrative, not exhaustive. It is clear that the first two sentences of Article 2 (10), which require due allowance to be made in each case, on its merits, for differences affecting price comparability, are of a general nature, whereas the guidelines referred to in the third sentence can in no way be regarded as exhaustive. Admittedly, those guidelines apply prima facie, but if their application, on the facts of a particular case, would conflict with the basic principle of fair comparison, there is no doubt that it would be impossible to reject a claim solely on the ground that the case does not fall within one of those guidelines.

The Commission was also wrong in including in the constructed normal value an amount for selling expenses in connection with distribution by related sales companies in Japan.

If the Community institutions had not included in the cost of production the expenses incurred by the exporters' Japanese sales companies, the normal value and the export price would have been on a comparable basis and no question of allowances would have arisen.

The applicants' analysis has the advantage that the likelihood of an exporter being found guilty of dumping will not vary according to whether (i) the normal value is based on actual domestic prices or is constructed, or (ii) export prices are based on actual export prices or are constructed. The principle is always the same: so far as practicable, material elements that are not included or reflected in the export price should not be included or reflected in the normal value.

Moreover, the Community institutions erroneously inflated the constructed value with abnormally high profit margins. The profit margins which the Commission established for certain producers, and the loss established in respect of Tokyo Juki, are simply the result of the Commission's failure properly to allocate costs incurred in connection with the distribution of electronic typewriters.

In determining the profit margin for undertakings selling their products on the domestic market, the Commission took no account of the fact that the advertising costs incurred by those undertakings in connection with their sales of electronic typewriters in Japan were much higher than the advertising costs incurred in relation to their overall turnover.

The loss established for Tokyo Juki stems from the fact that the Commission has disregarded verified accounting data for that company, which showed that Tokyo Juki's domestic sales were profitable. However, the Commission allocated to sales of electronic typewriters an unreasonable amount of Tokyo Juki's distribution expenses for unrelated products or product lines.

The profits used for the determination of the constructed value are thus based on gross errors in the allocation of the relevant costs.

In conclusion, the high dumping margins that have been established are to a large extent the result of an unfair and legally improper comparison rather than any objectively unfair trade practice which exporters may have engaged in.

2. *The Council's response*

Before replying to the joint observations of the applicants, the Council considers it appropriate to make two preliminary points.

In the first place the Council recalls that for each of the three main elements used for determining whether dumping is being practised (normal value, export price and a comparison between the two), there are precise, distinct and separate rules. It challenges the applicants' assertion that the GATT Anti-Dumping Code requires allowances to be made for *all* differences affecting price comparability. Apart from the fact that the code does not use the word 'all' as the applicants allege and that the provisions of GATT have never been regarded as directly applicable, as the Court has confirmed in its case-law, it is clear from the text of the code itself that the code represents a compromise, the result of which is a text which is deliberately imprecise and which leaves a considerable margin of discretion to the legislature of each contracting party to decide exactly what allowances should be made.

The second preliminary point concerns the hypothetical example given by the applicants to show that the methodology adopted by the Commission necessarily leads to the establishment of a dumping margin. According to the Council, that example has certain fundamental flaws which render it unusable. It is based on the internal transfer prices between the manufacturing company and its subsidiaries in Japan or the Community, which are inherently unreliable and always subject to manipulation. It omits completely both the expenses and profits of the corporate headquarters company. It considers the domestic sales company as a separate entity, whereas it was found to be an integral part of the corporate structure. It fails to deduct Common Customs Tariff duties. It is incorrectly based on the assumption that the sales price to independent purchasers in Japan is always below the price in the Community. Finally, it does not refer to the constructed normal value.

Next, the Council observes that the applicants' first argument seeks to show that the requirement of a comparable price or of a fair comparison between the normal value and the export price is fundamental, and that the words in Article 2 (10) concerning a fair comparison should override the other conflicting words in that provision. That is contrary to two basic principles of interpretation, namely:

(i) two provisions in the same legislation should normally be reconciled if possible;

(ii) in the event of a conflict, *lex specialis* prevails unless the two conflicting provisions can be reconciled in some other way.

The Council observes that the phrase 'conditions and terms of sale' should be interpreted in the light of the rest of Article 2 (10) (c), which shows that that phrase applies only to differences in terms and conditions which are capable of bearing a direct relationship to specific sales. The only costs which may bear a direct relationship to a sale are those which may be mentioned specifically in a contract of sale and which are likely to influence the mind of the buyer. In a normal contract of sale, it would be unusual to find any clause concerning 'overheads and general expenses', but not for there to be a clause concerning, for instance, credit and delivery terms.

The price charged in the exporting country and the export price may have different payment, credit, delivery and guarantee terms attached to them. Those prices should be brought on to a comparable footing by means of the operation described in Article 2 (10). That operation is designed not to compare costs, but to compare prices, and the cost element is used only when it is necessary to iron out different conditions attached to prevailing prices. However, even if there were no specific reference to overheads and general expenses, it is clear that such expenses would not 'bear a direct relationship' to specific sales. That interpretation is confirmed by the last clause in Article 2 (10) (c) which is worded as follows: 'the amount of these allowances shall normally be determined by the cost of such differences to the seller, though consideration may also be given to their effect on the value of the product'; that

shows that Article 2 (10) (c) is concerned only with costs to the seller which are likely to affect the price of the product on the open market, or with advantages to the buyer which may vary for different purchases of the same type of goods.

The applicants rely more specifically on the expression 'commissions or salaries paid to salesmen'. According to the Council, commissions are clearly expenses directly related to sales. The legislature has added salaries paid to salesmen simply in order to avoid different treatment depending solely on the legal form of the relationship between the manufacturer and the sales staff. Therefore that derogation, made for a very specific and legitimate reason, does not justify the general conclusions which the applicants seek to derive from it.

According to the Council, the applicants' second argument is based on two clauses in Article 2 (10) (c) which they do not contest but which, in their view, are intended only to make it unnecessary to allocate, as between domestic trade and exports, overheads and general expenses of a company's headquarters. The clauses in question read as follows:

'Allowances shall be limited to those differences which bear a direct relationship to the sales under consideration and include, for example, differences in credit terms, guarantees, warranties, technical assistance, servicing, commissions or salaries paid to salesmen, packing, transport, insurance, handling, loading and ancillary costs and, in so far as no account has been taken of them otherwise, differences in the level of trade;

allowances generally will not be made for differences in overheads and general expenses, including research and development or advertising costs.'

According to the Council, those clauses do not have the meaning attributed to them by the applicants. The Commission has already explained in its intervention the reasons why it is often inappropriate or impossible to attempt to allocate overheads as between domestic sales and export sales.

With regard to the statement that the general expenses of a domestic sales company can never be included, even partly, in the general expenses allowed for in the normal value, the Council makes the following comments on the points raised by the applicants in their joint observations:

(i) there is nothing in the two clauses in question to suggest that the overheads and general expenses of a domestic sales company should be treated differently from those of a domestic sales department of a company which also has an export department;

(ii) the purely formal legal distinctions between parent company and subsidiaries, on which the applicants rely, are inappropriate in anti-dumping law, which should take account of the economic reality and not the legal form;

(iii) the wording of the two clauses quoted by the applicants militates against their arguments. The applicants' opinion

that general expenses should always be the subject of an allowance is directly contrary to the phrase stating that allowances generally will not be made for general expenses;

(iv) if the applicants' theory were correct, sales companies could be set up for the purpose of enabling exporters to claim that all or most of the overheads and general expenses incurred on their domestic markets should be deducted from domestic sales prices, which would be contrary to Article 2 (10) (c), Article 2 (3) (a) and Article 2 (3) (b) (ii).

On the question of the level of trade, the applicants have contended that 'significant local marketing and distribution costs' were included in the normal value and that 'the resulting level of trade was therefore not before any local marketing and distribution' as it was in the case of the export price. The Council observes that the applicants give no reason for the suggestion that the phrase in Article 2 (9) which lays down the principle of comparison at the same level of trade should override Article 2 (10), which provides that no allowances are normally made for overheads and general expenses. Moreover, the applicants' argument rests on a misunderstanding of the expression 'level of trade'. Where two companies sell to both wholesalers and end-users, they should be regarded, unless each category represents very different proportions of the total sales of the two companies, as selling at the same level of trade.

The applicants' argument that the Community institutions should have taken into consideration overheads and general expenses not directly related to sales solely on the ground that the Japanese sales were made by separate sales companies cannot be accepted. It is quite clear that, if the same sales had been made by sales departments, the applicants' argument would be contrary to Article 2 (10) (c) and the important findings that the sales companies formed integral parts of the same economic units or enterprises as their parent companies, and that their functions were similar to those of sales departments, have not been challenged by the applicants.

Next, the Council challenges the applicants' contention that 'in order to reject a claim, either the institutions must be satisfied that allowance of the claim is not necessary to enable a fair comparison to be made or they must point to something in the regulation which specifically permits them to reject the claim even though it is or may be so necessary'.

The Council observes that the general principle of a fair comparison may not be relied upon in order to override the specific terms of Article 2 (10) (c), especially because those terms are the result not of imprecise drafting but of a carefully considered policy for dealing with an inherently difficult problem. Moreover, the applicants do not suggest that these cases are in any way special or unusual. They take the view that their arguments should apply in every case in which the domestic sales were made by a separate company.

Contrary to the applicants' contention, the difference between the ways in which the export price and the normal value are calculated is the natural and intended result of the express wording of Regulation No 2176/84 and does not inherently have any necessarily protectionist effect.

The applicants' argument to the effect that Article 2 (10) (c) is not applicable to a constructed normal value is incorrect for several reasons. In the first place, a comparison between normal value, however arrived at, and export price, always has to be made in any anti-dumping case and in making such a comparison it is always necessary to decide whether allowances need to be made. The applicants' argument is wrong also because it may be necessary to calculate the reasonable amount for selling, administrative and other general expenses on the basis of the real costs of a sales department or sales company selling the same or a similar product in the exporting country at a price containing allowable and non-allowable costs elements. If Article 2 (10) were not applicable, no allowances at all would be possible, and that clearly runs counter to the applicants' argument.

Finally, the constructed normal value would be unaffected by any change in the relative proportions of costs and profit in Japan since the total of the two elements is included in the constructed normal value. The applicants complain about the use of the lower figure for costs only in the calculation of the profit to be used in constructing the normal value. Even if they were right, their argument would lead to an increase in the costs which would be precisely equivalent to the reduction in the profit based on those costs.

3. *The Commission's observations*

The Commission observes that, under the rules in force, the normal value includes selling expenses in addition to an element for general expenses, that is to say, expenses which do not bear a direct relationship to sales of the product in question. That rule can be justified by arguments of a general nature, including the fact that any effort to relate general expenses to particular sales is likely to be arbitrary.

In the special context of dumping investigations, a further point to be made is that all enquiries by the Commission outside the Community depend on the voluntary cooperation of the companies concerned and that if it were necessary to allocate overheads and general expenses within the headquarters of an exporting company in a non-member country that would probably raise great difficulties even if adequate information were made available by the exporter to the anti-dumping authority.

An allocation of overheads in proportion to current sales would require the manufacturer's cooperation and might, moreover, be inappropriate as there is not necessarily a relationship between the proportion of research and development spending or advertising costs and current sales on different markets. No solution has been found so far in the discussions which took

place within GATT, both because it was impossible to reach agreement on certain principles and because any rule must, in many situations, inevitably rest on subjective considerations.

Following those preliminary considerations, the Commission considers the treatment of the general expenses of a manufacturing company when the normal value is based on the domestic price. It points out in the first place that, in the case of a manufacturing company which sells on its domestic market only to independent buyers, the normal value is based on the domestic price, with the result that the normal value generally includes overheads and general expenses since Article 2 (10) (c) provides that no allowance will be made for overheads, research and development costs or advertising costs attributable to domestic sales even if they are higher than those attributable to export sales to the Community. The principle that general expenses are not allocated was adopted on practical grounds in view of the huge difficulties involved in allocating overheads satisfactorily.

The problem which arises in this case is how to deal with the companies which sell on their domestic market only through a related sales company (not necessarily a wholly owned subsidiary), in view of the fact that, in the Commission's view, transfer prices between a company and its subsidiary cannot be regarded as being 'in the ordinary course of trade'.

There is nothing in Regulation No 2176/84 which suggests that the prices charged by a sales company cannot be used at all as a basis for determining the normal value. If it is decided that a proper comparison is possible, the domestic price in the exporting country should be used in preference to either of the alternatives provided for in Article 2 (3) (b). Regulation No 2176/84 gives priority to that criterion, provided that it permits a proper comparison to be made, regardless of whether that comparison is perfect or easier to make than a comparison based on other criteria.

Once it has been established that domestic prices may be used as a basis for calculating the normal value, the question arises of what deductions should be made from the prices charged by the Japanese sales companies.

According to the Commission, the general expenses of a sales company in the exporting country should be treated as far as possible in the same way as the general expenses of a manufacturing company which has a sales department. The formal difference in the corporate structure should not affect the result, if the sales company is effectively controlled by the manufacturing company and if it is fulfilling essentially the same function as a sales department. The Commission established that the Japanese sales companies formed integral parts of the same economic units as the manufacturing companies and that their functions were similar to those of sales departments. On the basis of those findings the Commission concluded that the general expenses of such companies should also be treated in the same manner as those of a sales department. That does not rule out the possibility that in

certain cases a sales company might have functions different from those of a sales department. In those circumstances, for instance, many of the expenses would probably be directly related to sales and consequently they would be allowable. In any event, every situation should be dealt with on its own facts.

The Commission considers that similar considerations apply with regard to the profits of sales companies. It would be intolerable if a manufacturing company which exports its products could effectively reduce the 'normal value' which the Community institutions could arrive at under Regulation No 2176/84 merely by having its sales to independent buyers handled by a sales company rather than a sales department. Admittedly, if a sales company also sold goods produced by other manufacturing companies or if it handled distribution down to and including the operation of retail outlets, it would be necessary to apportion its profits. In order to do so, however, reliable information would have to be made available by other companies in the same industry showing the profit margins made by distributors from sales to independent buyers on the domestic market.

In conclusion, the Commission considers that when the normal value is based on the prices of domestic sales companies, it must include both an element of general expenses and an element of profit, just as it would where it is based on the domestic prices of a manufacturing company's sales department. There is nothing in that approach which necessarily leads to a normal value which is higher for producers distributing their products through related companies than it is for those marketing their products through a sales department.

The Commission then deals with the problem of ascertaining what profit margin is 'reasonable' when the normal value is constructed in accordance with Article 2 (3) (b) (ii).

The Commission considers that when interpreting and applying that provision no rule should be adopted which would be likely to lead to the calculation of normal values different from those which would be arrived at by using domestic prices. The word 'reasonable' does not have a fixed meaning, nor does it refer to a percentage which should always be the same; instead, it is necessary to consider the circumstances of the market. More particularly, it is necessary to take into account any findings which the Community institutions have made in connection with domestic prices.

The desirability of ensuring that the two methods of calculating the normal value lead to parallel results makes it permissible, and even necessary, to use any findings concerning general expenses and profit on the domestic market for the purpose of interpreting and applying the term 'reasonable' when constructing the normal value. It would be not only undesirable but also wrong in principle if the establishment of a dumping margin were to depend on which method of calculating the normal value was chosen.

The Commission goes on to consider the applicants' argument to the effect that the Community institutions have contravened

the principle of legal certainty by applying Regulation No 2176/84 in a manner which is unforeseeable and which prevents the undertakings concerned from ascertaining what export price needs to be fixed in order to avoid dumping.

The Commission points out, in the first place, that an exporter cannot in any case expect to know 'with confidence' whether dumping will cause injury to Community industry or whether the Community institutions will conclude that it is in the interest of the Community to impose an anti-dumping duty; no objection can be made on grounds of legal certainty. Nor can the exporter rely on that principle with regard to the methods of calculating the normal value or the export price. The basic anti-dumping regulation confers on the Community institutions a considerable discretion with regard to the application of the rules which it lays down in particular situations which, as is the nature of things, cannot all be foreseen precisely.

Next, the Commission considers the argument that it is contrary to the principle of legal certainty for the constructed normal value to include an element of profit or of the general expenses which is not based on the individual exporter's own activities because that element cannot be predicted or anticipated by the exporter. According to the Commission, that argument amounts to a denial of the right of the Community institutions to use accurate confidential information available to them and, in practice, a denial of their power to determine what is reasonable in the light of the circumstances of the industry concerned and to use anything other than a standard low rate of profit unless, by coincidence, suitable information is published.

The Commission goes on to consider the problem of the reasonable profit margin to be attributed to a related sales company in the Community under Article 2 (8) (b) of Regulation No 2176/84.

The first question which arises is whether any profit margin should be attributed to a sales company in the Community. The answer to that question should be in the affirmative. The profit margin referred to in the aforesaid provision cannot be that of the exporter because it would not be appropriate to deduct it in order to calculate the export price; nor can it be the independent buyer's profit margin, which would not affect the price to that buyer. The next question is how the Community institutions should decide what constitutes a reasonable profit margin. According to the Commission, the term 'reasonable' does not refer to a profit margin which is fixed and unchanging irrespective of the circumstances, but rather to one which is appropriate to the circumstances of the industry and the market.

The purpose of deducting a profit margin is to reduce the price charged by a related sales company to a level at which it is equivalent to the price which would be charged to independent importers. That is the only correct solution.

To that end, therefore, it is necessary to examine the profit margins of independent importers, if there are any. There is no authority for the view that the maximum profit margin to be attributed to the related sales company is the profit margin based on the transfer price to that company. If independent importers make a large profit

margin in the Community, there would be no justification for attributing a small margin to a related sales company merely because its manufacturing parent company had chosen to absorb a large proportion of the profit made by the group in the exporting country.

With regard to the arguments put forward by the applicants in connection with the level of trade, the Commission observes that these cases actually raise three issues:

(i) It is first necessary to ascertain whether the prices of the Japanese sales companies were at the same level of trade as those of the related sales companies in the Community.

(ii) If not, what allowances were needed in order to take account of the differences in the level of trade?

(iii) What other allowances were needed for reasons other than differences in the level of trade?

Unfortunately, the activities of companies do not fall into clearly defined levels of trade. Some companies sell both to wholesalers and to end-users. In that case, unless each category of customer accounts for very different proportions of the total sales of two companies, they should be regarded as being at the same level of trade. The fact that the applicants have not seriously argued that specific allowances should be made may mean that the slight differences between the different categories of customers did not justify any significant allowance.

IV — Answers given by the parties to questions put to them by the Court

In its answer of 7 April 1987, the Council indicated the dumping margin and the precise level of injury established in relation of the applicant.

In its answer lodged on 4 April 1987, Silver Seiko amongst other things denied being a party to any agreement or concerted practice between Japanese manufacturers or following the directions of the Japanese Ministry of International Trade and Industry with a view to penetrating the Community market.

G. Bosco
Judge-Rapporteur