

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

*Mr President,
Members of the Court,*

A — Determination of the normal value

1. The case to which this Opinion relates is one of eight actions for annulment brought by Japanese plain paper photocopier (hereinafter referred to as 'PPC') manufacturers against Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan ¹ (hereinafter referred to as 'the definitive regulation' or 'the contested regulation').

2. In other cases, namely C-150/87 *Nashua v Council* [1990] ECR I-719 and C-156/87 *Gestetner v Council and Commission* [1990] ECR I-781, the Court has already dismissed two actions for the annulment of the same regulation brought by non-Japanese companies which, although not manufacturing PPCs themselves, supply PPCs manufactured by others under their own brand-names. The Court is thus familiar with the factual background and the relevant regulations, so that I shall need to refer to them only to the extent necessary for my reasoning to be followed. As regards the submissions and arguments adduced by the applicant in the present case, Canon Inc. (hereinafter referred to as 'Canon'), I shall consider them in the order in which they are presented in the Report for the Hearing.

3. Canon criticizes the determination of the normal value from two different viewpoints, the common feature of which is a comparison of the methods followed by the Council, the defendant, concerning, first, calculation of the normal value on the basis of Chapter B, and in particular Article 2(3), (4) and (7) 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 ² (hereinafter referred to as 'the basic regulation'), and, secondly, calculation of the export price on the basis of Article 2(8) of the same regulation. Since Canon makes a further submission concerning the allowances which the Council made or should have made pursuant to Article 2(9) and (10) of the same regulation 'for the purpose of a fair comparison' between those two items, I consider that it is not inappropriate to remind the Court, at the outset, that it has previously held ³ that those various provisions lay down

'three sets of distinct rules, each of which must be complied with separately' ⁴

² — OJ 1984 L 201, p. 1.

³ — See the judgments of 7 May 1987 in the ball-bearing cases (Cases 240, 255, 256, 258 and 260/84, [1987] ECR 1809, 1861, 1899, 1923 and 1975).

⁴ — See judgment in Joined Cases 260/85 and 106/86 *TEC v Council* [1988] ECR 5855, paragraph 31.

* Original language: French.

¹ — OJ 1987 L 54, p. 12.

and, in particular, that

‘the validity of the comparison provided for in Article 2(9) cannot therefore be conditional on calculation of the normal value and the export price by identical methods’. ⁵

4. Finally, it is apparent from the judgments of 7 May 1987 in the ‘ball-bearings’ cases (see in particular Case 255/84 *Nachi Fujikoshi* [1987] ECR 1861, paragraphs 17 and 32), on the one hand, that Article 2(9) is intended to define the adjustments which may be made to the normal value and the export price after they have been calculated according to the methods specified for that purpose and, on the other, that the allowances granted under Article 2(10)(c) in particular, which are different from such adjustments as may be made under Article 2(3)(b)(ii) or Article 2(8)(b) as regards both their purpose and the conditions in which they are applied, are made by reference to objective factors relating to particular features of the markets in question and have a varying impact on conditions and terms of sale, thus affecting price comparability.

5. 1. Canon claims that by determining the normal value at a level of trade not comparable to that adopted for construction of the export price, the institutions infringed Article 2(3) of the basic regulation.

⁵ — See judgment in Joined Cases 277/85 and 300/85 *Canon v Council* [1988] ECR 5731, paragraph 37.

6. According to that provision, the normal value is either

‘the *comparable* price actually paid or payable *in the ordinary course of trade* for the like product intended for consumption in the exporting country or country of origin’ (paragraph (a),

or the comparable price for the like product exported to any third country or a constructed value

‘when there are no sales of the like product *in the ordinary course of trade* on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison’ (paragraph (b).

7. Since the applicant maintains in this first submission that the Council constructed the export price by reference to dealings between Canon and its European subsidiaries, whereas it did not determine the normal value on the basis of transactions between Canon and its Japanese sales subsidiary, Canon Sales Company (hereinafter referred to as ‘CSC’), it must first be emphasized that in fact the Council did not take the relations between Canon and its European subsidiaries as the basis for determining the export price. As is clearly apparent from recital 15 in the preamble to the contested regulation, although the Council took account of them, it did so only to establish that the price charged by the exporter in Japan to its subsidiary in the Community was not a very reliable transfer price and accordingly it was decided to construct the export price

'on the basis of the price at which the imported product is first resold to an independent buyer',

'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)' (paragraph 19).

at the same time applying to it the adjustments provided for in Article 2(8)(b) of the basic regulation. It therefore constructed the export price on the basis of the selling prices of Canon's European subsidiaries on the Community market, just as it determined the normal value on the basis of the sales of Canon's Japanese subsidiary on the Japanese market.

8. Finally, since in this first submission the applicant alleges that by adopting that course the Council used, in determining the normal value, sales which were not 'comparable' or did not permit 'a proper comparison', as required by Article 2(3)(a) and (b) of the basic regulation, and that in those circumstances it should have constructed the normal value on the basis of paragraph (b) instead of using, pursuant to paragraph (a), the prices invoiced by CSC, it must be pointed out that the Court has already rejected a similar argument in its judgment of 5 October 1988, *Canon v Council*, cited earlier. The Court stated in that case, in particular, that, in order to establish the normal value, Article 2(3)(a) must be used *primarily*, Article 2(3)(b) being merely *subsidiary* (paragraph 11). It went on to add 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'

and that

9. As we have just seen, in the present case the normal value and the export price were both in fact established by reference to the first sale to an independent buyer. It follows that the applicant's argument that the normal value thus determined includes certain types of expenditure incurred by CSC which were excluded when the export price was constructed in order to take account of the involvement of Canon's European subsidiaries in the sales on the Community market logically belongs to the submission concerning the comparison between those two items, as provided for in Article 2(9) and (10), to which I shall revert later.

10. In the context of Article 2(3), the inclusion of those costs in the normal value is open to criticism only if the Council was wrong to determine the normal value on the basis of the prices charged by CSC to independent purchasers on the Japanese market.

11. However, in its judgment in *Canon v Council*, cited earlier, the Court expressly stated that the prices paid by the first independent purchaser may be properly regarded as the prices actually paid for the product in the exporting country or country of origin in the ordinary course of trade and must therefore be used pursuant to Article 2(3)(a) for determination of the normal value (see paragraph 12).

12. Moreover, in its judgment in *Silver Seiko v Council* of the same date (Joined Cases 273/85 and 107/86, [1988] ECR 5927), it stated that

‘the division of production and sale activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity which carries out in that way activities that are in other cases carried out by what is in legal terms as well a single entity’ (paragraph 13).

On the basis of that finding, it concluded

‘that by taking into consideration the sales subsidiaries’ prices it is possible to ensure that costs which manifestly form part of the selling price of a product where the sale is made by an internal sales department of the manufacturing organization are not left out of account where the same selling activity is carried out by a company which, despite being financially controlled by the manufacturer, is a legally distinct entity’ (paragraph 14).

13. In another judgment of the same date, Joined Cases 260/85 and 106/86 *TEC v Council* [1988] ECR 5855, the Court formulated the same idea with respect to the inclusion of selling costs in the normal constructed value in the following terms:

‘there would be discrimination if expenses necessarily included in the selling price of a product when it was sold by a sales department forming part of the manufacturer’s organization were not included when that product was sold by a company which, although financially controlled by

the manufacturer, was a legally distinct entity’ (paragraph 29).

14. Now, CSC is, in the words of the applicant itself,

‘a distributor which fulfils a function similar to those of Canon’s European distributors’ (paragraph 25 of the application),

and does so under the financial control of Canon, which is its majority shareholder. It thus carries out tasks which are normally the responsibility of an internal sales department of a manufacturing organization. The Court made that same finding in paragraph 39 of its judgment in *Canon*, cited earlier, a case relating to a regulation imposing an anti-dumping duty on imports of electronic typewriters, that is to say different products from those involved in this case. The latter finding provides a sufficient reason for dismissing the argument which the applicant endeavours to base on the fact that CSC also serves as a sales department for products other than PPCs and for suppliers other than Canon. I should also like to mention that in its judgment in *TEC v Council*, cited earlier (paragraph 33), and in its judgment in *Sharp Corporation v Council* of the same date (Case 301/85, [1988] ECR 5813, paragraph 13), the Court expressly stated that the institutions may, in constructing the normal value, take account of expenses incurred by a subsidiary company selling products other than those to which the anti-dumping investigation relates.

15. In those circumstances, it must be concluded that the Council was right to

adopt the prices invoiced by CSC for sales of PPCs on the Japanese market as the normal value within the meaning of Article 2(3)(a) of the basic regulation and therefore not to exclude from it the selling, general and administrative expenses (hereinafter referred to as 'SGA expenses') relating to them.

16. I would add that the conclusion that those prices could thus be properly regarded as charged 'in the ordinary course of trade' relieves me of the duty of expressing a view on the considerations put forward by the parties on the applicability of Article 2(7) of the basic regulation and the consequences which that provision, if applied, might have on the choice to be made between Article 2(3)(a) and Article 2(3)(b).

17. 2. Most of the foregoing considerations apply not only to determination of the normal value on the basis of Article 2(3)(a) but also to construction of that value under Article 2(3)(b)(ii). The same applies to the independence of the methods for calculating the normal value and the export price respectively and the legality of including SGA expenses incurred by CSC in constructing the normal value (see, in that respect, paragraph 29 of the judgment in *TEC*, cited earlier). Therefore, the applicant's argument that the Council constructed, for Canon's OEM sales and for three models sold under its own brand-name, a normal value not comparable with the export price because the first, by contrast with the second, included SGA expenses of the subsidiary, Canon's sales department, cannot be upheld.

18. As regards more particularly the *advertising costs* expressly mentioned by the applicant which, when the export price was constructed, were deducted from the price at which Canon's European subsidiaries sold PPCs to the first independent purchaser in the Community, I would add that it is clearly apparent from paragraph 19 of the *Canon* judgment, cited earlier, that if that deduction was properly made no new adjustment on the basis of Article 2(9) and (10) of the basic regulation is necessary. As the Court has in fact stated, it is apparent from Article 2(10)(c) that no allowances are made

'for differences in overheads and general expenses, including research and development or advertising costs'.

I am aware of the fact that that provision relates to differences in advertising costs according to whether they are incurred on the Japanese market or the Community market and not to the question whether the advertising costs should have been deducted from the normal value and/or from the export price. However, it is clear from all the foregoing that the Council was entitled to include the costs incurred by CSC in the normal value. As to whether the advertising expenses incurred by Canon's European subsidiaries were properly excluded from the export price, that question is not relevant to discussion of the legality of the construction of the normal value and comes within the scope of the submission concerning determination of the export price.

19. As regards Canon's argument that the normal value of the three models,

designated A, B and C, sold under its own brand-name, was artificially inflated by the use of profit margins which were not appropriate to the products concerned, I fully endorse the Council's observations. In particular, I consider that the Council did not exceed the limits of its discretion in that matter,

— either when it took the view that certain products, in particular model C, were sold at a loss over 'a sufficiently extended period' and in 'substantial quantities', so that it was entitled to consider such sales as not having been made in the ordinary course of trade, in accordance with Article 2(4) of the basic regulation, and therefore to construct a normal value for those products,

— or when it used as the 'reasonable profit margin', within the meaning of Article 2(3)(b)(ii), for the construction of that normal value the average profit calculated by reference to all sales of Canon models made in the ordinary course of trade.

20. It should be added that it would have been perfectly fair to use the average profit in the case of models not sold at a loss and not to apply it to the models sold at a loss, particularly since certain sales at a loss were included in the calculation of the average profit (see the fourth paragraph of recital 10 of the contested regulation).

21. Finally, the Council stated, without being contradicted, that if the approach advocated by the applicant were followed, the result would be a dumping margin which would differ only slightly from the one calculated for Canon, which is 26.6%. In view of the fact that the anti-dumping duty was fixed at a lower level than the dumping margin finally established, namely 20% of the net Community free-at-frontier price, which was judged sufficient to eliminate the harm caused to the Community industry, and that that rate of 20% is the rate applied to all exporters for whom a dumping margin equal to or higher than that percentage was established (see recital 114 of the definitive regulation), that minimal difference in Canon's dumping margin, which the Council calculated as 0.02%, would hardly have been capable of affecting the rate of anti-dumping duty, as fixed. Canon, in any event, has failed to prove to what extent it demonstrated the need for a change to that rate for its products.

22. The same finding is valid for model A, in respect of which the Council conceded that a normal value was wrongly constructed, on the basis of the incorrect view that it was not sold in sufficient quantities on the Japanese market to satisfy the 5% rule referred to in recital 8 of both the provisional and definitive regulations. And Canon, for its part, has not denied that that error had only a minimal impact on the dumping margin, of the order of 0.3%, and even took note of that fact without making any comment, so that it must be concluded that it has not been established that that error made any change to the rate of anti-dumping duty necessary. ⁶

⁶ — See, for similar cases in which reductions of the dumping margin did not justify amending the rate fixed with respect to the injury, the judgments of 5 October 1988, *Brother v Council*, paragraph 24 (Case 25/85, [1988] ECR 5683) and *TEC v Council*, cited above (paragraph 41).

23. As regards model B, it need merely be stated that Canon did not object to the Council's statement that, by reason of its minimal sales in the Community, it was not taken into consideration for calculation of the dumping margin.

24. The submission concerning incorrect determination of the normal value must therefore be dismissed in its entirety.

B — Determination of the export price

25. I can be extremely brief regarding the submission as to the unlawful determination of the export price. In its judgment of 14 March 1990 in *Gestetner v Council and Commission* (Case C-156/87, [1990] ECR I-781), the Court has already expressed its views concerning a situation in which PPCs are sold in the Community through a manufacturer's subsidiary, which processes the orders of the clients concerned, invoices them and receives the payments relating thereto. The Court stated that the Council was right to apply Article 2(8)(b) of the basic regulation and therefore to construct the export price on the basis of the price invoiced by the subsidiary to the first independent customers, at the same time deducting a reasonable margin for general expenses and profits.

26. What was decided in the *Gestetner* case with respect to sales to OEM purchasers (that is to say suppliers of PPCs which do not engage in manufacturing themselves but sell under their own brand-name products purchased from others) applies, in the present case, not only to Canon's OEM

sales but also to its sales, through Canon Europa, to other independent purchasers in Ireland, Denmark and Greece. For all those sales, in fact, Canon Europa 'although not formally importing the product, assumes, nevertheless, the functions typical of an importing subsidiary' (see the third paragraph of recital 15 of the contested regulation) and thus bears costs which reduce the amount effectively received by the exporter and must therefore be deducted from the price paid by the first independent purchaser where that price is used as a basis for constructing the export price.

27. It is also apparent from the *Gestetner* judgment that the fact that the costs thus incurred by Canon Europa relate to an activity which takes place *before importation* is not such as to prevent the application of Article 2(8)(b). In fact, that provision, although expressly mentioning only the allowances necessary to take account of all the costs incurred *between import and resale*, does not thereby exclude the making of the necessary adjustments where, for reasons other than those set out there, the export price must be constructed (paragraph 33 of the judgment).

28. Finally, as in the *Gestetner* case, it has likewise not been shown in the present case that the deductions made to take account of the costs and profits associated with Canon Europa's role, namely 5% in the case of OEM sales and 15% for sales to other independent customers, were excessive. Accordingly, the submission concerning determination of the export price must be dismissed.

C — The comparison

29. Canon claims that the institutions adopted an unduly restrictive interpretation of Article 2(10)(c) of the basic regulation, by refusing to make adjustments to the normal value to take account of all the costs incurred by CSC, of differences in level of trade and of certain cost components directly associated with sales, such as trading discounts, transport costs and direct expenses incurred by sales staff in respect of sales activities.

30. As regards the *level of trade*, Canon's argument is largely the same as the one advanced in relation to determination of the normal value, to the effect that the latter, having been determined at the level of sales *by* sales companies, incorporated expenses not included in the export price, which corresponded to the level of trade of sales *to* sales companies. I therefore refer to the observations made in that context.

31. I would add here that, in its judgment in *Canon*, cited above, the Court stated that

'It is precisely by taking account of the first sale to an independent purchaser that the normal value at the "ex-factory" level can be correctly established where there are production and sale arrangements of the kind set up by Canon on the Japanese market' (paragraph 41).

32. Pursuant to Article 2(9) of the basic regulation, the export price and the normal

value should preferably be compared at the ex-factory level, so that, if that is the case, the institutions are not required to grant allowances in respect of the level of trade (that point is made in paragraph 30 of the judgment in *Silver Seiko*, cited earlier, of 5 October 1988). Moreover, pursuant to Article 2(10)(c), differences in level of trade would justify an allowance only 'in so far no account has been taken of them otherwise'.

33. As regards *CSC's expenses*, Canon distinguishes between the criticism made of the Council's general refusal to make the deductions necessary to render the normal value and the export price comparable and the criticism of the refusal to make several specific adjustments on grounds which it regarded as unjustified.⁷

34. In that context, it is appropriate to bear in mind in the first place that it is apparent from the judgments of the Court of 7 May 1987 in the 'ball-bearings' cases that it is incumbent on the party seeking an adjustment under Article 2(10) of the basic regulation to prove that its request is justified,

'that is to say that the difference on which it relies concerns one of the factors listed by Article 2(9), but the difference affects price comparability and lastly, if, as in this case, it is a question particularly of differences in conditions and terms of sale, that those differences bear a direct relationship to the sales under consideration'.⁸

⁷ — See paragraph 95 of the reply.

⁸ — See in particular paragraph 43 of the judgment in *Minebea v Council* (Case 260/84, [1987] ECR 1975).

It is not therefore sufficient for Canon to claim, in general terms, that the institutions adopted a restrictive interpretation of the concept of

packing, transport, insurance, handling and ancillary costs'.

'differences in conditions and terms of sale... which bear a direct relationship to the sales'

Canon did not contest that fact, so it must be concluded that the complaint concerning the alleged general refusal to make the necessary adjustments relates not to all the SGA expenses incurred by CSC but only to the general and administrative expenses.⁹

by limiting them to those

'referring to the obligations inherent in a sales contract, which may be laid down in the contract itself or in general conditions of sale issued by the seller' (see recital 26 of the provisional regulation, confirmed by recital 20 of the definitive regulation).

36. As we have already seen, for differences in administrative and general expenses, including research and development or advertising costs, Article 2(10)(c) of the basic regulation expressly provides that no allowance will 'generally' be made. Thus, for an allowance under that heading to have been required, Canon would have had to have been able to claim, in addition to a direct relationship with sales in question,

On the contrary, Canon ought to prove, case by case, not only the reality of the differences of which it complains and of their impact on price comparability, but also the fact that they bear a direct relationship to the sales under consideration.

'the existence of [a] special circumstance capable of justifying an exception to that general rule'.¹⁰

35. In the second place, it is apparent from recitals 17 and 18 of the definitive regulation that the institutions did in fact make adjustments under Article 2(9) and (10) of the basic regulation to take account of differences affecting price comparability, relating in particular to the conditions of sale,

37. Like the Council, I consider that neither of the factors referred to by Canon constitutes such a 'special circumstance'.

'where claims of a direct relationship of these differences to the sales under consideration could be satisfactorily demonstrated. This was the case in respect of differences in credit terms, warranties, commissions, salaries paid to salesmen,

38. We saw, with respect to Canon's first submission, that the costs incurred by CSC for PPC sales on the Japanese market could

⁹ — See paragraphs 82 to 98 of the application.

¹⁰ — See in particular paragraph 45 of the judgment of 7 May 1987 in *Minebea v Council* (Case 260/84, [1987] ECR 1975).

legitimately have continued to be (in the event of the application of Article 2(3)(a) of the basic regulation) or could be (in the event of the application of Article 2(3)(b)(ii) included in the normal value, since, for such sales, CSC fulfils the function of a sales department of Canon. That is in conformity with the objective underlying the rules applicable to determination of the normal value, which is to determine the selling price of a product as charged in the original market or in the export market or the price that would be charged if the product were sold in the ordinary course of trade.¹¹ It would be contrary to that objective to exclude certain expenses from that price on the ground that they are related exclusively to sales on that domestic market (and are therefore not included in the export price).

39. Nor can such a requirement be imposed on the basis of the finding that CSC discharges, for other products and/or for other companies, functions identical to those which it carries out in relation to sales of Canon PPCs. To the extent to which that is the case, it is sufficient for the costs incurred by CSC to be apportioned so that only the costs relating to sales of Canon PPCs are included in the normal value. That is what happened in this case, since it is apparent from recital 12 of the provisional regulation, which was confirmed by recital 12 of the definitive regulation, that, in order to take account of the fact that CSC discharged functions other than those of a sales department for Canon PPCs, the institutions made certain that the costs relating to those other functions did not increase the portion of the costs relating to PPC sales, by calculating that portion on the basis of CSC's total turnover, as they

are expressly authorized to do by Article 2(11) of the basic regulation.

40. As regards Canon's request for an adjustment for *trade-in payments*, I consider that the Council was entitled to refuse to accede to it. On the one hand, a trade-in discount, in general, is merely a measure of 'the value to the exporter concerned of the used machine' (see recital 14 of the provisional regulation and paragraph 82 of the defence), since in fact it is not a real reduction of the sale price but a payment for what is received in return. That payment is thus clearly different from ordinary discounts, such as, for example, discounts for quantity sales, which are expressly mentioned in Article 2(10)(b)(i) of the basic regulation, the grant of which, by reference to the large number of products sold, involves a real reduction in the price of the products. It follows that every trade-in discount must in principle be included in the normal value as determined in accordance with Article 2(3) of the basic regulation, since the value of the traded-in machine represents a part of the price 'actually' paid or payable by the purchaser of the new product. Moreover, the question of its deductibility under Article 2(10)(c) could not arise if that were not the case.

41. Furthermore, the fact that the trade-in discount is granted only on the sale of new machines does not compel the conclusion that the payment is *directly* linked with the sale of those products. As the Council states in paragraph 59 of its rejoinder, the trade-in discount is, on the contrary, directly related to the trade-in transaction, and only indirectly to the sale, which could also take place without any trade-in. It thus brings the manufacturer/seller an additional advantage separate from the sale of the new

¹¹ — Paragraph 26 of the judgment in Canon, cited earlier, makes the same point with regard to construction of normal value.

product, namely the advantage deriving from receipt of the used machine.

42. I consider that that conclusion is valid irrespective of the nature or form of such an advantage, which is separate from the sale. It therefore seems to me to be irrelevant that in the present case the advantage accruing to the manufacturer from the trade-in does not consist in the resale price of the used machines (because there is no second-hand market for PPCs in Japan) but in the benefit which the manufacturer obtains from their withdrawal from the market and removal from circulation. As the Council explained in the second paragraph of recital 13 of the contested regulation, as a result of that fact

‘the demand for new machines is maintained at the highest possible level with prices consequently also being held at higher levels than would have been the case had a second-hand market existed’.

Moreover,

‘this higher demand not only stimulates prices but also higher production levels which should normally result in increased economies of scale and commensurately higher profit levels’.

43. Furthermore, Canon does not deny that that is the case but points out that the advantage arising from the higher prices is entirely reflected in the PPC prices used for calculation of the normal value. However, the advantages in question do not give rise to higher prices for new PPCs in the

absence of a second-hand market but also result, by virtue of the premature withdrawal from the market of PPCs in service, in the maintenance of a high level of production, and concomitant substantial economies of scale and increased profit margins.

44. I conclude from all the foregoing that, in so far as the Council found that

‘the producer receives a value for the trade-in payment apart from the value to it of the sale itself...[which] represents effectively the value...of the removal of the traded-in machine from the market’ (see recital 14 of the contested regulation),

it was entitled to refuse the adjustment requested under that heading.

45. As regards the adjustment requested by Canon to take account of *transport costs* incurred in respect of its sales to CSC, it must be remembered that it is apparent from recital 17 of the contested regulation that adjustments were made to take account of differences in transport costs which affected price comparability

‘where claims of a direct relationship of these differences to the sales under consideration could be satisfactorily demonstrated’.

It follows from the fact that the institutions properly regarded CSC as forming part of the Canon economic entity, and were therefore entitled to determine the normal value by reference to the first sale to an independent purchaser, that the transport

costs incurred in respect of sales to CSC could not be regarded as bearing 'a direct relationship to the sales under consideration'. Those costs are in reality internal transport costs and are incurred at a stage prior to the 'sales under consideration'. Moreover, the applicant is wrong to assert that, as a result of the refusal of any adjustment for transport costs, the normal value was not brought to the ex-factory level (see paragraph 128 of the rejoinder). On the contrary, as we saw in the context of the adjustments requested for differences in level of trade, the institutions, by taking into consideration the first sale to an independent purchaser, established the normal value at the ex-factory level, which, in its turn, confirms the fact that the transport costs within the Canon group precede the ex-factory level thus determined and that an adjustment under that heading is not therefore justified (see paragraphs 38 to 41 of the judgment in *Canon v Council*, cited earlier).

that it would have to be justified by reference to the particular case under review. Similarly, reference to the fact that the institutions recognized in earlier cases that salesmen's travel expenses *inter alia* might be directly associated with sales is not sufficient to prove that the same is true in the present case. To accept that approach would be tantamount to requiring the institutions to demonstrate on each occasion the precise reasons for which they departed from a position adopted in the past in other cases and thus to reverse the burden of proof which, in this area, as we have already seen, falls upon the party asking for an adjustment to be made under Article 2(10) of the basic regulation. In those circumstances, I can only conclude that the applicant has not succeeded in proving either the existence of a special circumstance justifying a derogation from the rule that adjustments are not to be made in respect of general and administrative expenses or the existence of a direct relationship between the expenses in question and the sales under consideration.

46. As regards the *expenses incurred by salesmen*, namely their travel expenses, car parking fees, insurance for their cars and sales training, they form part of administrative and general expenses for which as a general rule, save in 'special circumstances', no adjustment is made. Apart from mentioning that an adjustment under that heading had been granted, on the basis of the same evidence, in the electronic typewriter case, which gave rise to the *Canon* judgment of 5 October 1988, cited earlier, Canon has not however put forward any evidence to demonstrate the existence of any such 'special circumstance'. Since an adjustment under the heading of administrative and general expenses would constitute a derogation from a rule laid down in wholly general terms, which moreover allows the institutions a far-reaching power of appraisal, it is clear

47. I would add that the amount of expenses for which an adjustment is requested is minimal, so that it would certainly have no significant impact on the dumping margin found in Canon's case or, *a fortiori*, on the rate of the anti-dumping duty imposed.

48. The submission alleging an incorrect comparison of the normal value and the export price must therefore also be dismissed in its entirety.

D — The injury

49. The arguments put forward by Canon in support of its submission that the injury was incorrectly evaluated by the institutions because they did not give sufficient attention to the segmentation of the market are not new. They had already been raised during the investigation and the Council expressed specific views on them in recitals 28 to 31 of the contested regulation. I must say at the outset that I consider that Canon did not succeed, in the procedure before the Court, in demonstrating that by rejecting all those arguments for the reasons stated the Council relied on materially incorrect factual data or committed a manifest error in appraising them.

50. The principal weakness of the applicant's arguments lies in the fact that they are to a considerable extent based on considerations relating to the market shares of Community producers for the various categories of PPCs, extending from the personal photocopier (hereinafter referred to as 'PC') to the copier in segment 5. It is by reference to the finding that in the period from 1982 to 1984 the market shares of the complainants increased in each of those categories, with the exception of PPCs in segment 2, of which the only Community manufacturer, Rank Xerox, suspended production between 1983 and 1985, that Canon reaches the conclusion that the only way available to the institutions of establishing the existence of injury was to merge all the segments and treat photocopiers in all the segments as 'like products' within the meaning of Article 2(12) of the basic regulation.¹²

51. However, that approach is not the one which must be followed in determining the injury and which the institutions adopted in the present case. Pursuant to Article 4(1) of the basic regulation,

'a determination of injury shall be made only if the dumped or subsidized imports are ... causing ... material injury to an established Community industry or materially retarding the establishment of such an industry'.

In order to verify whether that is the case, Article 4(4) provides that

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

It is apparent from Article 4(2) that, for the purposes of that examination, various factors must be taken into account, one of them being the impact which the imports in question have had *inter alia* on the market shares of the Community industry concerned.

52. It follows from those provisions that it is necessary in the first place to determine the 'Community production of the like product' before considering whether that

12 — See in particular paragraph 155 of the Reply.

industry has suffered serious injury as a result of dumping or subsidies.

53. It also follows that if the institutions were right to consider that the industry concerned in this case was the PPC industry in its various segments, without distinction, no argument can be derived from the fact that the industry's market share for one or other of those segments may have increased during the reference period. The Court followed exactly the same reasoning in order to reject, in the *Gestetner* case cited earlier, a complaint about the inclusion of Rank Xerox in the Community industry within the meaning of Article 4(5) of the basic regulation. In fact, in paragraph 56 of its judgment in *Gestetner*, it attributed absolutely no relevance to the fact that the added value of low volume PPCs manufactured in the United Kingdom by Rank Xerox was much less than the figure determined for all the segments, on the ground that the Council had correctly observed in recital 58 of the contested regulation that

'since the like product in the proceeding has been defined to be all photocopiers from personal copiers up to and including machines classified in Dataquest segment 5, it would be inappropriate to analyse whether a Community producer should be part of Community industry just in terms of its production of one model or a limited range of models'.

54. Was the Council right to adopt such a definition of 'like product'?

55. In that connection it seems to me to be relevant to make it clear that, for the purpose of evaluating injury, it is first necessary to establish whether, in the Community, products are produced which may be regarded as 'like products' to imported dumped products. Initially, therefore, it is not a question of determining whether different types of the same product, regardless of origin, may be regarded as 'like products' but rather of comparing the imported products with those manufactured in the Community.

56. The applicant has not denied that, during the reference period, a PPC industry existed in the Community in all segments, from PCs to segment 5, and that the Japanese exports were PPCs up to segment 4. Since Canon itself, like the institutions, relies on the Dataquest segments and does not claim that certain types of PPC do not form part of the 'right' segment, it must be concluded that there did indeed exist in the Community an industry manufacturing products which were 'alike in all respects to the product under consideration' or, at least, in the event of there being slight differences between certain products in the same segment,

'another product which has characteristics closely resembling those of the product under consideration' (see the wording of Article 2(12) of the basic regulation).

57. The only question which could have arisen in this context is whether it was correct to include segment 5 PPCs in the

definition of the Community industry manufacturing the 'like product', since there were no Japanese PPC exports of that category during the reference period. However, as the Council properly pointed out (in paragraph 104 of its defence), that question is to some extent academic, since in any event it concluded that PPCs in segment 5 were not subject to any injury (see recitals 79 and 80). Moreover, the Commission had expressed a specific view in that respect in the provisional regulation (see recitals 37 and 38) and the Council, in so far as it considered in general terms that PPCs in adjacent segments are also 'like products', confirmed by implication that (Community) PPCs in segment 5 are similar to (Japanese) PPCs in segment 4.

need not necessarily lead to a different overall evaluation of the injury and, secondly, that even an increase in the market share of Community manufacturers does not necessarily exclude a finding of injury.

59. It should then be noted that the Council has never claimed that *all* PPCs are 'like products'. The Commission took great care to make that clear in recital 38 of the provisional regulation by observing that

'personal copiers and high-volume operator-controlled console machines are evidently not like products'.

58. As to the question whether the institutions were entitled to go so far as to evaluate the injury by reference to all Community PPC production, extending from PCs to PPCs in segment 5, it will first of all be recalled that market shares are merely one of several economic factors to be taken into consideration in measuring the impact which dumped imports have had on the relevant industry in the Community. Moreover, the list of economic factors in Article 4(2)(c) of the basic regulation is merely indicative, so that the institutions are entitled not to include all of them in every case (see to that effect in particular paragraph 56 of *Canon*, cited earlier). Finally, the actual impact which imports have had on the economic aspects in question constitutes, in turn, only one of the factors to be taken into consideration in determining the injury, besides the volume and the prices of imports (see to that effect the judgment of 5 October 1988 in Joined Cases 294/86 and 77/87 *Technointorg v Commission and Council* [1988] ECR 6077, paragraph 41). It follows, first, that even errors in the assessment of market shares

But even though all PPCs are not 'like products', 'at least' PPCs in adjacent segments may be regarded as such. That is what the Council confirmed in recital 31 of the contested regulation.

60. The considerations on which the Council based that conclusion, which are set out in recital 30 of the contested regulation, appear to me to be perfectly valid and are certainly not vitiated by any manifest error. In their assessment of the facts, the institutions also relied on the work of the independent market research establishments Dataquest and Info-Markt, which shows, on the one hand, that there are no clear-cut boundaries between the various segments, which overlap on occasion, since certain PPCs can be classified in different segments

on the basis of certain of their technical characteristics and data, and, on the other, that PPCs in adjacent segments in fact compete with each other.

61. Even though PPCs belonging to different segments, or indeed to the same segment, may thus differ in particular as regards their copying speed, the fact remains that they have identical functions and fundamentally answer the same needs. The finding, which was not contested as such by the applicant (see paragraph 162 of the Reply), that the customer's choice is often determined according to whether he wishes to centralize or decentralize his copying facilities, that is to say to install a large-volume PPC or several low-volume PPCs, is sufficient to prove that. By stating that

'for the most part the Japanese success has been a result of the development of market segments which have largely been ignored by other companies' (paragraph 144 of the application),

Canon recognizes by implication that certain segments may develop at the expense of other segments, if only because they remove from those other segments openings which they might otherwise have been able to occupy.

62. That applies also to personal photocopiers and PPCs in segment 1, so that Canon has no grounds for maintaining that it created a new market by introducing the PC which it had developed. As the Council

rightly pointed out, at most Canon enlarged the existing market for PPCs and created increased demand for low-volume PPCs. Moreover, according to Canon's figures, the complainant's market share in the PC segment rose only from 0 to 0.8% so that the possibility cannot be ruled out that in that isolated segment injury might have derived from the fact that the establishment of Community production was held back for a considerable period.

63. In those circumstances, it appears to me that the Council had good grounds for concluding that

'machines in adjoining segments are *sufficiently alike* to be considered "like products" in the context of this proceeding' (recital 31 of the contested regulation).

The submission as to the incorrect evaluation of the injury cannot therefore be upheld.

E — The infringement of essential procedural requirements

64. I do not consider that the allegation as to the lack of an adequate statement of reasons is substantiated by any of the three arguments put forward by Canon.

65. Canon claims in the first place that, in order to determine the normal value on the basis of Article 2(3)(a) of the basic regulation, the institutions should have expressly determined that the prices used were

'comparable' to those adopted for calculation of the export price.

66. In that regard it must be made clear that, although the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Court to exercise its supervisory jurisdiction (see *inter alia* the judgment in *Minebea*, *supra*, [1987] ECR 1975, paragraph 23),

'the statement of reasons on which regulations are based cannot be required to specify the various, often very numerous and complex, matters of fact or of law with which the regulations are concerned, provided that the latter come within the systematic framework of the whole of which they form part' (see in particular the judgment of 2 May 1990 in Case C-27/89 *SCARPE v ONIC* [1990] ECR I-1701).

Moreover, as the Court has previously held,

'The reasons on which a piece of legislation is based may appear not only from its own wording but also from the whole body of the legal rules governing the field under consideration' (see the judgment of 23 February 1978 in Case 92/77 *An Board Bainne* [1978] ECR 497).

67. A comparison between, on the one hand, recitals 5 and 6 of the definitive regulation, which refers to the corresponding recitals in the provisional regulation, and,

on the other, the subsequent recitals of the chapter devoted to normal value, shows that that value was sometimes determined on the basis of Article 2(3)(a) and was sometimes constructed on the basis of Article 2(3)(b). In that context, the first paragraph of recital 7 of the provisional regulation, which was expressly confirmed by recital 6 of the contested regulation, seems to me to be sufficiently clear and explicit to explain the use made by the institutions of Article 2(3)(a). Its wording is as follows:

'Despite certain exporters' claims to the contrary, the Commission considered that it would be inappropriate to take account of any transfer price between related companies or branches of any exporter when establishing normal value by means of domestic prices, these prices not being those paid or payable in the ordinary course of trade for the like product. Accordingly, only prices to independent purchasers were used for the determination of normal value.'

68. Moreover, since in cases where an exporter's subsidiary was involved in sales on the Community market, the prices charged to the first independent purchaser were also used in calculating the export price, owing to the fact that the prices paid to the Japanese exporter by its subsidiary in the Community were regarded as somewhat unreliable transfer prices (see recitals 15 and 16 of the definitive regulation), an attentive reader could certainly have apprehended the fact that, by using the prices charged to independent purchasers in order to determine normal value, the Council's intention was to satisfy the requirement of comparability laid down by Article 2(3)(a). Canon, in any event, was not misled in that

regard and its first substantive submission in support of its action alleged that the Council wrongly relied on Article 2(3)(a) in order to determine normal value. It thus demonstrated that it was in a position fully to defend its rights, particularly since the Council's position merely confirmed that of the Commission, of which it had an opportunity to take note during the anti-dumping proceeding.

69. The applicant then claims that the institutions refused to examine the evidence presented to them concerning the functions of CSC, showing in particular that CSC is not merely a sales department of Canon.

70. It is apparent from the observations made in connection with Canon's first submission that in the event of production and sales activities being divided between two legally distinct but economically linked companies, the prices charged by the sales department to the first independent purchasers may legally be used in order to determine normal value, so that, when the Council became aware that CSC discharged, with respect to Canon's PPCs, the functions normally performed by a sales department, it was no longer under any obligation to examine evidence relating to other functions of CSC. Moreover, the Council never denied that CSC did in fact perform those other functions.

71. Finally, as regards the statement of the reasons for the refusal to accept certain expenses as being directly related to sales, reference need merely be made to recital 26

of the provisional regulation, which was confirmed by recital 20 of the contested regulation. There, the institutions expressly state that, for differences in conditions of sale to be able to be regarded as bearing 'a direct relationship to the sales under consideration' within the meaning of Article 2(1)(c) of the basic regulation, they must relate to 'costs [which] are strictly necessary to fulfil the terms of the sales under consideration' and the latter must 'bear a direct functional relationship to the sales under consideration', that is to say 'they are incurred because a particular sale is made'. They add that 'in general, overheads and general expenses, wherever they occur, do not have such a direct functional relationship and are therefore not allowable' and that 'in the present case there is no reason to deviate from this guideline'. With regard more particularly to trade-in payments, it should be remembered that the Council explained the institutions' position in great detail in recitals 13 and 14 of the contested regulation.

72. It cannot therefore be considered that the institutions did not explain what they understood by 'costs which bear a direct relationship' to sales or failed to indicate the reasons for which they refused allowances for the various kinds of expenses claimed by the applicant. The question whether their interpretation is correct and whether therefore they were entitled to refuse the allowances claimed comes within the third submission, which I examined earlier, concerning the application of Article 2(10)(c) of the basic regulation.

73. For the sake of completeness, I would add that the alleged contradiction

concerning the export price adopted for Canon's sales to OEMs, raised by the applicant at the end of its reply, is based on a misunderstanding on the part of the applicant. Canon claims that it is clear from recitals 16 and 92 of the contested regulation that, for those sales, the export price was the price charged to OEM customers, contrary to what the Council asserted in the proceedings before the Court, namely that it had applied Article 2(8)(b) of the basic regulation to all Canon's sales to OEMs in the Community.

as the export price within the meaning of the anti-dumping regulations, was an unreliable transfer price and that it therefore had to construct the export price on the basis of the price at which the product was first sold to an independent buyer. In that context, the expression 'export prices' used in the second sentence of recital 16 can refer only to that sale price, which was used for construction of the export price. It was to that sale price that the 'appropriate adjustments to take account of the exporters' subsidiaries' role in those sales' to OEMs were made. As we have seen, in its judgment in *Gestetner*, *supra*, the Court also held that it was lawful to apply Article 2(8)(b) of the basic regulation to OEM sales.

74. The second sentence of recital 16 of the contested regulation states that

75. As regards the passage in recital 92 of the contested regulation, which states that

'as regards the question of the sales to OEMs discussed in recital 18 of that [provisional] regulation, the Council confirms the Commission's findings that the export prices in these circumstances should be appropriately adjusted to take account of the function of the exporter's subsidiary in making such sales'.

'the price paid for export to the Community is the price paid by the OEM to the Japanese producer concerned',

Earlier, both in recital 15 and at the beginning of recital 16, the Council had explained why and how it applied Article 2(8)(b) to sales in the Community in which exporters' subsidiaries were involved. In particular, it took the view that the price charged by the exporter in Japan to its subsidiary in the Community, which was the price paid for export and should have served

it must also be read in context, namely against the background of the general question whether OEMs could be treated as exporters for which separate dumping margins should have been calculated. That does not therefore in any way prejudice the manner in which the export price must be determined in a specific case. Moreover, there is nothing to indicate that in the event of the exporters' subsidiaries not having been involved in sales to OEMs in the Community, the institutions would not have adopted 'the price paid by the OEM to the producer concerned' as the export price.

Conclusion

76. Since none of the applicants' submissions can thus be upheld, I propose that the Court dismiss the application as unfounded and order Canon to pay the costs, including those of the interveners.