OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 5 December 1990 *

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Mr President,
Members of the Court,

A — Facts and preliminary remark

I — *Facts*

1. The applicant in this case is contesting an anti-dumping regulation adopted by the Council. It is Regulation (EEC) No 3651/88 of 23 November 1988 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan.[1] The applicant is one of the manufacturers named in Article 1(2) of that regulation whose goods sold for export to the Community were subjected to a definitive anti-dumping duty, which in the applicant's case was fixed at 12%.

2. Under Article 2 of that regulation (hereinafter referred to as 'the contested regulation'), the amounts secured by way of provisional anti-dumping duty under Regulation (EEC) No 1418/88[2] were collected at the rates of duty definitively imposed, since in the applicant's case the definitive duty was lower than the provisional anti-dumping duty. Although it is not itself challenged in the application, Regulation (EEC) No 1418/88 (hereinafter referred to as 'the regulation imposing the provisional duty') is the subject of numerous references in the contested regulation.

3. With regard to the legal basis of those measures, a change occurred in this case between the time of the adoption of the regulation imposing the provisional duty and the time of the adoption of the contested regulation. This factor had a bearing on broad aspects of the dispute in the present proceedings. The regulation imposing the provisional duty was still based on Regulation No 2176/83[3] (hereinafter referred to as 'the former basic regulation'), whereas the contested regulation is based on Regulation No 2423/88 of 11 July 1988 (hereinafter referred to as 'the new basic regulation').[4]

4. One of those changes concerns Article 2(3)(b)(ii) of the regulation (in both versions). That provision deals with the construction of the normal value (the reference value used for determining whether the export prices applied reveal the existence of dumping). Both versions are reproduced in full at points 10 and 11 of the Report for the Hearing, and consequently I need here only mention that the applicant claims that the new provision is invalid and that it was incorrectly applied to it in this case.

5. Among the various alternatives contained in that provision and which describe methods by which the selling, general and administrative expenses (hereinafter referred to as 'SGA expenses') as well as the profit margin to be used for the construction of

1 — OJ 1988 L 317, p. 33.

2 — Commission Regulation of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan (OJ 1988 L 130, p. 12).

3 — Council Regulation of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1).

4 — Council Regulation on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1).

the normal value may be determined, the applicant points to the following passage:

'If such data[5] is unavailable or unreliable or is not suitable for use they shall be calculated by reference to the expenses incurred and profit realized by other producers or exporters *in the country of origin or export*[6] on profitable sales of the like product.'

6. The pleas in law which concern the validity and the actual application of that provision and on which this dispute hinges rest *inter alia* on international law rules on anti-dumping measures, and so I must also outline those rules. While anti-dumping duties are governed by Article VI of the General Agreement on Tariffs and Trade ('the GATT'), a number of the contracting parties to the GATT have laid down in this regard more detailed rules of application in adopting the 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade'[7] (hereinafter referred to — in accordance with Part I of that agreement — as 'the Anti-Dumping Code'). The Community is also a party to this agreement and it was on its behalf that the Council approved the Anti-Dumping Code by a decision of 10 December 1979.[8] According to their preambles, the two basic regulations are founded on Article VI of the GATT and on the Anti-Dumping Code.

5 — These words refer to the first option contained in the provision in question, which provides that 'the amount for selling, general and administrative expenses and profit shall be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of like products on the domestic market.'

6 — My emphasis.

7 — OJ 1980 L 71, p. 90.

8 — OJ 1980 L 71, p. 1.

7. For a more detailed account of the facts and in particular of the various pleas in law, I would refer to the Report for the Hearing. Where necessary I shall refer to the report in the course of my Opinion.

II — *Preliminary remark*

8. My preliminary remark concerns the sequence and extent of the review.

9. *1.* As far as the sequence is concerned, I consider it appropriate to depart from the structure of the application (and the structure consequently used in the subsequent pleadings and the Report for the Hearing). Under that structure a distinction is drawn between two main points — the objection that the new basic regulation is inapplicable and the annulment of the contested regulation, and to each of them is attached a number of pleas in law which correspond to the grounds set out in the first paragraph of Article 173 of the EEC Treaty. In this Opinion I consider it to be in the interest of clarity to concentrate more on the conditions governing the imposition of anti-dumping duties (and, where appropriate, the correct determination of the amount of that duty).

10. In the first part of my Opinion I shall therefore deal with the question whether essential procedural requirements were infringed upon the adoption of the contested regulation, while in the second part I shall examine the pleas in law concerning the conditions for the imposition

of an anti-dumping duty and the amount of that duty.

11.2. As far as the extent of the review is concerned, the Community institutions are often required to appraise complex economic situations under the provisions applicable to anti-dumping measures. In this case, the judicial review must be limited to the question whether the procedural rules were complied with, the question whether the facts on which the contested decision was based were correctly determined and the question whether there was any manifest error in the assessment of the facts or any misuse of powers.[9]

B — Legal assessment

First part — Infringement of essential procedural requirements

I — *Breach of paragraphs 1 to 3 of Article 2 and of Article 8 of the Council's rules of procedure*[10]

12.1. The applicant claims first of all that paragraphs 1 to 3 of Article 2 and Article 8 of the Council's rules of procedure were not complied with because the Commission proposal for the adoption of the contested regulation was not submitted to the Council until about 18 November 1988, which was only five days before the Council formally adopted that regulation. That proposal could therefore not have been included in the provisional agenda which the President is required to send to the other members of the Council and to the Commission at least fourteen days before the beginning of the meeting, in addition to the documents referred to in Article 2(3) and Article 8.

13. The Council admits that the Commission proposal had not been available in all language versions fourteen days before the beginning of the meeting (of 23 November 1988). Apparently it also does not deny that the proposal for the adoption of the contested regulation was not included in the provisional agenda. On the other hand, it does contend, without being contradicted, that this item was included in the definitive agenda, in accordance with Article 2(5), which provides that the Council is to adopt the agenda at the beginning of each meeting. The inclusion of items not appearing on the provisional agenda requires unanimity in the Council. Items thus included may be made subject to a vote. This means that a failure to include an item in the provisional agenda and a failure to comply with the requisite forms and time-limits (paragraphs 1 to 3 of Article 2 and Article 8) are not irregular if the Council unanimously includes the item concerned in the agenda pursuant to Article 2(5). The applicant's argument on this issue must therefore be rejected.

14.2. The applicant also argues that, in view of the length and complexity of the instrument, it is very unlikely that when voting the Council would have had before it all the language versions as required by Article 8 of its rules of procedure. The Council disputes this assertion and points

9 — See, for example, the judgment in Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923, at paragraph 21).

10 — Rules of procedure adopted by the Council on 24 July 1979 on the basis of Article 5 of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities (OJ 1979 L 268, p. 1).

out that the contested regulation was published in the Official Journal on 24 November 1988, only one day after the decision was taken.

15. The applicant rightly points out that in view of the internal nature of the Council's working documents it can do no more than conjecture about the observance or non-observance of the procedural rule in question. On the other hand, I consider the point made by the Council to be valid. It is completely out of the question that the contested regulation could have been published on 24 November without all the (published) language versions being available the previous day as proposed texts. Since it appears from the statements of the parties that the Commission proposal was the direct object of the one vote taken by the Council, it must be assumed that the draft text voted on corresponded in every respect to the Commission proposal.

16. The applicant's arguments concerning Article 8 of the Council's rules of procedure must therefore be rejected, with the result that the plea in law alleging a breach by the Council of its own rules of procedure is entirely unfounded.

II — *Infringement of the rights of the defence*

17. *1.* According to the applicant, the Council, by adopting the contested regulation, infringed in several respects the applicant's rights, in the first place with regard to the *calculation of the normal value.*

18. (a) The applicant's first argument relates to its treatment in the anti-dumping proceeding concerning electronic typewriters. In view of the particular structure of the applicant, the normal value in that proceeding was determined on the basis of SGA expenses corresponding to it as an undertaking, plus a reasonable profit, and this resulted in the termination of the proceeding. [11] The decision to terminate that proceeding was based on the finding that the applicant's structure differed from that of competing Japanese undertakings. In view of those circumstances, the applicant argues, the Commission, in order to respect the applicant's rights of defence in this case, ought to have explained why it had abandoned the criterion of similarity between the undertaking concerned and other undertakings whose accounting data had been taken into consideration.

19. In this regard I would point out first of all that the only proceeding which concerns us now is that which resulted in the adoption of the contested regulation. The possible illegality of the regulation imposing the provisional duty could affect the legality of the contested regulation only in so far as the latter requires the provisional duty to be collected definitively. On this point, however, the Court has ruled that a defect in the regulation imposing the provisional duty may lead to the illegality of the regulation imposing the definitive duty only in so far as the defect is reflected in the regulation imposing the definitive duty. [12] In this context, it must be examined whether it was necessary to set out the reasons for the method applied.

11 — See Commission Decision 86/34 of 12 February 1986 terminating the anti-dumping proceeding concerning imports of electronic typewriters manufactured by Nakajima All Precision Co. Ltd and originating in Japan (OJ 1986 L 40, p. 29).

12 — See the judgment in Joined Cases 305/86 and 160/87 *Neotype Techmashexport GmbH* v *Commission and Council* [1990] ECR I-2945, at paragraph 69.

20. In order to respect the rights of the defence, the undertakings concerned must be given the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and, if necessary, on the documents used. [13]

21. I consider it doubtful that internal matters such as the legal considerations which are to form the basis for a discretionary decision should also be included among those requirements. However, this question does not arise in this case because Article 2(3)(b)(ii) of the new basic regulation — published more than three months prior to the contested regulation — expressly provides for the method which was applied to the applicant. Thus, whatever the legal position under the former basic regulation may have been, the new basic regulation itself provides the explanation for the method applied.

22. Whether, in the light of the circumstances of this case, that method ought to have been applied is, of course, a quite separate question. However, the applicant could have effectively made known its point of view on this question before the adoption of the contested regulation by arguing that the conditions governing that method, with which it was familiar from the regulation imposing the provisional duty, had not been satisfied (in particular, that the application of that method was unreasonable in the light of the first two sentences of that provision) or by arguing that the new basic regulation was itself invalid.

13 — Judgment in Case 85/76 *Hoffman-La Roche & Co. AG* v *Commission* [1979] ECR 461, at paragraph 11.

23. Since, according to the Council, the Commission proposal for the adoption of the contested regulation was made on 23 October 1988, — according to the applicant, it was not even made until 18 November 1988 — [14] there was in any event sufficient time to put forward those arguments to allow the Commission to take account of them when drafting its proposal.

24. With regard to the argument put forward by the applicant in the same connection, to the effect that the new basic regulation itself infringes its rights of defence on the ground that it deprives it of the opportunity to demonstrate the particular nature of its structure in contrast with the structures of its Japanese competitors, this is not in fact a matter concerning the rights of the defence but concerns the question whether the fact that the Council was able, in the course of the administrative procedure in this case, to adopt the new version of a provision still in force was compatible with the principles of legal certainty and the prohibition of retroactive measures. The applicant takes the view that the new version is more unfavourable to it than the original version and that it was introduced for the purpose of justifying *a posteriori* the approach adopted under the regulation imposing the provisional duty, which would not have been lawful under the former version. This is a point to which I shall return later.

25. It must therefore be concluded that the Commission did not infringe the principle of the rights of the defence by failing to inform

14 — The applicant's argument on this point is contradictory: the date of 18 November 1988 is taken from its arguments concerning the alleged infringement of the Council's rules of procedure; at point 12 on page 11 of the application, however, it is stated that the applicant sent a memorandum to the Council on 26 October 1988 concerning that Commission proposal.

the applicant in detail of the reasons why, for the purposes of the contested regulation, it departed from the method applied in the anti-dumping proceeding concerning the importation of electronic typewriters.

26. (b) The applicant also considers its rights of defence to have been infringed by the fact that the Council did not inform it before 20 September 1988 of the names of the undertakings whose accounting data had been taken into consideration for the purpose of determining the SGA expenses and profit for the construction of the applicant's normal value. The Community authorities ought to have explained how, on the basis of the accounting data of those undertakings, they arrived at the 'weighted average' which, according to recital 36 of the regulation imposing the provisional duty, was applied to the applicant. As the applicant did not have that information during the entire proceeding, it was unable to express its views on those matters and in this way its rights of defence were infringed.

27. That argument does not withstand examination. It is clear from the minutes produced by the Council that the applicant was aware at the commencement of the proceeding, or at the latest on 5 November 1987, that accounting data of other undertakings would be used for the purpose of constructing the normal value. It also appears that from 17 March 1988 the applicant was aware of the percentages which the Community authorities intended to use for the SGA expenses and profit in the constructed normal value. As the documents on the case file demonstrate, those percentages were much higher than those of the applicant. From this the applicant must have been able to conclude that the figures which would be used corresponded to undertakings with structures different from its own. It thus had available to it all the information necessary to mount an effective defence. The individual accounting data used for the purposes of weighting, and thus also for the percentages applied, had to be regarded as confidential information within the meaning of Article 8(3) of the new basic regulation [15] and for that reason could not be divulged to the applicant.

28. Inasmuch as in this connection the applicant also objects that no reply was received to its letter of 2 September 1988 requesting information on the method used to determine the SGA expenses and profit and on the adjustments made to exclude from the calculation expenses and profits arising on sales on the domestic market, it suffices to point out that under Article 7(4)(c)(i)(cc) of the basic regulation (in its former and new versions) such requests for information must be received by the Commission not later than one month after publication of the imposition of the provisional anti-dumping duty (in this case, therefore, by 26 June 1988). By sending a letter on 2 September 1988, the applicant failed to comply with that time-limit.

29. (c) In the applicant's opinion, its rights of defence were also infringed by the fact that the Commission led it to believe that it would still be able to present its arguments regarding the method of constructing the normal value at the disclosure conference. That conference, however, was not held until 23 August 1988, which was thus at a date subsequent to the entry into force of the new basic regulation which, in so far as it provides expressly for the method

15 — See also the judgment in Joined Cases 260/85 and 106/86 *TEC and Others* v *Council* [1988] ECR 5855, at paragraph 20.

criticized in this case, was more unfavourable for the applicant than the former basic regulation.

30. As far as the factual core of this argument is concerned, it is clear that the disclosure conference referred to was not held until 23 August 1988. In addition, it appears from a letter sent by the applicant to the Commission on 18 March 1988 that it was apparently 'agreed' to discuss this point more fully at the disclosure conference. I am unable to ascertain from the documents what importance is to be attached to this agreement. However, even if the Commission was here attempting (as the applicant apparently believes) to use delaying tactics in order to postpone discussion to a date after the adoption of the new basic regulation, I would not regard this as an infringement of the rights of the defence. Either the new basic regulation is more unfavourable to the applicant, in which case the matter must be examined from the perspective of legal certainty and the prohibition of retroactive measures. The applicant's rights of defence will have been infringed in this regard only if it had insufficient time to submit its arguments, on the basis of *that* regulation, for account to be taken of them when the Council took its decision. I have already demonstrated that this is not the case. Or the new basic regulation does not make the applicant's position more unfavourable, in which case the applicant's arguments have no foundation. In any event, the applicant had already set out in its letter of 21 June 1988 all the arguments which it presented during the procedure before the Court of Justice. The extent to which the 'agreement' prevented the applicant from submitting additional arguments (at whatever stage) cannot be determined. The applicant's plea in law must therefore be rejected.

31.2. Apart from the questions dealt with above, which concern the construction of the normal value, the applicant also contends that its rights of defence were infringed in the *determination of the injury*. It points out in this connection that, for the period preceding that covered by the investigation, it supplied only overall figures, and only for the years 1984 and 1985 (not for 1983), as no figures for individual printer models or individual market segments had been requested for those years. In so far as the effects of alleged dumping had been established prior to the period covered by the investigation on the basis of 'further investigation' (see recital 59 of the contested regulation), that is to say by the examination of accounting data of Community manufacturers, the applicant's rights of defence were infringed.

32. It is certainly undeniable that recital 59 does indeed mention dumping and thereby apparently also refers to a period beginning in 1983 and preceding the period covered by the investigation. On the other hand, it is not disputed that the Community authority, over this period, investigated only an *injury* in the sense that it established that Japanese imports were having an effect on the economic development of Community producers.[16] The question whether this is sufficient to establish a causal connection between dumping and injury where the period of investigation and that in which the injury was established to exist are not wholly concurrent is not a question touching on the rights of the defence, but rather one which relates to the substantive legality of the contested regulation. The applicant has submitted further arguments

16 — I cannot understand how dumping can be established through an evaluation of accounting data of Community producers.

on this point, which I shall also consider. So far as the determination of injury is concerned, it would appear that this was done on the basis of the study carried out by the consultancy firm of Ernst & Whinney, which was submitted by the Japanese printer manufacturers themselves, and that this study also covers the year 1983. The applicant was also informed, by a Commission letter of 28 September 1988, that this study would be used. The data relating to the applicant itself for the years 1984 and 1985 are included in the questionnaire which it submitted in the course of the administrative proceeding. Finally, with regard to the data on individual European manufacturers, these are confidential in nature and for that reason could not as such be communicated to the applicant. However, it is not disputed that the file opened by the Commission, to which the applicant had access pursuant to Article 7(4)(a) of both the new and former basic regulations, contained non-confidential summaries. The applicant was thus informed of, or at least had access to, all the material on which the determination of injury had been based. There was consequently no infringement of its rights of defence.

III — *Failure to provide a statement of reasons*

33.*1.* According to the applicant, the first failure to provide a statement of reasons in the contested regulation occurs in recitals 21 and 22, which concern the construction of the *normal value*. The applicant refers in this connection to the anti-dumping proceeding concerning imports of electronic typewriters originating in Japan,[17] in which the SGA expenses and profit were calculated on the basis of the applicant's accounting data, which led to the termination of the proceeding in so far as the applicant itself was concerned.[18] Since that method was abandoned for the purposes of this proceeding, the Council ought to have specified the reasons for this change of method for determining the normal value and how it could avoid discriminatory treatment when applying the new method which it had selected.

34. According to the established case-law of the Court, the statement of reasons required by Article 190 of the EEC Treaty must be appropriate to the nature of the measure in question. It must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review.[19] In this case, in recital 21 of the contested regulation the Council referred to Article 2(3)(b)(ii) of the new basic regulation, which provides expressly for the method applied in this case. It also addressed the question of discrimination raised by the applicant by pointing out (in the second paragraph in the above recital) that:

'the fact that a particular exporter does not sell the product concerned, and accordingly, does not have a sales organization on its domestic market, should not alter the basis for estimating selling, administrative and other general expenses and profit in the construction of that exporter's normal value.'

17 — See Council Regulation (EEC) No 1698/85 (OJ 1985 L 163, p. 1).

18 — Commission Decision of 12 February 1986 (OJ 1986 L 40, p. 29).

19 — Judgment in Case 250/84 *Eridania and Others* v *Conguaglio Zucchero and Others* [1986] ECR 117, at paragraph 37; judgment in Joined Cases C-304/86 and C-185/87 *Enital* v *Commission and Council* [1990] ECR I-2939.

35. It follows from that passage that the Council does not regard the particular characteristics of the applicant's structure as providing any reason for treating it any differently than other exporters, or that those structural differences do not justify the view that the situations are fundamentally different. It is thus evident that the Council is proceeding from a completely different standpoint from that of the applicant, and that this explains the measure adopted and the method applied. The possibility for the Court to exercise its supervisory control is thus ensured; in particular, the Court is in a position to ascertain whether the Council's position on the question of discrimination is correct. The plea in law alleging a failure to provide reasons is thus unfounded in so far as it concerns recitals 21 and 22 of the contested regulation.

36.2. The second argument relied on, alleging a lack of a statement of reasons for the contested regulation, concerns the issue of *injury*; in this argument doubt is expressed with regard to recital 60 of that regulation, which, according to the applicant, shows that the Community authority attributed the consequences of imports from third countries other than Japan to the dumping (by Japanese manufacturers).

37. I see no evidence of such a statement in that recital. It refers only to imports which became 'substantial only after the end of the period under investigation'. In any event, to conclude that there was no statement of reasons would likewise not be justified if it was clear from the text criticized by the applicant that the Council had imputed injury to the imports covered by the anti-dumping proceeding in the present case which had nothing to do with them. If the Council had done this and referred to this step in the contested regulation, this could not constitute a failure to provide reasons but would at the most amount to a breach of the basic regulation (see the second sentence of Article 4(1]. It is therefore not possible to agree with the applicant on this point.

Second part — The substantive legality[20] *of the contested regulation*

I — *Definition of the (like) products taken into consideration*

38. The applicant objects to recital 5 et seq. of the contested regulation. In its view, the group of products falling within the category of 'like products' was not properly defined for the purposes of this anti-dumping proceeding. A distinction ought to have been drawn between two segments comprising the printers taken into consideration (lower and upper segments). Those two segments may be distinguished according to the intended purpose of the machines, the target customers and the expected profit. The Council did not draw any distinction according to segments and this, in the opinion of the applicant, constitutes an error in the assessment of the facts.

39. That argument can be rejected at once. In the first place, the applicant does not indicate how the method applied by the Council had a more unfavourable effect upon it. Secondly (and this point seems to be closely connected with the point above), it states in its reply (in response to the arguments set out by the Council in its statement of defence) that opinions may in fact differ as to the criteria to be applied in

20 — Infringement of the Treaty or of any rule of law relating to its application or misuse of powers.

order to divide the category of printers in question into segments; according to the applicant, the Council should none the less have endeavoured to apply one or other of those criteria. It thus admits that there are no generally accepted criteria for making such a division, and this is a view shared by the Council. The argument is accordingly unfounded.

II — *Normal value*

40. *1.* So far as the arguments relating to the construction of the normal value are concerned, it is first of all necessary to examine the argument which, relying on Article 184 of the EEC Treaty, goes to the *applicability of Article 2(3)(b)(ii) of the new basic regulation.*

41. (a) In this context, I will first of all examine the applicant's criticism of the reasons given for that provision and the doubt it casts on its substantive legality before passing (at point (b] to its applicability in time under Article 19 of the new basic regulation.

42. (aa) The applicant takes the view that, in view of the requirements set out in Article 190 of the EEC Treaty, insufficient reasons are given in the preamble to the new basic regulation[21] for the provision to which objection is taken in the present case. It considers first of all that the Community authority ought to have stated that it was a new, substantive provision which represented a substantial amendment and did not correspond to normal Commission practice.

43. It suffices to note here that the wording in the fourth and thirty-third recitals of the new basic regulation presents the resultant textual amendment as a mere *clarification* of the former basic regulation.[22] The *intention* of the legislature is thereby made sufficiently clear. If the wording of the provision were to go beyond that aim, that might justify a restrictive interpretation or, if that were not possible, an examination to ascertain whether the principle of proportionality was observed. I see no failure to state reasons in this regard.

44. The applicant goes on to argue that the Community authorities ought to have explained how the application of the new rule would not discriminate against undertakings such as the applicant. In the case of such undertakings, there would have been added to the actual production costs the expenses and profits of other undertakings, without any examination as to whether the latter essentially exhibited similar characteristics. It would have been necessary to demonstrate, where appropriate, how that discriminatory effect could be avoided or offset. However, in my view, the legislature is not obliged to provide, for all provisions capable in one way or another of being applied in a discriminatory manner, a statement of reasons covering this specific point. The prohibition of discrimination is a general principle of Community law. In applying every provision of secondary law, the Community institutions must do their utmost to comply with that principle. If a provision does not allow this to be done, this does not constitute insufficient

21 — Fourth and thirty-third recitals.

22 — See the fourth recital: 'should be presented clearly and in sufficient detail'; thirty-third recital: 'to define more precisely'.

reasoning but a breach of the prohibition of discrimination.

45. Finally, the applicant believes that it has identified a contradiction between the thirty-third recital and Article 2(3)(b)(ii) of the new basic regulation inasmuch as the text of the provision itself does not provide that SGA expenses and profit may be determined on 'any other reasonable basis'. [23] I would refer the applicant on this matter to the final sentence in the provision in question which states that:

'If neither of these two methods can be applied the expenses incurred and the profit realized shall be calculated . . . on any other reasonable basis.'

46. It is thus clear that the applicant's argument that the new basic regulation exhibits a number of failures to state reasons cannot be accepted.

47. (bb) I now come to the questions relating to the substantive legality of the new basic regulation.

48. (1) The first breach of Community law alleged by the applicant relates to Article 2(4) of the GATT Anti-Dumping Code.

49. (a) According to the applicant, the method applied by the defendant in this case under Article 2(3)(b)(ii) of Regulation (EEC) No 2423/88 results in the use, for the purposes of constructing the normal value, of expenses and profits which are not 'reasonable' within the meaning of the abovementioned provision of the Anti-Dumping Code.

50. The applicant undertaking consists simply of a factory; it has no sales staff or distribution structure and has a limited number of customers. It produces only a limited number of various products (typewriters and printers). For each country of exportation there is one buyer who is responsible for dealing with the orders submitted by a distributor who is responsible for distribution throughout the country in question. Reference to undertakings which, in their structures, are not comparable to the applicant is unreasonable within the meaning of the requirement set out in the Anti-Dumping Code. This becomes even clearer when the treatment accorded to the applicant in the anti-dumping proceeding concerning electronic typewriters is considered. Account was taken in that proceeding of the applicant's particular structure, and this led to the termination of the proceeding. [24]

51. In this connection, the applicant takes the view that either Article 2(3)(b)(ii) of the new basic regulation is inconsistent as such with the Anti-Dumping Code if in cases such as this it restricts the discretion of Community authorities by limiting it to the method here applied, or alternatively that

23 — The thirty-third recital in the German version of the regulation does not correspond to the versions in the other official languages, in which the recital concludes with the words 'or on any other reasonable basis'.

24 — See Commission Decision 86/34/EEC of 12 February 1986 terminating the anti-dumping proceeding concerning imports of electronic typewriters manufactured by Nakajima All Precision Co. Ltd and originating in Japan (OJ 1986 L 40, p. 29).

the Community authorities retained under that provision the discretion which they have under the Code, in which event it is the method chosen in this case which is contrary to the Code.

52. (b) Of those two possibilities set out by the applicant — breach of the Anti-Dumping Code by the new basic regulation or by the method of applying that regulation — it is only the former which is susceptible of review under Article 184 of the EEC Treaty.

53. (aa) I would first of all like to point out in this regard that the Code, to which the Community is a contracting party, may indeed be the subject of a review under Article 184 of the EEC Treaty. Under Article 228(2), international agreements concluded by the Community are part of Community law. As is clear from the wording of Article 228, they stand somewhere between primary Community law (Treaty law) and secondary law, and may therefore be classified among the 'rule[s] of law relating to [the Treaty's] application'. This view is confirmed by the Court's case-law on Article 177 of the EEC Treaty, according to which such agreements are to be considered as acts of the Community institutions in respect of which the Court accordingly has jurisdiction to give rulings on their interpretation in the Community legal order,[25] and in which the Court has reviewed the validity of provisions of secondary Community law from the perspective of an infringement of agreements entered into by the Community.[26],[27] With regard to the Anti-Dumping Code, the Court of Justice would appear to have proceeded on the basis of the same principles in the *Cartorobica* case.[28]

54. (bb) The question which then arose in this case is whether the provisions of the Anti-Dumping Code are directly applicable to individuals — in this case, the applicant — which the applicant, but not the defendant, considers to be the case.

55. The defendant's position is based on the case-law of the Court concerning a number of provisions of the GATT,[29] Article VI of which has, as we know, been given concrete expression in the current Code. That case-law refers to the spirit, the structure and the wording of the GATT; from the provisions on exemptions from the general rules, the provisions on measures which could be adopted in the event of exceptional difficulties and the provisions on the settlement of differences the Court concluded that the various GATT provisions were not directly applicable. In a later judgment in the *Fediol III* case[30] the Court had to rule on an objection of inadmissibility raised by the Commission against an

25 — See, in particular, the judgment in Case 181/73 *Haegemann* v *Belgium* [1974] ECR 449, at paragraphs 2 to 6; judgment in Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641, at paragraph 13 et seq; finally, the judgment in Case C-192/89 *Sevince* v *Staatssecretaris van Justitie* [1990] ECR I-3461, at paragraph 10 et seq.

26 — The judgment cited next concerns an agreement originally concluded by a Member State which subsequently became an integral part of Community law when the Community became the sole body responsible for commercial policy; however, in the present context this distinction is irrelevant.

27 — See in particular the judgment in Case 38/75 *Nederlandse Spoorwegen* v *Inspektor der Einfuhrzölle und Verbrauchssteuern* [1975] ECR 1439, at paragraph 20 et seq.

28 — Judgment in Case C-189/88 *Cartorobica* v *Ministero delle Finanze dello Stato* [1990] ECR I-1269, in particular at paragraph 23.

29 — Judgment in Joined Cases 21 to 24/72 *International Fruit Company NV and Others* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219; judgment in Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135; judgment in Case 266/81 *SIOT* v *Ministero delle Finanze and Others* [1983] ECR 731; and judgment in Joined Cases 267/81 to 269/81 *Amministrazione delle Finanze dello Stato* v *SPI and SAMI* [1983] ECR 801.

30 — Judgment in Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, at paragraph 18 et seq.

action brought against a Commission decision rejecting a complaint based on Regulation (EEC) No 2641/84.[31] That regulation provides for measures against illicit commercial practices which include all practices of third countries which, with regard to international trade, are incompatible with the rules of international law (Article 1). Reference is thus made, *inter alia*, to the GATT.[32] Under Article 3, certain persons and associations may lodge a written application for the opening of a procedure. The Court ruled that the previous case-law on the direct applicability of the GATT did not mean that applicants could not rely on the provisions of the GATT in order to obtain a ruling on whether conduct objected to in a complaint constituted an illicit commercial practice.[33] The Court held that the regulation entitled applicants to rely on the GATT provisions in their complaint and that consequently they were entitled to request the Court to exercise its powers of review in this connection.[34]

56. It would certainly be interesting to examine in theory the question whether the Court should hold the Anti-Dumping Code to be directly applicable. However, according to the case-law cited above,[35] a mere *review* of validity does not in any event presuppose that the question whether the relevant provision in the agreement governed by international law is directly applicable has already been determined. Admittedly, the situation is quite different in the case of agreements whose provisions are so vague that they cannot be regarded as justiciable. On this point, the Court has ruled, in its judgment in *Fediol III*,[36] that, for the purpose of establishing the existence of illicit commercial practices, the rules of GATT may be interpreted and applied by the Court and thus satisfy that requirement. As far as the Anti-Dumping Code is concerned, I have no reservations about review by the Court in the sense indicated, particularly since the basic regulations (in particular the former basic Regulations Nos 3017/79[37] and 2176/84) are based broadly on the wording of the Code. As regards the provision on the constructed normal value, Article 2(3)(b)(ii) of Regulation No 2176/84 and the Anti-Dumping Code are almost completely identical as far as the point at issue here is concerned.

57. (cc) If I do not therefore go into the question of the direct applicability of the Anti-Dumping Code, it is because the possibility that the new rules may be incompatible with that Code is most certainly ruled out.

58. The starting point for any examination must be the requirement of 'reasonableness' with which, according to the Code, both the margin of profit and the SGA expenses to be used in calculating the constructed normal value must comply.

59. The precise meaning of reasonableness in this connection will naturally depend on

31 — Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (OJ 1984 L 252, p. 1).

32 — See the final sentence in paragraph 19 of the judgment in *Fediol III*, cited above.

33 — Paragraph 19.

34 — Paragraph 22 of the judgment.

35 — Paragraph 53 (see footnotes 27 and 28).

36 — Paragraph 20 of the judgment.

37 — Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1979 L 339, p. 1).

the aim pursued under the Code in the construction of the normal value. Two views may be held in this regard. The first would suggest that the construction of the normal value serves to define the selling price for a product as it would be if that product were sold in the exporting country or the country of origin. This was how the Court described the purpose of the construction of the normal value in the cases relating to the importation of electronic typewriters.[38] The other view was espoused by the applicants in the aforementioned cases. Under that view, the constructed normal value is the reasonable value of the exported goods.

60. It is not possible to ascertain from the Code whether only one of those views is correct. Apart from the rule that the production costs to be taken into account are those of the country of origin, a point which is obvious and does not support one or the other of the two views, it is only the provision relating to profit which makes some reference to the country of origin (or to the exporting country; see Article 2(3) of the Code). According to that provision, the addition for profit may not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin (final sentence of Article 2(4) of the Code). This, however, constitutes only a 'general rule', which does not itself concern in any way at all the determination of the profit to be taken into consideration as a whole, but simply lays down a maximum limit.

61. For the rest, the general provision in Article 2(1) of the Code does not take us any further since the construction of the normal value concerns precisely those cases in which the conditions of the reference case have not been satisfied. The fact that upon the application of the alternative criteria set out in Article 2(4), the main criterion (comparison with sales on the domestic market) need not necessarily be regarded as the decisive test is clear from the nature of the first alternative criterion. According to that criterion, the dumping margin is to be determined by means of a comparison with a comparable price of the like product when exported to any *third country*.

62. These considerations, which I shall expand at a later stage, are sufficient to enable this argument of the applicant to be addressed and to conclude that the new basic regulation has not been infringed in the way suggested.

63. Despite the fact that at the hearing the applicant attempted to demonstrate, with figures relating to sales of typewriters on the Japanese market, that it was possible for it to sell large quantities of needle printers on that market, its objection is really directed at the choice of method of evaluation between the two approaches which I have just described. That consideration, however, cannot in any case entail the invalidity of the second method mentioned in Article 2(3)(b)(ii) of the new basic regulation. It is undeniable that this method clearly results in the calculation of a normal value such as it would be if the manufacturer in question actually sold on the domestic market of the exporting country, whereas the applicant takes the view that the application of that provision is not 'reasonable' in view of its particular circumstances.

38 — Judgments in Joined Cases 260/85 and 106/86 *Tokyo Electric Company (TEC) and Others* v *Council* [1988] ECR 5855, at paragraphs 24 and 27; in Case 250/85 *Brother Industries Limited* v *Council* [1988] ECR 5683, at paragraph 18; in Joined Cases 277/85 and 300/85 *Canon Inc. and Others* v *Council* [1988] ECR 5731, at paragraph 26; and in Joined Cases 273/85 and 107/86 *Silver Seiko Ltd and Others* v *Council* [1988] ECR 5927, at paragraph 16.

64. This, however, could lead to the invalidity of the provision in question, even on the basis of this consideration, only if that provision required an 'unreasonable' calculation of the normal value to be made in this case. This, however, is not the case.

65. It follows from the structure of Article 2(3)(b)(ii) of the new basic regulation that each of the methods set out in that provision must be applied in the light of the principle of reasonableness, which is referred to twice in the first two sentences of that provision. Inasmuch as this approach is not clearly evident from the wording of the three methods set out, it is necessary to refer to this criterion. Furthermore, independently of that requirement, each of the three methods referred to is subject to a proviso of reasonableness. Thus, it is appropriate to go from the first method (determination of the relevant expenses and profit margin on the basis of sales of the manufacturer/exporter on the domestic market) to the second method at issue in this case, in particular where the use of the figures thus obtained would not be reasonable.[39] If 'neither of these two methods can be applied', it is necessary to go on to apply the third method mentioned (reference to sales in the same economic sector within the domestic market) or to determine the expenses and profits on any other reasonable basis. This introductory formula clearly lays down the conditions for proceeding from the first to the second method, which signifies that the second method may itself only be applied if it is reasonable. As far as the third method mentioned is concerned, this is ensured by the final part of the sentence ('or on any *other* reasonable basis.')[40] which thus has a double function: it is a proviso of reasonableness for the third method mentioned as well as a clause referring back to the basic test laid down in the Code.

66. For the sake of completeness, I would also point out that the mere fact that a condition expressed in very general terms in the Code (in this case, the requirement that the expenses and profits taken into account be 'reasonable') is subsequently put into concrete terms by the legislatures of the various contracting parties when anti-dumping laws are adopted may not be regarded as a breach of the Code. The Code does not require its signatories to reproduce the agreed text word for word in the provisions which they each adopt. It stipulates simply that such provisions must 'conform' to those of the Agreement,[41] that is to say — as is confirmed by the use of the expression 'greater uniformity' (and not complete uniformity) in the preamble — that they must not be contrary to the rules of the Agreement — to the detriment of traders affected by anti-dumping measures.[42] It must certainly be borne in mind that the putting of imprecise concepts into concrete terms may in the end entail a departure from the Code in some individual cases where because of the adoption of more concrete terms the person concerned is placed in a worse situation than that in which he would have been under the Code alone. However, as my remarks on the wording and structure of the provision have demonstrated, Article 2(3)(b)(ii) of the new basic regulation

39 — In other official languages, the concept of reasonableness is not repeated here; it is however indicated that such figures cannot be used. However, I do not see any difference in this regard.

40 — My emphasis.

41 — See Article 16(6)(a) of the Code.

42 — See Vermulst: *Anti-dumping Law and Practice in the United States and the European Communities*, 1987, p. 700.

cannot be criticized, particularly with regard to the second method of calculation in point here. That provision cannot therefore be regarded as being contrary to Article 2(4) of the Anti-Dumping Code.

67. (2) The applicant goes on to argue that, as a result of the second method of calculation to which it objects, the normal value and the export price are compared at different levels of trade, contrary to Article 2(6) of the Anti-Dumping Code. The normal value is not then comparable to the export prices existing in the case of structures such as those possessed by the applicant, that is to say on the ex-factory basis. It considers that the adjustments provided for in the new basic regulation are insufficient to resolve these problems.

68. Under Article 2(6) of the Anti-Dumping Code, the export price and the domestic price in the exporting country are to be compared 'at the same level of trade, normally at the ex-factory level'.

69. This argument is not relevant to the problem in point, which in reality is very closely linked to the determination of the normal value.[43] If it is unreasonable to use the expenses and profits in question here (those arising where a sales structure exists for the domestic Japanese market), that must, as I have already explained, affect the determination of the normal value inasmuch as they are not included in the normal value and this is calculated according to a different method. In which case, the method of comparison objected to by the applicant is likewise not at issue. On the other hand, if those expenses and profits are to be included because this is reasonable, then the considerations set out below apply.

70. A proper comparison between the normal value and the export price at the ex-factory level (Article 2(6) of the Code) presupposes in the first place that those two values are compared at the level of the first sale to an independent buyer. This means in particular that the normal value is to be compared after inclusion of the SGA expenses and profits of distribution companies which, though legally independent of the parent production company, are not economically independent.[44] Only the sales of those companies to an independent buyer form the basis of the constructed normal value. This is no more than one aspect of the principle that all expenses and profit resulting from actual sales on the domestic market are included in the normal value. The Court expressly confirmed this principle in its judgment in the *TEC* case. That case involved the construction of the normal value for an undertaking which did not sell the product which was the subject of the proceeding (electronic typewriters) on the Japanese market. The Council had constructed the normal value by including it in the SGA expenses of a dependent distribution company which sold other goods and had compared that value with the export price. On this point, the Court ruled as follows:

43 — Although Article 2(6) of the Code does not use the term 'normal value', it does provide for a comparison to be made between the export price and all the data which the basic regulation groups together under the concept of 'normal value'.

44 — See in this instance recital 40 of the Commission regulation imposing the provisional duty.

'The foregoing considerations are likewise grounds for the rejection of TEC's argument that the method used by the institutions is contrary to Article 2(9) of Regulation No 2176/84, which provides that the normal value and the export price should "normally be compared at the same level of trade, preferably at the ex-factory level'. In fact, 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 sales arrangements of the kind adopted by Tokyo Electric Company Limited for the products it sells on the Japanese market.' [45]

71. I see no reason not to apply those considerations to the profit margin to be taken into account for the purposes of calculating the normal value. [46] It may also be assumed that those remarks are applicable *mutatis mutandis* to the interpretation of the Code, which, on the point concerned, is consistent with the former basic regulation applied in the judgment cited above.

72. The provision criticized by the applicant is clearly compatible with the resultant principle that the comparison made at the ex-factory level concerns the prices charged in each case to the first independent buyer. The expenses and profits referred to in Article 2(3)(b)(ii) of the new basic regulation are solely those which concern 'other producers or exporters', [47] that is to say to the exclusion of those persons who purchase the goods from those producers or exporters.

73. The applicant takes the view that, in its case, the expenses and profits were treated unequally as regards the normal value and the export price because in the case of normal value those factors were established on the basis of sales at a level of trade subsequent to the ex-factory stage (ex-distributor) whereas the applicant's export price is an ex-factory price. In this regard, it must be acknowledged that in Article 2(9) and (10) in particular the new basic regulation does not provide for any adjustment in respect of different general expenses and different profits.

74. This argument calls for two comments.

75. First, this problem has nothing to do with the method applied to the applicant pursuant to Article 2(3)(b)(ii) of the new basic regulation. If a Japanese manufacturer sells on the domestic market through the intermediary of an associated distribution company, the normal value is not constructed but is determined on the basis of the main criterion of Article 2(3)(a) of the (new or former) basic regulation. In this case, exactly the same comparison problem arises with sales made within the Community directly by the exporter to an independent buyer without the intervention of an intermediary. The situation is no different upon the application of the third

45 — Paragraph 30.

46 — See recital 39, in conjunction with recital 40, of the Commission regulation imposing the provisional duty.

47 — According to the *TEC* judgment, this is to be understood as referring in each case to the 'economic unit'.

method of determining the normal value set out in Article 2(3)(b)(ii) of the new basic regulation (calculation on the basis of sales within the same economic sector).

76. The fact that the new basic regulation does not provide, with regard to such situations, for adjustments to be made for the purposes of the comparison might give rise to the question whether the provisions relating to the comparison (Article 2(9) and (10)) are valid. However, I perceive no argument supporting the invalidity of the provision criticized.

77. Secondly, the Court of Justice has on several occasions addressed the question whether under the relevant basic regulation (Regulation (EEC) No 3017/79 or No 2176/84) the normal value and the export price must be determined according to the same methods for the purposes of the comparison. It expressly replied in the negative to that question. The Court took the view that the normal value, the export price and the comparison were each subject to distinct rules [48] and that the various adjustments relating to the export price and the normal value had different purposes and were governed by different conditions. [49] On this basis, the Court, with reference to the applicable basic regulations, rejected the argument that expenses having no direct connection with sales should not be deducted from the normal value for comparison purposes, even if such a deduction was made in respect of the export price pursuant to Article 2(8)(b) (of all the basic regulations since Regulation (EEC) No 3017/79). [50]

78. In the *TEC* case, cited above, the Court had to address this question once again with regard to the SGA expenses, and it summarized its case-law on this point as follows:

'As regards the argument to the effect that the SGA expenses must be treated in the same way when the normal value is constructed as when the export price is constructed, it need only be pointed out that that argument was clearly rejected in the judgments of the Court of 7 May 1987 (in Cases 240/84, 255/84, 256/84, 258/84 and 260/84, concerning an anti-dumping duty on imports of ball-bearings, [1987] ECR 1809, 1861, 1899, 1923 and 1975), in which it is stated that there are three sets of distinct rules, each of which must be complied with separately for the respective purposes of determining the normal value, establishing the export price and making the comparison between the two.' [51]

79. I have no doubt that that pronouncement in principle applies in like manner to the profit included in the normal value which, as the Court will recall, cannot be adjusted under the new basic regulation (or under the former basic regulation — see the enumeration of the adjustment factors in Article 2(9)).

48 — See the judgment in Case 240/84 *NTN Toyo Bearing Limited and Others* v *Council* [1987] ECR 1809, at paragraph 13 et seq.

49 — Judgments in Case 255/84 *Nachi Fujikoshi Corporation* v *Council* [1987] ECR 1861, at paragraph 31 et seq.; in Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923, at paragraph 43 et seq.; and in Case 260/84 *Minebea Company Limited* v *Council* [1987] ECR 1975, at paragraph 41 et seq.

50 — See previous footnote.

51 — See also the judgment of the same day in Joined Cases 277 and 300/85 *Canon Inc and Others* v *Council* [1988] ECR 5731, at paragraph 37, and that in Joined Cases 273/85 and 107/86 *Silver Seiko Ltd and Others* v *Council* [1988] ECR 5927.

80. Advocate General Sir Gordon Slynn [52] correctly pointed out that the systematic division applied in that case-law also exists in the Anti-Dumping Code, as is clear from Article 2(4), (5) and (6). As far as the question of the adjustment of general expenses and profits upon sales by the exporter or by an independent company at a level of trade subsequent to the ex-factory level is concerned, these do not fall into any of the categories mentioned in the second sentence of Article 2(6) of the Code. This is clear from a comparison with the third sentence of the provision. The purpose of the adjustments provided for in the third sentence is 'the establishment of a sales price corresponding to normal commercial conditions'. [53] For this purpose, allowance must also be made 'for costs, including duties and taxes incurred between importation and resale, and for profits accruing'. In relation to the export price in the special case dealt with in the third sentence of Article 2(6) of the Code, those factors are to be applied along with the factors set out in the second sentence, as is shown by the use of the word 'also' in the third sentence. Accordingly, it follows that the '*conditions and terms of sale*' cover only those cost factors which are directly connected with sales (thus excluding *general costs*). It would appear that the applicants in the *ball-bearing* cases cited above also used this terminology. [54]

81. With regard to the *profits*, a comparison between the second and third sentences shows that these do not come under 'other differences affecting price comparability' either.

82. While it is open to the signatories to the Code to apply to the parties against whom any anti-dumping measures are directed more favourable treatment than that allowed by this interpretation, this does not preclude the Community authorities from making full use of the discretion which they have under the Code.

83. In the result, it would appear that Article 2(3)(b)(ii) of the new basic regulation is not contrary to Article 2(6) of the Anti-Dumping Code.

84. (3) As regards the arguments relating to the validity of that provision, which allege the infringement of general principles of law, these either object to its *actual application* to the applicant, regardless of *its applicability in time*, such as those based on the following principles:

— prohibition of discrimination;

— proportionality;

— fair and equitable application of Community law, from the point of view of legal certainty also;

— respect for vested rights;

— protection of legitimate expectations;

— estoppel,

52 — Opinion in the *TEC* case, cited above, at p. 5898.

53 — See, for example, the judgment in the *Minebea* case, cited above, at paragraph 42.

54 — See the judgment in the *Minebea* case, cited above, at paragraph 36.

or concern *the applicability of the contested provision in time* (see Article 19), such as those based on the following principles:

— legal certainty;

— non-retroactivity.

85. None of these arguments is thus directed against the validity of the provision in question as such. Solely for the purpose of completeness, I shall examine here the only point which, if one intended to interpret the arguments of the applicant differently, could be relevant to the question of validity, namely the question of *equal treatment.* It is well known that the Community principle of equal treatment not only precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified,[55] but also prohibits different situations from being treated in the same way unless such treatment is objectively justified.[56] The use of accounting data relating to the expenses and profits of undertakings other than the undertaking in question may be problematic from the point of view of the equal treatment of unequal situations if the undertaking to which that method is applied differs in important respects from the other undertakings considered and from competing undertakings which are also the subject of the anti-dumping proceeding. However, the provision here in question can be invalid on the basis of the abovementioned consideration only if, in such a case, it did not allow account to be taken of the prohibition of discrimination; this, however, is not the case. In the first place, the application of the contested method is, as I have already explained, subject to the requirement that it is reasonable in nature. It follows from the meaning and purpose of the anti-dumping legislation — to compensate for injury arising from conduct which affects equality of opportunity in matters of competition — that it can never be 'reasonable' to treat an undertaking in a discriminatory manner in the course of an anti-dumping proceeding. On the other hand, a provision of secondary Community law which is capable of being interpreted must, as a general rule, be interpreted within the meaning of higher-ranking Community law; only where such an interpretation is impossible is it possible to accept that the provision is contrary to higher-ranking Community law which renders it invalid.[57] Since the wording of the contested provision at any rate keeps open the possibility of using the figures of *comparable* undertakings or, if that is not possible or is not reasonable, of using another reasonable (non-discriminatory) method, I am unable therefore to discern any breach of the prohibition of discrimination.

86. (b) The applicant goes on to put forward a series of arguments concerning the applicability in time of Article 2(3)(b)(ii) of the new basic regulation and which are directed against *Article 19 of the new basic regulation.* It argues that that provision is

55 — Judgment in Joined Cases 117/76 and 16/77 *Ruckdeschel and Another* v *Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, at paragraph 7; most recently, judgment in Joined Cases C-267/88 to C-285/88 *Wuidart and Others* v *Laiteries Coopératives Eupenoises and Others* [1990] ECR I-435, at paragraph 13.

56 — Judgment in Case 13/63 *Italy* v *Commission* [1963] ECR 165, at part III (4) of the judgment; judgment in Case 8/82 *Wagner* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1983] ECR 371; and judgment in Case 106/83 *Sermide STA* v *Cassa Conguaglia Zucchero and Others* [1984] ECR 4209, at paragraph 28.

57 — See in particular the judgment in Case 218/82 *Commission* v *Council* [1983] ECR 4063; in Joined Cases 201/85 and 202/85 *Klensch and Others* v *Staatssekretär für Landwirtschaft und Weinbau* [1986] ECR 3477; and in Case 205/84 *Commission* v *Federal Republic of Germany* [1986] ECR 3755.

contrary to the principles of legal certainty and non-retroactivity. It argues that the new basic regulation, which is disadvantageous to it from the point of view of the construction of the normal value, introduced a new method during a current anti-dumping proceeding (namely the proceeding which led to the present case). The applicant takes the view that this constitutes a breach of the principle of legal certainty and that it is also retroactive. On those grounds, and in view of the absence of a statement of reasons, Article 19 of the new basic regulation is, in its opinion, invalid.

87. (aa) On closer inspection it appears that those arguments are based on two separate notions. First, the new basic regulation *makes it possible*, in circumstances such as those in the present case, to construct a normal value which is more disadvantageous for the exporter concerned than that calculated according to the method possible under the former basic regulation. Secondly, that the new basic regulation *imposes* a method and a type of calculation which the former basic regulation may have permitted but did not impose as compulsory in a case such as that of the applicant, so that the more favourable method applied to the applicant in the case concerning imports of electronic typewriters is in future automatically excluded.

88. Before examining each of those arguments, it is necessary to consider those two hypotheses.

89. (1) As far as the first hypothesis is concerned, I believe that it has been refuted by my remarks on the compatibility of the new provision with the Anti-Dumping Code.

90. I have already explained that each of the methods set out in Article 2(3)(b)(ii) of the new basic regulation is subject to the requirement of reasonableness. Under the former basic regulation, this criterion was the sole criterion to be applied for the purpose of determining the SGA expenses and profit (under the Code, there was a standard maximum limit for profit). In this respect, the former basic regulation and the Anti-Dumping Code were in full accord. The criterion of reasonableness is thus a thread which is discernible throughout all the legal bases, passing from the Anti-Dumping Code through the former basic regulation and on into the new basic regulation. While the new basic regulation lays down various methods of calculation and the order in which they have to be considered, the limits drawn in each case are those drawn by the requirement of reasonableness and these are also those which applied under the former basic regulation.

91. (2) I shall now examine the second hypothesis according to which the new provision imposes an obligation to apply the contested method in certain cases, such as the present, in which the former basic regulation also allowed for the application of the method used in the earlier proceeding (and which led to the termination of that proceeding).

92. It could be argued that this hypothesis is simply the converse of the first hypothesis. However, this is not entirely true. It is not

logically impossible that under the former basic regulation the method applied to Nakajima with regard to imports of electronic typewriters and the method used in the present case might both withstand the test of reasonableness, whilst the new basic regulation should narrow down the possibility of choice left by that test — this being the margin of discretion of the Community institutions — to the method which has been applied in this case.

93. In my view, however, the two methods are so fundamentally different from one another that only one of them can be reasonable for a particular situation. As I explained earlier, it follows from the meaning and purpose of the anti-dumping rules that the test of reasonableness is also meant to avoid discrimination between undertakings affected by anti-dumping measures. From that point of view, it cannot be possible to regard as reasonable the application of different methods to the same situation.

94. (bb) On that basis, I need only make a few remarks on the applicant's arguments.

95. (1) The contentions that the principles of legal certainty and non-retroactivity were infringed fail at the outset in view of the fact that Article 2(3)(b)(ii), the amendment of which is challenged by the applicant, remained unchanged with regard to its legal effects. No amendment took place affecting a proceeding already in progress, which could have given rise to problems with regard to legal certainty. Secondly, there is no retroactive effect either, since past situations were not regulated differently from the way in which they were regulated before the reform. This point is of particular importance for the definitive collection of the provisional duty (Article 2 of Regulation No 3651/88), which in my view is a retroactive measure, which means that if Article 2(3)(b)(ii) of the new basic regulation made the legal position of exporters worse in the respect complained of by the applicant, that provision would have had retroactive effect with regard to that measure, through Article 19.

96. In my view, those considerations are sufficient to hold that, *for the purposes of the present proceedings*, Article 19 of the new basic regulation must be regarded as being free from any substantive defect. Admittedly, the new basic regulation does introduce a number of other reforms, the repercussions of which I have not yet examined; if the new provisions should prove more unfavourable to exporters than the old provisions, this would give rise to the same problems as those which would have arisen if we had found such a worsened position under Article 2(3)(b)(ii). However, I take the view that in the context of Article 184 we need only examine the points which have been raised. That provision refers to a part of the review which takes place in direct actions, namely under Article 173 of the EEC Treaty. Logically, it does not provide for a general review of validity but for a review of 'inapplicability' on 'the grounds specified in the first paragraph of Article 173'. Any

party may 'plead' those grounds. The limitation of the review to the grounds pleaded, as it applies to Article 173 of the EEC Treaty, thus also extends to Article 184 of the Treaty.

97. (2) It is also from this perspective that the plea in law alleging insufficient reasoning must be examined. In my opinion, Article 19 of the new basic regulation did not require any special explanation in the preamble to that regulation. Since that provision does not create any problems of retroactivity or of legal certainty but, on the contrary, merely renders the detailed rules of the new basic regulation applicable to proceedings already in progress, it represents only a part of the overall rules introduced by the new basic regulation and falls within their general scheme.[58] Furthermore, the thirty-third recital in the preamble to the new basic regulation makes it clear that Article 2(3)(b)(ii) constitutes a clarification, which explains indirectly the function of Article 19 in so far as that function relates to Article 2(3)(b)(ii).

98. (2) The applicant also submits that the Council acted wrongly in *applying* to it the second method set out in Article 2(3)(b)(ii) of the new basic regulation.

99. In response to that point, I would like, as part of this review, to begin by examining only those grounds of challenge which relate to the construction of the normal value as such and which are not concerned with the comparison between the normal value and the export price. The arguments relating to the second point will be the subject of a separate examination (in section IV).

100. (a) In the context thus delineated, three arguments must first be examined together; they essentially relate to the same subject-matter and concern the exercise of the Council's discretion in the light of the Anti-Dumping Code and a number of general principles.

101. The applicant submits in the first place (as an alternative to the argument, already refuted, that the provision applied was itself contrary to the Anti-Dumping Code) that the application of that provision in the present case is contrary to the Anti-Dumping Code. It argues that its structural characteristics distinguish it from other undertakings, in particular from those which were specifically selected for the purpose of determining expenses and profits, and that, in view of those particular characteristics, the manner in which the Council proceeded by using the method in question was, contrary to the Anti-Dumping Code, 'unreasonable'. Secondly, the applicant claims that, when applying the provision in question, the Community institutions ought to have exercised their discretion in such a manner as to take account of the applicant's different structure. By failing to do so, the institutions acted in breach not only of the new basic regulation, which imposes an obligation to determine the normal value on a reasonable basis, but also of general principles of law, namely the principle of the fair and equitable application of Community law and the requirement of proportionality. Thirdly, the applicant argues that this

58 — See the judgment in Case 250/84 *Eridania Zuccherifici Nazionali SpA and Others* v *Cassa Conguaglia Zucchero and Others* [1986] ECR 117, at paragraph 37; judgment in Case C-27/89 *SCARPE* v *ONIC* [1990] ECR I-1701, at paragraph 27.

conduct is discriminatory and therefore contrary to the principle of equality.

102. First of all, I can confirm that the Council was correct in constructing the normal value (Article 2(3)(b)(ii) of the new basic regulation), since it is not disputed that the applicant does not sell printers on the Japanese market, which excludes the possibility of proceeding according to Article 2(3)(a) of that regulation, whilst the choice is left between the alternatives set out in points (i) and (ii) of Article 2(3)(b).

103. It follows from the structure of Article 2(3)(b)(ii) of the new basic regulation that the three methods specifically set out therein must be considered in the sequence indicated. Only when none of those methods can be applied is recourse to be had to the general provision providing that expenses and profits must be calculated 'on any other reasonable basis'.

104. In this connection, the Council rightly did not apply the first method set out,[59] since the applicant does not sell like products on the Japanese market. For the sake only of completeness, I would like here to explain the significance of this method, as I understand it, since the applicant considers its scope of application to be unclear. In my opinion, it is a method based on domestic sales of one or more models of a specific category of products; with reference to those sales, the normal value of other (exported) models of the same category can then be determined. In the German version the term used is not (obviously for this reason) 'gleichartige Ware' but a wider expression ('Waren gleicher Art'). In most of the other language versions, this difference in relation to 'gleichartige Ware'(see Article 2(12] is reflected only by the use of the plural; only the Danish and Italian versions do not make this distinction.

105. In those circumstances, the Council had to check (and in this regard its conduct cannot be subject to criticism) whether the second method objected to by the applicant had to be used. Following the opinion of the Commission the Council decided that it did. I *cannot* agree with that view. By so acting, the Council infringed the rule set out in Article 2(3)(b)(ii) that the SGA expenses and profits should be determined on a reasonable basis.

106. In this regard, it is essential to examine in greater detail the meaning and purpose of the construction of the normal value and to examine the consequences which that construction entails as far as the test of reasonableness is concerned.

107. I have already pointed out that in the cases concerning imports of electronic typewriters the Court took the view that the construction of the normal value was designed to determine the selling price at

59 — 'The amount for selling, general and administrative expenses and profit shall be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of like products on the domestic market.'

which a product would be sold if it were sold in its country of origin or in the country of exportation. While that approach is undoubtedly appropriate in many cases, it does not, in my opinion, call for unlimited application.

108. In order to explain that proposition, I would like to examine the aforementioned pronouncements of the Court by putting them in the context in which they were made.

109. In the cases concerning imports of electronic typewriters, the Court had to rule on three different situations. In the *Brother, Canon and Silver Seiko cases,* cited above, for those models which the exporters sold on the Japanese market, the normal value was determined according to Article 2(3)(a) and for the other models it was constructed. In the latter case, the SGA expenses were determined by taking account of the costs of the distribution companies dependent on the three producers mentioned. Profits were based on the margins which had been determined in respect of models sold on the domestic market.

110. In the *TEC* case, although the applicant also had a dependent distribution company, it did not distribute electronic typewriters on the Japanese market, either through this dependent company or through any other channels. However, a number of other electronic goods which, according to TEC, also included 'office automation equipment', were sold on the Japanese market. The distribution company sold cash registers, electronic scales and other products. In those circumstances, the SGA expenses were determined by reference to the expenses of the distribution company and the profits were determined on the basis of the profits made by the Canon company on sales of electronic typewriters on the Japanese market through the intermediary of its distribution company.

111. In the *Sharp* case,[60] the applicant sold only very few electronic typewriters on its domestic market. However, it apparently sold other products on that domestic market although the Report for the Hearing does not indicate the extent of the volume of such sales. In common with other producers who had brought proceedings against the regulation introducing a definitive duty in that case,[61] the applicant owned a dependent distribution company. In its case, the SGA expenses and profits were determined as in the *TEC* case.

112. As that survey shows, the degree of involvement of the aforementioned typewriter manufacturers on the Japanese market was different — it was much greater in the case of Brother, Canon and Silver Seiko and less pronounced in the case of TEC and Sharp. While in the cases of TEC and Sharp, a distribution company was their only sales structure for the Japanese market, Brother, Canon and Silver Seiko also sold electronic typewriters on the Japanese market, even if such sales did not involve all the models exported to the Community. This distinction is also reflected in the considerations adopted by the Court in its

60 — Judgment in Case 301/85 *Sharp Corporation* v *Council* [1988] ECR 5813.

61 — Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (OJ L 163, p. 1).

judgments in *Brother* and *Sharp*. At paragraph 19 of its judgment in *Brother* and paragraph 10 of its judgment in *Sharp*, the Court points out that there would be discrimination between manufacturers if the normal value of products, the manufacturer of which sells like products on the domestic market of the country from which they are exported, was constructed in a manner different from the normal value of the products which the manufacturer does not sell on the domestic market.

113. It seems appropriate at this point to establish the connection between the case-law cited and the meaning and purpose of the construction of the normal value under the new basic regulation and to expand on the considerations into which I have entered elsewhere.

114. Depending on the facts on the basis of which the normal value is determined, the economic situation is different in each case, so that the economic justification for the introduction of anti-dumping duties will also differ from case to case.

115. Pursuant to the main criterion provided for in Article 2(3)(a) of the new basic regulation, 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 is higher than the export price. In such a case it is clear that the manufacturer (or exporter) concerned discriminates between two markets (the domestic market and the export market in question). It is immediately obvious that such conduct does not accord with the idea of fair competition, for such a situation gives rise to the danger that the producer or exporter will finance the low prices on the export market through the high prices on its domestic market, thereby ensuring an unfair advantage vis-à-vis other competitors operating on the export market.

116. If, however, 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 (Article 2(3)(b)(ii) of the new basic regulation), the choice has to be made between two subsidiary criteria. Under the first of these (point (i)), the normal value is the comparable price of the like product when exported to any third country. This case is essentially distinguishable from that of Article 2(3)(a) only in so far as the discrimination is not found to exist between the domestic market of the manufacturer or exporter and the export market concerned, but between that export market and another export market. In this case, the economic consideration which makes the introduction of an anti-dumping duty appear justified is thus very similar to that in the main case envisaged.

117. I now come to the construction of the normal value. The applicants in the cases concerning imports of electronic typewriters took the view, as the Court will recall, that the constructed normal value had to be the reasonable value of the exported product. From an economic point of view, that

approach does not strike me as being implausible, for in the course of such an examination it is ascertained whether the exporter sells its products on the export market at prices which cover all expenses and include a reasonable profit margin. If the prices are below that threshold, the exporter thus creates for itself an opportunity to eliminate from the export market the competitors present on it (without its lower prices being justified in economic terms). Subsequently, depending on the degree to which it has succeeded in eliminating other competitors from the market, it can subsequently compensate for the disadvantages of this pricing policy by raising its prices once again. It is clear that, in situations of this kind, anti-dumping law is designed to provide a compensatory mechanism.

118. However, for the construction of the normal value the Court looks at a situation which would exist if the product were sold on the domestic market of the exporting country. In doing so it seeks to bring the result of the construction of the normal value as close as possible to the normal value under Article 2(3)(a). However, in such cases the economic justification for the imposition of an anti-dumping duty underlying Article 2(3)(a) does not always exist. A trader who does not sell on the domestic market cannot discriminate between that market and the export market and procure unjustified advantages from such discrimination. This, however, does not mean that the approach adopted in the case-law cited is always impossible to follow in such cases. In my opinion, the construction of the normal value should follow the scheme set out in Article 2(3)(a) where the situation in question *is similar* to the case covered by that provision. The main focus must be on the *possibilities* for the undertaking in question to bring about at any time the situation in Article 2(3)(a) or to prevent the existence of dumping within the meaning of that provision from being found because certain models belonging to a uniform category are not sold on its domestic market, even though it has the possibility of effecting such sales (see the third sentence of Article 2(3)(b)(ii) of the new basic regulation). This approach can also be envisaged where the undertaking sells on its domestic market products which, while technologically related to the exported products, still cannot be regarded as 'like' or 'similar' products [62] (see the sixth sentence of Article 2(3)(b)(ii) of the new basic regulation). However, I do not consider it acceptable to determine the normal value by reference to a price which would exist in the case of sales of like products on the domestic market if such sales, or at any rate sales in the same sector, appear to be a purely hypothetical possibility. In such a case the Community authorities must, if they wish to proceed on the basis of this method, await further developments and if necessary introduce an anti-dumping duty at a later stage.

119. Viewed from this perspective, it can no longer be surprising that in the *Brother*, *Canon* and *Silver Seiko* cases the Court confirmed the approach chosen by the Council for the construction of the normal value. For those manufacturers sold electronic typewriters on the Japanese market through an existing distribution structure (a dependent distribution company). By virtue of the existing structures, those manufacturers could at any time have placed on the market other of the exported models if that

62 — See footnote 104.

had made economic sense. The SGA expenses and profit were logically determined on the basis of sales actually realized on the Japanese market.

120. The need to adopt the same approach towards TEC and Sharp (in respect of SGA expenses) is less evident but is, nonetheless, explicable. TEC, after all, had its own distribution structure and sold on the domestic market articles which it described as 'office automation equipment'. The sales in this case were in the same sector and there was a sales structure which could have been used for sales of electronic typewriters.

121. In the case of Sharp, there were negligible sales of electronic typewriters on the domestic market through a distribution company dependent on the parent company, and also negligible sales of other products. Here again, it would not appear to be fundamentally wrong to determine the normal value as if there had been a sufficient volume of sales of electronic typewriters on the Japanese market, particularly if (on this point, however, the Report for the Hearing sheds no light) the volume of sales of electronic typewriters affected by Sharp itself in Japan was only slightly below the insignificance threshold. In any event, Sharp could have attempted to increase sales through its distribution structure.

122. It is not appropriate here, nor is it necessary, to discuss in detail each of the individual cases then before the Court or to examine the application of the method by which the normal value is constructed on the basis of a hypothetical sale of the product in the country of origin or the exporting country. In this case, we have a different situation in which there is no justification for an approach of that kind: the applicant does not sell any needle printers on the Japanese market, nor does it have a distribution structure which it can use for that purpose. According to the Council, such sales would, however, presuppose a structure such as that of the other undertakings referred to for the calculation of the normal value (a distribution company having the appropriate staff and material assets).

123. Such a situation does not correspond to the basic situation envisaged in Article 2(3)(a) of the new basic regulation nor is it in any respect similar to it. If we consider the case with sole regard to that basic situation, there appears to be no discrimination between the Japanese market and the Community market or possibility of it being created in the short term nor is any abuse of organizational facilities, concealment or circumvention conceivable.

124. In this case, Nakajima would suffer discrimination vis-à-vis the other undertakings if it were to be treated in exactly the same manner as those other undertakings; this, as I have already pointed out, would

render the measure unreasonable and contrary to the new basic regulation. As regards the higher SGA expenses of the other undertakings, which have their own sales structure, these do not, and cannot, arise in the case of Nakajima. Similarly, there is no connecting factor to justify imputing to the applicant the profit determined in respect of sales by other manufacturers on the domestic market.

125. At this juncture it might be asked whether this approach leaves any scope for the application of the method contested by the applicant, that is to say the second method set out in Article 2(3)(b)(ii) of the new basic regulation. The result I have reached here might appear to contradict my original finding that this second method is compatible with the requirement of 'reasonableness', as it is laid down in the Anti-Dumping Code. And yet the profit margin of other undertakings was included in the calculation of the normal value in the *Sharp* and *TEC* cases. This appeared to be permissible for the reasons already given. The construction of the normal value in accordance with this method can also be envisaged where domestic sales are made at a loss. In such a case, Article 2(4) of the new basic regulation provides that the normal value in particular may be constructed and I then see no objection to the use of the method contested by the applicant.

126. Nakajima, obviously in response to the Council's point that the applicant's arguments have already been refuted by the Court's decisions on anti-dumping measures against imports of electronic typewriters, attempted to demonstrate at the hearing, aided by figures relating to sales of typewriters in Japan, that even with its simple structure it could still sell large quantities of needle printers on its domestic market.

127. Disregarding the procedural issue of late submission, I also take the view that those figures do not have any evidentiary value since they consist of absolute sales figures with no indication of market shares. Even if the applicant's line of argument could be pursued, to ascertain penetration of the market in typewriters in this way and then go on to deduce a corresponding penetration of the market in printers and, with the help of this figure, to arrive at the absolute (possible) sales figures for the applicant in the printer sector would in any event be out of the question. Besides, the figures cited at the hearing exhibit considerable variations from one year to the next, which would suggest that the sales in question were sporadic. In respect of electronic typewriters and the period covered by the investigation in the anti-dumping proceeding in question (from 1 April 1983 to 31 March 1984 — see recital 6 of Regulation No 3643/84)[63] the applicant also clearly admitted that its sales were sporadic in nature and thus that they were not suitable as a basis on which to construct the normal value.

128. Finally, by far the largest proportion of sales since 1984 relates to *mechanical* typewriters, which are not related to printers either technologically or functionally — a

63 — OJ 1984 L 335, p. 43.

factor which increases yet further the difficulty in evaluating possible sales of a certain product by drawing certain conclusions from sales of another product.

129. The interim conclusion is therefore that the second method set out in Article 2(3)(b)(ii), to which the applicant objects, should not have been used because that approach was not reasonable, contrary to the first and second sentences of that provision. Since the arguments relating to the breach of the Anti-Dumping Code and of general principles of law touch on precisely the same problem, it is not necessary to examine them separately.

130. It follows from my arguments regarding the sales of typewriters that the third method mentioned cannot be taken into consideration either, so that reference must be made in the final resort to the general clause in Article 2(3)(b)(ii), which provides for the normal value to be determined 'on any other reasonable basis'. Under that provision, the normal value was to be calculated on the basis of the actual expenses incurred upon exportation and a reasonable export profit margin in order subsequently to establish, by means of a comparison with the export price, whether that price was a dumping price or not (if it is not a dumping price, it being economically reasonable).

131. Since this was not done and such an approach would, according to the undisputed submissions of Nakajima, have led to a result more favourable to it, *the contested regulation must be annulled to the extent sought.*

132. This conclusion would be the same even if one were to regard the evidence offered by the applicant at the hearing as having been adduced. For this would mean that, upon the construction of the normal value on the basis of domestic sales which would then come into consideration, it would in any event be necessary to include the applicant's unaltered SGA expenses in the normal value and to leave out of account the higher SGA expenses of other Japanese undertakings. This method would indeed be the one which is provided as the third possibility in Article 2(3)(b)(ii) of the new basic regulation.

133. Even in this case, the application would have to be *upheld* without its being necessary to undertake any separate examination of the other arguments concerning the same issue.

134. In view of that *conclusion* I could conclude my Opinion at this point. For the sake of completeness, however, it is also necessary to examine the applicant's other submissions in case the Court should not share my view.

135. (b) The applicant also claims in this context that the Council misused its powers (the final ground referred to in the first paragraph of Article 173 of the EEC Treaty).

136. Before I examine the arguments submitted on this issue, I would like briefly to recall the definition of misuse of powers under Community law.

137. The primary instance of a misuse of powers is where Community authorities exercise their powers for purposes other than those provided for in the relevant legislation. [64] According to the case-law on Article 33 of the ECSC Treaty, powers are also misused where, through want of foresight or serious lack of care amounting to disregard for the purpose of the law, the authority in question pursues objectives other than those for which the powers provided were conferred upon it. [65]

138. In my view, the difference between those two alternatives lies in the fact that in the first case the Community authority acts intentionally whereas in the second case it acts with such a serious degree of negligence that its action is tantamount to being intentional. [66]

139. In order to make a submission based on misuse of powers succeed, the applicant must submit objective, relevant and consistent facts which point to such conduct on the part of the authorities. [67]

140. Once those principles are applied, the possibility of a misuse of powers can be excluded in this case.

141. If I have correctly understood the lengthy arguments advanced by the applicant on this point, it is asserting that two objectives, not covered by the (former or new) basic regulation, were pursued:

— the deliberate infliction of injury upon the applicant;

— the avoidance of proceedings in which other Japanese manufacturers might rely on the present case as a precedent.

142. The applicant first of all takes the view that the conduct of the Community authorities leads to the conclusion that they did not exercise their discretion. It contends that the Community authorities ignored the evidence produced by the applicant about its particular structure. They did not reply to the applicant's letter containing an explanation of its special structure or to the applicant's request made in that letter that it explain the method chosen for the calculation of the normal value. [68]

143. First of all, as far as the complaint of a failure to examine evidence is concerned, it must be borne in mind that the Community authorities were already quite familiar with that structure as a result of the proceeding concerning electronic typewriters. As I have already pointed out, the Council's error does not lie in an inaccurate assessment of

64 — Judgment in Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1966] ECR 103, at p. 117; judgment in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, at paragraph 30.

65 — Judgment in Case 8/55 *Fédération Charbonnière de Belgique* v *High Authority* [1954 to 1956] ECR 245, at 257; judgment in Joined Cases 3/64 and 4/64 *Chambre Syndicale de la Sidérurgie Française and Others* v *High Authority* [1965] ECR 441, at 454.

66 — See Daig, *Nichtigkeits- und Untätigkeitsklagen im Recht der Europäischen Gemeinschaften*, 1985, p. 175.

67 — See footnote 64.

68 — These contentions refer to the applicant's letter of 2 September 1988 addressed to the Commission.

the facts but rather in the legal consequences which it drew from the uncontested facts.

144. With regard to the other two arguments, I cannot see how the failure to reply to the applicant's letter of 2 September 1988 can constitute evidence of a misuse of powers as claimed by the applicant. I would refer in this connection to Article 7(4)(c) of the new basic regulation and to my comments at paragraph 28 of this Opinion.

145. As regards the applicant's assertion that the Council incorrectly described the disputed method of calculation as the 'normal practice' of the Commission, I also see no evidence of a misuse of powers. I understand by this argument that the method applied to the other undertakings in the proceeding concerning the importation of electronic typewriters, which then came to be considered before the Court, ought now to be applied to the applicant.

146. Finally, with regard to the argument that in a letter of 13 February 1989[69] the Commission based the calculation of the normal value on Article *2(4)* of the new basic regulation, I would regard the statement in question, which undoubtedly refers to an irrelevant provision, as a manifest drafting error. Moreover, it is entirely unclear what conclusions should be drawn from a *Commission* letter, sent long after the contested regulation had been adopted, with regard to a misuse of powers by the *Council.* It follows from all the foregoing that the ground of challenge alleging a misuse of powers must be rejected.

147. (c) The applicant then goes on to submit a number of other arguments relating to the principle of legal certainty.

148. (aa) In this connection, it relies essentially on the fact that the method on which the present measure was based was not applied to it in the anti-dumping proceeding relating to electronic typewriters. It points out that in that proceeding account was taken of its special structure. That had been the reason for the termination of the proceeding.[70] The Community authorities had there expressly recognized that its structure was different. The applicant refers on this point to the grounds given in recital 5 in the preamble to the decision terminating the above proceeding, which state *inter alia* as follows:

'Contrary to all other Japanese firms involved in the proceeding concerning electronic typewriters from Japan, [Nakajima] was basically a factory only without a conventional sales force or sales structure for any of the very limited number of products it manufactured. Nakajima only sold to a handful of customers world-wide.

It was therefore considered unreasonable to apply to Nakajima the same profit margin

69 — Annex K to the application.

70 — Decision 86/34/EEC, cited above at footnote 11.

as that referred to in Regulation (EEC) No 1698/85, which was determined for a firm with completely different characteristics.

No other exporter involved in this proceeding for which a profit margin on its domestic sales could be established was structured in a way comparable to Nakajima.

...

Nakajima submitted further evidence with regard to certain other aspects of the normal value computation, especially cost elements, direct and indirect labour and research and development. After examination, the data submitted were found acceptable.'

149. The applicant also relies on the Council's argument in the *TEC* case; this is summarized as follows in the Report for the Hearing:[71]

'With regard to the profit margin finally determined for Nakajima in the Commission's Decision of 12 February 1986, the Council emphasizes that, as was clearly explained in that decision, Nakajima was unlike any of the other companies concerned since it was basically a factory manufacturing a limited number of products which were sold to a limited number of customers and it lacked a conventional sales force or sales structure. One company's profit margin cannot be used for constructing another company's normal value unless the two companies are broadly similar. Those findings have not been contradicted by the applicant.'

150. Finally, according to the applicant, it also follows from the judgment delivered in the case cited that the Court regards the different treatment accorded to the applicant as acceptable. It refers to paragraph 18 of this judgment, which provides as follows:[72]

'In that connection, it must be observed that, since Nakajima's exclusion from the number of companies subject to a definitive anti-dumping duty stems from the aforesaid Decision 86/34, discrimination in favour of Nakajima could not, even if it were established, lead to the annulment of the regulation imposing a definitive anti-dumping duty on TEC, which was adopted on the basis of findings correctly made in the course of the anti-dumping investigation and in accordance with the rules laid down by Regulation No 2176/84.'

151. In the proceeding in the present case, the Council explained that the method was changed because experience had shown that the method applied in this case is more appropriate. So far as the judgment in the *TEC* case is concerned, the Council takes the view that in that case the Court did not rule on the method applied to the applicant at that time but only on the anti-dumping measures adopted in respect of the applicants in that case.

71 — [1985] ECR 5855, at 5865.

72 — See also the other judgments delivered on 5 October 1988 in Joined Cases 273/85 and 107/86 *Silver Seiko Limited and Others* v *Council* [1988] ECR 5927, at paragraph 55, and in Case 301/85 *Sharp Corporation* v *Council* [1988] ECR 5813, at paragraph 22.

152. (bb) Of these arguments, I would first of all like to address the point concerning the interpretation of the judgment in the *TEC* case. In this regard, I can only concur with the Council. The wording of paragraph 18 of the *TEC* judgment makes it quite clear that it is only the measure contested in that case which the Court considered to be unobjectionable and that it expressly left open the question of the legality of the termination of the proceeding in respect of Nakajima.

153. (cc) Next, it is necessary to examine the various submissions based on the principle of legal certainty.

154. (1) First, the applicant contends that there has been an infringement of the principle of the *protection of vested rights*. It is clear from the case-law that such a right does exist under Community law.[73] The Court has also treated the freedom to engage in a trade or profession as a right protected in the legal order of the Community.[74]

155. However, in that respect I cannot identify any infringement whatever of that right in this case.

156. If the Court should follow the view I have taken in this case with regard to the construction of the normal value, the judgment delivered in the *TEC* case would then, in principle, also be correct from this point of view (subject to the details of the calculation). The basis requiring the normal value in this case to be constructed in the way sought by the applicant would then, however, not be the result of a vested right acquired by virtue of an earlier decision but would reside in the (new) basic regulation.

157. If, on the contrary, the Court should take the view that the treatment accorded to the applicant in the earlier proceeding was unlawful, there can likewise be no question of a vested right.

158. The question really only arises if it is assumed that both methods are covered by the discretion of the Community authorities. Even if this is so, however, the mere fact that in a separate earlier proceeding the Community authorities, in the exercise of their discretion, applied the relevant provisions in a certain way or made specific comments on this subject in the course of proceedings before the Court does not create a right, as regards the freedom to exercise a trade or profession, to expect those same authorities (again) to exercise their discretion in the same manner in a later case. The correctness of this view is confirmed by three points of guidance provided by the case-law. In the first place, the Court made it clear in its judgments in *Hauer* and *Nold*, cited above, that the right to exercise a trade or profession must be considered in the light of the social function of the protected activity. For that reason, rights of this type were in general protected only subject to limits imposed in the public interest. It also appeared to be justified under Community law to impose on those rights certain restrictions justified by the Community objectives serving the general good, provided that the rights were not

73 — Judgment in Joined Cases 7/56 and 3/57 *Algera and Others* v *Common Assembly* [1957 and 1958] ECR 39, at 55; judgment in Case 15/60 *Simon* v *Court of Justice* [1961] ECR 115, at 123; judgment in Case 54/77 *Herpels* v *Commission* [1978] ECR 585, at paragraph 34 et seq.

74 — Judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491; judgment in Case 44/79 *Hauer* v *Land Rheinland-Pfalz* [1979] ECR 3727.

affected in their essential aspects. So far as the protection of undertakings in particular was concerned, it could not in any case be extended to cover mere commercial interests or expectations, the uncertain nature of which was an integral part of any economic activity.

159. In the area of the organization of agricultural markets, the Court accordingly concluded that traders could not claim a vested right to the maintenance of an advantage which they derived from the establishment of the common organization of the markets and which they enjoyed at a given time.[75] Those authorities, which are based on the wide margin of discretion which the Community authorities enjoy under the common agricultural policy, may also be applied to the Community's anti-dumping practice, for the Court has also accepted that the Community institutions have a comparable discretion in this sphere;[76] if the two methods here in question are covered by the discretion of the Community authorities, this would be an instance of the exercise of that wide discretion.

160. Two other lines of authority bear this out. First, it seems to me that the case-law logically proceeds on the basis that the legal problems connected with the conduct adopted by traders as a result of previous decisions by Community authorities must be treated, not from the aspect of vested rights, but from the aspect of the protection of legitimate expectation,[77] especially as regards the anti-dumping law of the Community.[78] And, secondly, the main sphere in which the Court has looked closely at vested rights as an object worthy of protection is that in which (advantageous) administrative measures are withdrawn.[79] I accordingly take the view that the change in the way in which the Community authorities exercised their discretion does not signify a breach of a vested right of the applicant.

161. (2) The next point to be examined is the question raised by the applicant as to whether or not the exercise of discretion in this case (if there was a discretion of the kind suggested) infringed the *principle of the protection of legitimate expectation* which has incontestably been part of Community law since the judgment in *Töpfer*.[80] However, in this respect too, I cannot concur with the applicant's view, even if both methods were to be covered by the discretion of the Community authorities.

75 — Judgments in Case 230/78 *Eridania-Zuccherifici Nazionali and Another* v *Minister for Agriculture and Forestry and Others* [1979] ECR 2749, at paragraph 22; *Biovilac* v *European Economic Community* [1984] ECR 4057, at paragraph 23; in Joined Cases 133/85 to 136/85 *Rau and Others* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2289, at paragraph 18; and in Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, at paragraph 34.

76 — Judgment in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, at paragraph 26; judgment in Case 264/82 *Timex Corporation* v *Council and Commission* [1985] ECR 849, at paragraph 16.

77 — See the judgments in Case 245/81 *Edeka Zentrale AG* v *Federal Republic of Germany* [1982] ECR 2745, at paragraph 27; in Case 52/81 *Faust* v *Commission* [1982] ECR 3745, at paragraph 27; in Joined Cases 424/85 and 425/85 *Frico and Others* v *Voedselvoorzienings In- en Verkoopbureau* [1987] ECR 2755, at paragraph 33; and in Case C-350/88, cited above at footnote 75, at paragraph 33.

78 — See the judgments in Case 260/84 *Minebea* v *Council* [1987] ECR 1975, at paragraph 28 et seq.; in Case 258/84 *Nippon Seiko KK* v *Council* [1987] ECR 1923, at paragraph 34; and in Case 256/84 *Koyo Seiko Company Limited* v *Council* [1987] ECR 1899, at paragraph 20.

79 — In addition to the judgments cited in footnote 73, see also the judgments in Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 53; in Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253; in Case 159/82 *Verli-Wallace* v *Commission* [1983] ECR 2711; and in Case 253/86 *Sociedade Agro-Pecuaria Vicente Nobre LDA* v *Council* [1988] ECR 2725.

80 — Judgment in Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019, at paragraph 19.

162. The Council's argument that no protection can be afforded to the expectation that the previous way of exercising the discretion concerned will be maintained must be accepted in this case. If the Community authorities enjoy a wide margin of discretion, then, according to established case-law, [81] the parties concerned are not entitled to entertain an expectation that the method originally chosen, which may be changed by the institutions pursuant to their powers, will be maintained. In other words, the exercise of a particular discretion in relation to a (previous) factual situation is not a criterion recognized in law in order to protect the legitimated expectations of traders. For the sake of completeness, I would point out that the principles laid down by this case-law are not particular to anti-dumping law but are based on a general legal principle which has its place in the sphere of external trade as well as in that of agricultural policy, and which has already been mentioned in the law governing officials. [82]

163. The applicant in the present case accordingly cannot rely on Decision 86/34, since the discretion which was exercised in that decision relates to quite different facts in a separate proceeding, and for that reason cannot form the basis for any legitimate expectation as recognized in the case-law cited above.

164. No other factors on which the applicant might base a legitimate expectation are discernible. As it has itself admitted, in this case the same method was employed throughout the entire proceeding. Even transactions which may have been entered into in reliance on the original interpretation create no right to protection of expectations. This might be possible only if the applicant had entered into an obligation towards the Community authorities to perform such transactions. [83]

165. The ground of challenge alleging a breach of the principle of the protection of legitimate expectation cannot therefore be upheld.

166. (3) Finally, the applicant considers that an estoppel operates on the ground that it was misled by the treatment accorded to it during the earlier anti-dumping proceeding.

167. So far as the application of this principle in Community law is concerned, the Court has hitherto dealt only with its international law aspect and not with its administrative law aspect, which concerns us here. [84]

168. However, even if that principle, as defined by Advocate General Warner [85] and adopted by the applicant, were part of Community law, it could not be said that it has been breached in this case. As I have already explained, the relationship created in the earlier proceeding between the Community and the applicant must be distinguished from the relationship at the core of the present case. Since the Community authorities applied the same method from the start of this proceeding,

81 — See footnotes 77 and 78 above.

82 — See the opinion of Advocate General Sir Gordon Slynn in Case 108/84 *De Santis* v *Court of Auditors* [1985] ECR 947, at 952.

83 — See, in detail, my Opinion in Joined Cases 63/84 and 147/84 *Finsider* v *Commission* [1985] ECR 2857, at 2866.

84 — See the judgment in Case 230/81 *Luxembourg* v *European Parliament* [1983] ECR 255, at paragraph 22 et seq.; judgment in Case 44/84 *Hurd* v *Jones* [1986] ECR 29, at paragraph 57 et seq.

85 — Opinion in Joined Cases 63/79 and 64/79 *Boizard* v *Commission* [1980] ECR 2975, at 3002.

there can be no question of the applicant's being misled in this regard.

169. Consequently, no estoppel could operate in any event.

170. (3) The *conclusion* to be drawn from all the considerations set out above is that although in this case the legal basis for the calculation of the normal value (Article 2(3)(b)(ii) of the new basic regulation) cannot be criticized, the actual application of that method by the Council was none the less contrary to the regulation. On the other hand, the other grounds challenging the construction of the normal value must be rejected.

III — *Export Price*

171. The applicant does not make any submission in respect of the determination of the export price.

IV — *Comparison between the normal value and the export price*

172. The applicant considers the comparison drawn between the normal value and the export price to be unlawful for two reasons:

173. *1.* In the first place, the applicant takes the view that by the manner in which it applied the new basic regulation the Council infringed Article 2(6) of the Anti-Dumping Code. According to the applicant, the Council failed to compare the constructed normal value and the export price at the same level of trade. The export price was established 'ex-factory', whereas the normal value was calculated on the basis of the distribution or resale price with the aid of a constructed value, taking into account the SGA expenses and profits of third undertakings which sell at a level subsequent to the ex-factory level. The fact that the adjustments made were restricted to the selling costs represented by commissions and salaries paid to sales staff while all the other general and sales expenses and the portion of profits contained in sales effected at a stage subsequent to the ex-factory stage were maintained means that an export price which is truly 'ex-factory' is compared with a normal value which is not sufficiently adjusted for it to be at the same level of trade.

174. Given my view on the determination of the constructed normal value, this ground of challenge is nugatory since for the normal value a figure calculated in a completely different manner would have to be used in the comparison in any case. If, on the other hand, the determination of the constructed normal value is to be regarded as correct, then this ground of challenge must be dismissed. With regard to this point, reference may generally be made to my argument regarding the validity of Article 2(3)(b)(ii) of the new basic regulation viewed in the light of Article 2(6) of the Anti-Dumping Code. It remains to be added that at no stage during the entire administrative procedure did the applicant request any necessary adjustments to be made — a point which, as the Council and Commission have maintained, was not disputed by the applicant during the written or oral procedure. In the light of Article 2(9)(b) of the new basic regulation, the question might therefore be asked whether,

and in which cases, the Council must make adjustments of its own accord or only upon request. In any event, however, the applicant has not adduced any evidence to suggest, in the light of my argument concerning the validity of the new version of Article 2(3)(b)(ii), that adjustments going beyond those which the Council undisputedly made of its own accord were necessary.

175. 2. The applicant goes on to argue that the comparison between the normal value and the export price was not carried out correctly because the Community authorities drew an inaccurate distinction between OEM and non-OEM products.[86] Since all its products were sold ex-factory, the attribution of distribution costs amounts to a factual error which is likely to distort the comparison and, consequently, the determination of the dumping margin. So far as OEM sales in particular are concerned, the fact that distribution costs of vertically-integrated undertakings are taken into consideration results in an overestimation of the applicant's SGA expenses. It argues that those expenses, of which the Community authorities are aware by reason of on-site checks, are lower than 5%, whereas the Council applied to it an amount in excess of 15%.

176. In reality, this problem does not relate to the comparison between the normal value and the export price, but rather to the determination of the normal value. The applicant admits that in the case of OEM sales the comparison was made at the same level of trade. In advancing its argument the applicant merely seeks to have its own actual expenses included in the normal value, and not the expenses which it would incur if it were present on the Japanese market. As I have explained, this view is indeed correct but does not as such relate to the comparison between the normal value and the export price.

177. Furthermore, if it is assumed that the normal value was correctly constructed, the applicant has failed to refute the Council's argument that own-brand sales normally entail expenses higher than those entailed by sales of printers as OEM products, which justifies the distinction and, as far as the comparative process is concerned, results in a realistic comparison of the two groups of sales (in the exporting country and in the importing country) (see, for example, Article 2(10)(c)(iv)). Furthermore, apart from the aspect concerning the construction of the normal value which I have just dealt with, the applicant also did not dispute the choice of the other undertakings selected for the purpose of the calculation.

178. In those circumstances, the applicant's argument on this point cannot be accepted either. Consequently, the two grounds of challenge concerning the comparison between the normal value and the export price must be rejected.

V — *Injury*

179. On this issue too, I submit my views only in the event that the Court decides not

86 — Products sold to independent customers who resell them under their own brand names (see recital 27 of the contested regulation).

to uphold the application on the question of the determination of the normal value.

180. *1.* By one set of objections the applicant first criticizes the fact that the contested regulation (at recitals 41 to 46) defined the four members of Europrint as constituting the '*Community industry*'. In the considerations set out in recital 45 of the contested regulation, the Community authorities made a number of incorrect findings of fact and incorrect assessments. The Community authorities thus proceeded from the wrong assumption that all four members of Europrint together satisfied the conditions laid down in Article 4(5) of the basic regulation; according to the applicant, this meant that in the aggregate the determination of injury was incorrect.

181. (a) The applicant submits first of all that the undertakings Mannesmann-Tally and Philips ought to have been excluded from the group of producers within the meaning of Article 4(5) of the basic regulation. In this connection, it cites figures from a study carried out by the firm of Ernst & Whinney Conseil. That study was commissioned by the Committee of Japanese Printers for the purposes of this anti-dumping proceeding and deals with aspects of the question of injury. Those figures show that the volume of OEM imports in relation to own production was 75.8% for Mannesmann-Tally and 259.27% for Philips. In view of that very high percentage of OEM imports, these could no longer be treated as forming a legitimate measure of self-defence on the part of the undertakings concerned, as is asserted in recital 41 of the contested regulation.

182. That complaint thus refers to the determination of the facts upon the application of the first indent of Article 4(5) of the basic regulation, which provides as follows:

'When producers are related to the exporters or importers or are themselves importers of the allegedly dumped or subsidized product the term "Community industry" may be interpreted as referring to the rest of the producers'.

183. In my opinion, however, the calculations made by the applicant do not cast any doubt on the correctness of the percentages mentioned in recital 45 which, according to the Council, were taken from the accounts of the three members of Europrint engaged in importing OEM products.

184. First of all, I consider it important that Article 4(5) of the basic regulation does not have regard to the share of the undertakings involved of sales on the Community market but to 'Community producers as a whole' of the relevant product.[87] The reason for this would appear to be that the economic disadvantages which may arise in the area of the dumped imports (in this instance, the Community) are not only a question of the market share of those undertakings whose fluctuations are taken into account pursuant to Article 4(2)(c), but also of tax payments — depending on the extent of production (measured in terms of overall production) — , decongestion of the labour

87 — We should note in passing that the provisions applied here are almost identical in wording to the corresponding provisions of the Anti-Dumping Code (see Article 4(1), introductory sentence and point (i), of that Code).

market and other advantages for the economy.

185. Accordingly, in my view, the Council did not exceed its discretion when (as is clear from recital 45 of the contested regulation) it had regard, upon deciding to include the three importers in the Community industry, to the proportion which OEM products — to a certain extent as a substitute for own products — represented in the overall figure for own products and OEM products.

186. The figures submitted by the applicant, however, concern only the relationship between sales on the Community market of OEM products and own products.

187. It is obvious that such a calculation may produce results which are quite different from those obtained by the Council. For not every unit produced will necessarily be sold and not every sale will necessarily be on the Community market. Thus, we know from the Ernst & Whinney study, which was submitted by the applicant itself, that the undertakings HISI and Philips, which are among the three OEM importers, also supply markets other than the Community market.[88] Moreover, recital 54 of the contested regulation indicates that that the Community producers' stocks of unsold SIDM printers increased more rapidly between 1983 and 1986 than their sales.

188. The fact that the applicant's argument in this regard is unsound also follows from the fact that, on the basis of the percentages mentioned in recital 45 and the deliveries of OEM products given in the Ernst & Whinney study, the applicant calculates a figure for total production in 1986 by the four members of Europrint (461 681 units) which is far in excess of the figure given in recital 47 for all Community producers — and not only for the members of Europrint.[89] In actual fact, the figures given in recital 47 refer to sales on the Community market. The Ernst & Whinney study, from which the figures given in recital 47 are obviously drawn, accordingly indicates for 1986 a sales figure which is appreciably lower for the four members of Europrint on the Community market (309 920 units).[90]

189. For the reasons mentioned, I see no grounds for doubting the findings of fact which underlie recital 45 of the contested regulation.

190. (b) The applicant argues that the facts as established by the defendant contain an additional error inasmuch as the OEM imports by the undertakings Mannesmann-Tally and Philips did not, contrary to what is stated in recital 45, belong in their entirety to the low end of the market but also belonged in part to the middle-market segment, as those segments are defined in the Ernst & Whinney study. From this the applicant concludes that the volume of the imports in question was not relatively low which, according to the case-law,[91] is a precondition for the

88 — See the Ernst & Whinney study at p. VII-9 and VII-17.

89 — A comparison between the Ernst & Whinney study and the figures given in recital 47 of the contested regulation clearly shows that the figures used in this part of the regulation are drawn in their entirety from the Ernst & Whinney study and that they relate also to Community producers other than those who are members of Europrint.

90 — See Table VII-1 of the study.

91 — See the judgment in the *TEC* case, at paragraph 47.

inclusion of OEM importers in the Community industry.

191. So far as the latter conclusion is concerned, I would reject it immediately since I cannot see how a possible error in the division of the market into segments can justify the conclusion that there was an error in the determination of the number of imported units.

192. On the other hand, however, it cannot be denied that this submission does have a certain logic since in recital 45 the Council specifically stressed that OEM imports belonged to the low end of the market. It states as follows: 'In this respect, the Commission considered that these imported printers all belonged to the low end of the market (as defined by the study of Ernst & Whinney Conseil). This market segment is the most important of the printer market and has recently grown significantly faster than the total market. In addition, the Community producers wished to regain their market shares lost by abandoning their own production in this sector. The volume, value and growth of these imports can, therefore, not be considered as being disproportionate to their own production levels.'

193. The Council submits that recital 45 contains a drafting error: the reference intended was to the division of the market into segments according to a study made by the market research institute IMV-Info-Marketing and not the division made in the Ernst & Whinney study. The Council also returns to its argument on the question of which products fall within the concept of 'like product' in the present context; it takes the view that any division of the market into segments is arbitrary and aleatory since no generally accepted definition of the segments in question exists. It also points out that, according to the Ernst & Whinney study, Philips and Mannesmann-Tally had abandoned their own production in 1984, and that Philips had also abandoned production in the middle segment, with the result that, in the light of the reasons given in recital 46, where reference is made to recitals 63 to 67 of the regulation imposing the provisional duty, medium-segment imports by Philips could not have had any influence on the definition of the Community industry. The applicant claims that there is a contradiction between the uncertainty which, according to the Council, lies in defining the market segments and the statement contained in recital 64 of the regulation imposing the provisional duty to the effect that, in order to defend their position on the market, it was necessary for SIDM printer manufacturers to offer a full range of printers and to be represented in all market segments.

194. In the light of that argument I think that it is undeniable that the imported OEM products served to complete the range of products of importers. Ultimately, the argument boils down to the question how the market can be divided into segments and then how the various imported products are to be classified within that segmentation. In the first place, it follows that we here have no evidence of the alleged fact-finding error. Secondly, it is necessary to consider the statement about this classification of imported OEM printers in the lower-market segment in the light of the Council's further point that imported printers complete the range of products of the importing producers, that is to say that they were intended to replace like goods which they themselves had ceased to produce. This is a

point which the Council stresses in both recital 43 and recital 45 of the contested regulation. It follows that the classification as such of OEM products in a specific market segment still does not represent an independent consideration, which, if wrong, could have affected the reply to the question whether only individual or all producers who imported OEM products are to be excluded from the Community industry.

195. Consequently, the applicant's argument that not all imported OEM products belonged to the lower-market segment must be rejected.

196. (c) Before I come to the applicant's arguments concerning the importance and growth of the lower-market segment, I would first like briefly to examine, in connection with what has already been said, the two arguments set out in the reply to the effect that it is not necessary to have a complete range of products and that the pressure on the three undertakings in question to withdraw from the lower-market segment has not been established. Those arguments do not appear in the application and consequently they were, in my opinion, made out of time. They are, however, also unfounded. So far as the necessity to have a complete range of products is concerned, the applicant, in response to the arguments advanced by the Council on this point in recital 43, merely points out that it itself offers only printers in the lower segment. To this point the Council correctly replies that the majority of European and Japanese producers can offer a full range of products. The applicant's circumstances are indeed special in so far as it sells most of its production in the form of OEM products, which means that it leaves it to the importing manufacturer to complete the range of products.

197. With regard to the pressure to withdraw from the lower-market segment, I would refer to my considerations on the significance of the market segmentation in the views outlined by the Council. In any event, it is clear from the Ernst & Whinney study[92] that, contrary to the view expressed by the applicant, the situation of the Olivetti company does not place in question the conclusions drawn by the Council. Having held in 1983 a market share of 5% of the lower segment Olivetti ceased all sales in that segment in 1984; however, it resumed sales in 1985 and obtained a market share of 6%. In 1986, the absolute sales figure fell by approximately 11 300 units (29%) compared with 1985, despite an expanding market (as is clear from recital 47 of the contested regulation and from the Ernst & Whinney study).

198. Those arguments must therefore also be rejected.

199. (d) The applicant goes on to argue that the Council inaccurately assessed the situation with regard to the significance and growth of the lower segment. Contrary to recital 45 of the contested regulation, in 1986, according to the Ernst & Whinney study, the medium sector represented 54.1% of all sales, whereas the lower segment amounted to only 38.6%. Furthermore, the market experienced an overall growth of 38% between 1985 and 1986, whereas growth in the lower segment came to only

92 — See Table VII-3 at p. VII-6 of the Ernst & Whinney study.

17%, and during the period 1984 to 1986 the lower segment and the overall market each experienced the same rate of growth of 88%.[93]

200. In my opinion, none of those arguments is relevant. In the first place, I believe that the Council was entitled to treat the imports as measures of self defence on the part of importers if the size and growth of the share of the market to which the imported printers belonged could *not* be treated as *insignificant*. Subject to the proviso about the possibility of dividing the market into segments according to generally accepted criteria, I take the view that a share (of the segment) of 38.6% of the entire market is sufficient to conclude that the Council was entitled, without exceeding its discretion, to treat that circumstance as evidence of a measure of self defence on the part of the importers.

201. As far as the growth of the lower-market segment is concerned, it is clear from the Ernst & Whinney study[94] that, from 1983 to 1986, the lower and medium segments increased at rates differing from one year to the next, sometimes more rapidly and sometimes more slowly than the overall market, while the upper segment did not at any time during 1984 to 1985 grow more rapidly than the overall market, and from 1985 to 1986 grew at a slightly slower rate than the overall market. With regard to the rates of growth in the lower and medium segments, sales of printers in the lower segment experienced greater growth than the overall market between 1983 and 1985, both in overall terms and from one year to the next. During the same period, the medium segment showed the opposite trend (both for the whole period and from one year to the next). The trend from 1985 to 1986 is characterized by the fact that the lower segment grew less than the overall market, whereas the medium segment experienced higher growth, with the result that the market share of the lower segment in 1986 (38.6%) corresponds approximately to that for 1984 (38.8%), whereas the market share of the medium segment in 1986 (54.1%) lies between the market shares for 1983 (59.1%) and for 1984 (51.9%). Thus, even if we question the segmentation carried out by the Council and the consequent conclusions in respect of growth in the different segments, it may be stated in any event that, even according to the figures submitted by the applicant, the lower segment was responsible for a considerable part of market growth (it even increased more quickly between 1983 and 1986 than the overall market), so that the Council cannot be regarded as having exceeded its discretion by having particular regard to the growth of this segment, to which, according to its data, imported OEM products belonged. Furthermore, the applicant contradicts itself in arguing that, on the one hand, not all imported OEM products belong to the lower-market segment but also belong in part to the medium segment, while, on the other hand, it contests the views expressed by the Council in recital 45 with its assertion that it was not the lower segment but the medium segment which grew more rapidly than the overall market (between 1985 and 1986 and between 1984 and 1986).

202. (e) The *conclusion* must be that the Council's view that the four members of Europrint are to regarded as forming part of the '*Community industry*' is not open to objection.

93 — The figure of 188% given is attributable to an arithmetical error.

94 — Table V-2.

203. 2. (a) As far as the *determination of the injury itself* is concerned, the applicant first of all argues that the year 1983 should not have been chosen as the reference year for this purpose since it had not been asked about that year.

204. On this point I can refer to my comments on the question of the rights of the defence. It remains for me to add that, in my view, the Council quite correctly draws attention to the circumstances referred to in recital 104 of the regulation imposing the provisional duty. According to that recital, the exclusive rights belonging to Seiko Epson for the manufacture of printers compatible with IBM personal computers came to an end in 1984. Since 1983, the IBM company held a dominant position in the Community in respect of personal computers. The year 1983 is therefore typical of the situation which existed before the opening-up of a substantial part of the market to *all* competitors (whether from the Community or from non-member countries). Consequently, it is not incorrect to choose the year 1983 as the starting point from which to assess subsequent developments. Furthermore, this method of taking as a basis a 'departure period' had already been used by the Council in Regulation No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan. [95]

205. (b) The applicant then advances a number of arguments in relation to the statements contained in recital 47 of the contested regulation concerning the changes in market shares.

95 — OJ 1985 L 163, p. 1 (see recital 31).

206. (aa) It takes the view first of all that the fact that before the period of investigation the Community manufacturers owned undertakings which, for reasons concerning only them, decided before April 1986 to cease production should not have been taken into account. The Community authorities should not have attributed the cessation of production to dumping. Once this correction is made, there is no injury in the individual market segments.

207. This argument relates to the cessation of production by the firm Triumph-Adler (gradual cessation between 1984, 1986) and Logabax (complete cessation after 1985). The figures put forward by the applicant, which are taken from the E & W study, show the trends in the lower, medium and upper market segments between 1984 and 1986 without taking account of the two aforementioned companies.

208. Unlike the applicant, I take the view that the Council did not commit any error of assessment in this regard. First of all, I consider the applicant's argument eroneous from the outset. All the losses in respect of which the lack of relationship with the imports at issue is not established from the outset may be included in the determination of the injury. Everything else is a question of causality, to which I shall later return.

209. In so far as the applicant argues that Triumph-Adler and Logabax abandoned production for reasons which concerned only those companies, that argument is, in view of the considerations set forth above, an empty formula which does not justify the exclusion of those companies from the

determination of the injury. On the contrary, the abandonment of production fits into the overall picture, as it appears from the E & W study.[96] The four members of Europrint as well as the other manufacturers in the Community had to accept a considerable loss of market share between 1983 and 1984. Between 1984 and 1986 the market share of the four members of Europrint was maintained at roughly the same level (1983: 14.5%; 1984: 14.2%; 1986: 14.8%); this, however, signifies that they took virtually no part in the new distribution of market shares which were lost between 1984 and 1986 by the other manufacturers in the Community (market shares in 1984: 7.6%; 1986: 3.6%). Given that context, the fact that when considering the injury incurred the Council treated the abandonment of production by Triumph-Adler and Logabax as part of the overall development cannot be regarded as an eroneous factual assessment.

210. For the rest, the Council rightly points out that, even according to the figures produced by the applicant relating to all three segments taken together as well as to the lower and upper segments, a loss of market share between 1984 and 1986 by the Community manufacturers can be identified, even if the figures of Triumph-Adler and Logabax are left out of the count. The applicant maintains that this had nothing to do with the Japanese imports. However, it does not substantiate this assertion, except perhaps with regard to the companies HISI and Nixdorf. As regards HISI, the applicant's assertion that the decline in the market share in the lower segment of the market was due to OEM imports carried out by that undertaking itself is refuted by the figures submitted by the applicant. According to those figures, in 1986, the only year in which such imports are recorded, the OEM imports and the sales of own-manufacture printers in the lower segment, taken together, produce a number of units lower than sales of own-manufacture printers belonging to this segment in 1985. As far as Nixdorf is concerned, reference is again made to the argument dealt with in recitals 57 and 59 of the contested regulation, according to which various Community undertakings had pursued a niche-market strategy but which provides no detailed analysis of the Council's considerations contained in those recitals.

211. For all those reasons the applicant's submissions on this point must be dismissed.

212. (bb) The applicant goes on to question the correctness of the figures relating to changes in market share given in recital 47 of the contested regulation. It considers that if the percentages of OEM imports by the three Europrint members concerned (as recorded in recital 45) are taken into account, an increase in the market shares of the Europrint members should be recorded in that recital and not a decrease.

213. With reference to the aforegoing it is sufficient to point out that the figures mentioned in recital 47 correspond fully with the figures contained in the E & W study submitted by the applicant, that those figures relate not only to the four members

96 — See Table VII-1.

of Europrint but to all Community manufacturers and, finally, that recital 45 deals with production figures whilst recital 47 deals with sales figures. This ground of challenge must therefore also be rejected.

214. (c) In the applicant's view, the Council's considerations on *price trends* are also factually incorrect.

215. (aa) First of all, the applicant contends that the Council was guilty of an error of assessment with reference to the fall in prices stated to have occurred in recital 49 of the contested regulation.

216. (1) In so far as the applicant takes the view that the price falls were less than indicated, this is due to the fact that the applicant did not take 1983 into account in its calculations. I have, however, already shown that the Council rightly took that year into account in its assessment.

217. (2) Next, the applicant objects to the Council's finding that the various price falls (in the individual segments) matched the relative increase in the market share of the Japanese exporters in the lower and upper market segments. In its view, it is more correct to say that between 1984 and 1986 prices in the lower segment fell between 29 and 30% whilst the relative increase in the market share in this segment amounted to 10%. Prices in the middle segment, on the other hand, fell between 8.3% and 15% whilst the relative increase in the market share of the Japanese manufacturers was 'of similar extent' (that is to say 6.7%, as correctly calculated by the Council relying on the E & W study).

218. In my view, the figures quoted by the applicant for the years 1984 to 1986 confirm in the final analysis the considerations set out by the Council in recital 49 of the contested regulation. As far as the relationship between the growth in the lower segment and in the middle segment is concerned, the figures prove that in the lower segment both the price fall and the relative increase of the market share of the Japanese manufacturers were greater than in the middle segment. In recital 49 of the contested regulation it is not asserted that the price fall and the relative increase in the market share of the Japanese manufacturers were proportional. Nor does Article 4(2)(c) of the (new) basic regulation presuppose such a finding; consequently, in finding only that the greatest fall in prices was in the segments in which the Japanese manufacturers had penetrated the furthest, the Council did not commit any error of assessment.

219. According to the figures submitted by the applicant, the facts and figures ascertained in recital 49 of the contested regulation are also in principle true for the period between 1983 and 1986. It appears, however, from the figures which the Council submitted as an extract from the E & W study for this period that the relative increase in the market share of the Japanese manufacturers in the middle sector was greater than in the lower sector, although the price fall in the latter sector was not so marked. Nevertheless, that study shows that trends in prices and shares must be divided into two periods — the period

1983/1984 and the period from 1984 to 1986. Between 1983 and 1984 the middle segment showed the greatest price decline (between 10.4 and 11.1%) and the greatest growth rate in the market share of the Japanese manufacturers, namely 32.6% (lower segment: price decline between 5.4 and 11.3%; increase in the market share of the Japanese manufacturers: 23.1%). In the period between 1984 and 1986 this situation was reversed, both with regard to the price decline and changes in market shares.[97] I would note in passing that in the upper segment, too, to which the applicant's objection does not relate, a distinction must likewise be drawn between different periods in order to discern the connection between the decline in prices and the increase in the market share of the Japanese manufacturers.

220. This ground of challenge must therefore be dismissed.

221. (3) The applicant also considers that the reason for the decline in prices was not any strategy pursued by the Japanese manufacturers but a sharp fall in production costs (the proportion of raw material costs (70%) fell to 30% of the total costs between 1984 and the investigation period). This ground of challenge must, however, be rejected since the applicant does not substantiate or prove its assertions in this regard and, moreover, failed to recognize the various trends in the decline in prices and the increase in the market shares of the Japanese manufacturers described in the previous paragraph.

97 — Lower segment: price decline between 29 and 30%; relative increase in the market share of the Japanese manufacturers: 10.2%;
Middle segment: price decline between 8.3 and 15%; relative increase in the market share of the Japanese manufacturers: 6.7%.

222. (4) Finally, on the question of the decline in prices, the applicant maintains that on average its prices increased between 1984 and 1986 or, depending on the case, 1987.

223. However, the Council correctly points out in this regard that during the period covered by the investigation price undercutting of 41% was found (see Annex N to the application). Moreover, the applicant's calculations relate exclusively to a comparison between the numbers of units sold and the resultant revenue so that the average increase may also arise from a shift in sales towards the more expensive models. Trends between 1985 and 1986 indicated by the questionnaire submitted by the applicant in the administrative procedure also suggest that the applicant's assertion rests more on such developments than on the increase in the prices actually calculated. If the aforementioned method of calculation is applied to the figures contained in the questionnaire for that period, a considerable decline in prices results.

224. (bb) Moreover, the applicant considers that in recitals 51 and 53 of the contested regulation the Council committed an error of assessment concerning the price undercutting. As far as Nakajima was concerned, the prices of the Community manufacturers and the Japanese exporters were not examined at the same marketing stage because Nakajima's particular structure was not taken into account. Not having any particular sales structure, the applicant always sells ex-factory. In its view, the 25% adjustment made to offset the difference in price between dealers and distribution company (see recital 51 of the preamble to the contested regulation) is not sufficient

since it only partly offsets the difference between the ex-factory stage and the retail stage.

225. In the applicant's view, the following point also suggests that the Council's assessment was wrong: if one calculates the Community price from the price undercutting with which the applicant is charged (41.28%) and deducts the profit (1%) mentioned in recital 70, this results, for a profit margin of 20% which is that achieved by the applicant, in a cost price for the Community product at the ex-factory level which is double that of the applicant's product. That assumption can rest only on a comparison at different levels of trade. In the applicant's view, the Council's error is also proved by the fact that, given the price margins for normal commercial transactions, the ex-factory price and the ex-dealer price (the latter reduced by 25%) differ by about the same margin as the margin of price undercutting of which the applicant is accused.

226. In my view, that argument is not tenable. The Council has in fact demonstrated that, given the explanations contained in recital 50, the adjustment referred to in recital 51 (25% between dealer and distributor) can only be an adjustment which offsets the difference between prices upon sales *to* dealers and *to* distributors. The 'sales channels' referred to in recital 50 of the preamble to the contested regulation are described by the terms 'OEM, distributer, dealer and end-user'. Since end-users are also included in that list, the levels referred to can only be 'purchasing levels' and not 'selling levels'. Moreover, that interpretation coincides with recital 76 of the preamble to the regulation imposing the provisional duty. The Council also correctly points out that the adjustment mentioned in parenthesis in recital 51 is mentioned only by way of example.

227. Given those considerations, the 'evidence'advanced by the applicant in support of its assertion is not convincing. As far as the argument concerning the comparison of cost of prices is concerned, it is possible, owing to the circumstances described in recital 70 of the preamble to the contested regulation, that this cost was higher for Community manufacturers than for the Japanese manufacturers. It was not possible for them to maintain the same level of investment for research and rationalization purposes as the Japanese manufacturers owing to the constant fall in profits.

228. As regards the argument concerning the comparison of prices at the various levels of trade, on the one hand, and the applicant's margin of price undercutting on the other, it is possible that there are parallels here but they are due purely to chance.

229. (d) The applicant's arguments concerning the findings set out in recital 54 of the preamble to the contested regulation should also be rejected.

230. As far as the increase in stocks is concerned, the applicant, in its reply, considers that the stocks of the undertaking HISI represented 10 manufacturing days. Apart from the fact that this argument was put forward out of time, it is not capable, as a single item of information, of refuting the

statements in recital 54 concerning the volume of stocks.

231. The applicant also considers that, contrary to what is stated in recital 54, it was possible for the Community manufacturers to increase their production capacity, to reduce costs and to develop new products. However, it does not explain how the assessment made in recital 54 was incorrect. All those submissions must therefore be rejected.

232. 3. (a) The first set of pleas concerning the causal relationship between the injury and the dumping relates to the fact that the period covered by the investigation stretched from April 1986 to March 1987 whereas the Council's findings concerning the injury included the period since 1983.

233. (aa) The applicant points out that before 1 April 1986 no dumping can be assumed to have taken place since the period before that date was not part of the period covered by the investigation.

234. As the Council correctly observes, this argument ignores the fact that a causal relationship between the dumping and the injury need not necessarily exist throughout the period taken into consideration. This is because measures against dumping are not concerned with the past but look to the future. The injury concerned is not past injury but injury being incurred at present.[98]

98 — See the judgment in Case 121/86 *Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE and Others* v *Council* [1989] ECR 3919, paragraph 35 at 3955.

In so far as it is established that the imports from the third countries concerned (Japan) had an injurious effect on the Community industry over a lengthy period of time — even if that period only partly coincides with the period of the investigation — and, moreover, it is clear that during the period of the investigation dumping and undercutting occurred, it is not fundamentally wrong to presume that injury is at present being caused to the Community industry by the dumped imports. In this case, having regard to the criteria laid down in Article 4(2) of the basic regulation, the *increase in the dumped imports* can be established only in relation to a short period of time; but the Community authorities may get an idea of the *volume* of those imports (Article 4(2)(a)). The factors of *prices* and *price undercutting* (Article 4(2)(b)) can be established without restriction. As regards the *impact* on the economic sector concerned (Article 4(2)(c)), actual trends (existing even before the period of investigation) or potential trends may be taken into account. Subject to the arguments concerning the (other) causes of the trends detrimental to the Community industry between 1983 and 1986, to which I shall come shortly, the causal relationship in that regard is demonstrated in the contested regulation (see recitals 47 to 55). Moreover, the applicant has not contended that there was no dumping or price undercutting before the period of the investigation. For the reasons set out above, the applicant's argument on this point must be rejected.

235. (bb) The applicant also considers that the Community authorities did not sufficiently examine the falls in prices before the period covered by the investigation in order to be able to attribute them to dumping. In

this regard, the observations made on the previous point are also valid. Furthermore, the applicant does not explain how it takes objection to the defendant's examination of the injury.

236. (b) The applicant's submission whereby it essentially argues that the Community manufacturers caused injury to themselves must also be dealt with as part of the question of causality. Challenging the statements in recitals 54, 55 and 64 of the contested regulation, it contends that, compared with the growth of the market between 1984 and 1986 (88%), the Community manufacturers increased their capacity disproportionately during the same period (92.7% or — if Philips is left out of account owing to its niche-market strategy — 103.2%), contrary to what is stated in points 88 and 89 of Regulation No 1418/88. In doing this, they deprived themselves of the advantages which they could have obtained from possible economies owing to increased numbers of units. If the Community manufacturers had acted in that prudent fashion, as they are supposed to have done according to recital 89 of the regulation imposing the provisional duty, they would have been able to invest more in research and development owing to those savings.

237. I have three comments to make with regard to that argument. First of all, the applicant has not mentioned the source of those figures nor substantiated them in any way. Secondly, a different picture emerges for the period between 1983 and 1986 examined by the Council. The E & W study[99] shows that, compared with other periods, the market grew strongly between 1983 and 1984.[100] That would seem to suggest that between 1983 and 1984 the Community manufacturers increased their capacity to an extent less than the growth in the market. It is not therefore possible to proceed from an assumption that capacity increased disproportionately; this is borne out by the uncontested fact that between 1983 and 1986 the rate of utilization of capacity remained constant (70%: recital 54 of the contested regulation). Thirdly, the fact that the Community manufacturers supply not only the Community market but also other markets must be taken into consideration.[101]

238. It follows that the applicant's submission on this point is not well founded.

239. (c) With reference to recital 60 of the contested regulation, the applicant then contends that the Community authority should not have contented itself with the finding that the impact of the OEM imports from third countries other than Japan was limited to a single Member State and became considerable only after the the end of the investigation period. The applicant considers that a close examination of those imports would have led to its being accepted that they held a not inconsiderable market share. In breach of Article 4(1) of the basic regulation, the injury arising from those imports was wrongly attributed to dumping by the Japanese importers.

99 — Table V-6.

100 — 1983/1984: 39 %; 1984/1985: 36 %; 1985/1986: 38,2 %.

101 — See the E & W study at p. VII-6 (Olivetti); p. VII-9 (HISI); p. VII-17 (Philips).

240. However, it is clear from a comparison between the calculation used by the applicant (for the years 1984 to 1986) and the table used as a basis for that calculation [102] that the applicant, in taking the view that the volume of imports from third countries was higher than was assumed by the Council, bases that view on imports of printers *originating in Japan*. On this point, the Council has stated without being contradicted that those imports are the subject of the anti-dumping proceeding in this case, which is, moreover, confirmed by the title as well as Article 1(1) of the contested regulation. Furthermore, the table which is mentioned shows that imports of printers having their origin in third countries other than Japan effected between 1983 and 1986 constantly lost market share [103] and the growth in the numbers of units sold (8% between 1983 and 1986) was lower than the growth achieved by the Japanese manufacturers (290%) and the European manufacturers (44%). Like all the other submissions concerning the causal relationship between dumping and injury, this submission, too, must be rejected.

241. 4. In *conclusion*, it must be stated that none of the submissions concerning the *findings as to injury* is well founded so that the applicant's arguments on this point must be rejected in their entirety.

VI — *The interest of the Community*

242. The applicant raises a number of objections against the statements contained in recitals 63 to 66 of the contested regulation. It considers that in arriving at its findings concerning the interest of the Community the Council committed a number of errors of assessment. As far as most of these points are concerned, which relate to the possibilities for the Community manufacturers to make investments, I have already replied to them in response to the submissions concerning injury. The same applies with regard to the significance of the imports of printers of Japanese origin from other third countries.

243. It remains to deal with the argument that the anti-dumping measure operated to the advantage above all of manufacturers in other third countries. However, this assertion is not substantiated in any detail. Since between 1983 and 1986 the share of the manufacturers in other third countries constantly fell throughout the common market whilst the share of the Japanese manufacturers constantly grew, it ought to have been demonstrated how the situation was altered (reversed), particularly in the final months of the period covered by the investigation. However, no evidence or arguments are advanced in this regard. Moreover, there is no evidence to suggest that the import of products originating in other third countries were dumped, so that protection against penetration by these manufacturers on the market would not have been appropriate. [104]

VII — *Amount of the duty*

244. Finally, the applicant again challenges the Council's statements contained in recital

102 — Table V-6 of the E & W study.

103 — 1983: 15 %; 1984: 11 %; 1985: 8 %; 1986: 6 %.

104 — In this regard, see the judgment in Case 250/88 *Brother* v *Council* [1988] ECR 5683, paragraph 41.

72 of the contested regulation. In its view, these contain an error of assessment and also evince a misuse of powers; the method of calculation explained there was not applied to it, otherwise an injury threshold of 0 would have resulted. The applicant's average price to its first independent seller, that is to say the Community importer, is necessarily identical to the c. i. f. price since that is the price actually paid by that importer. In the applicant's case, there is no justification for reducing that price when determining the c. i. f. value because the applicant normally sells ex-factory.

245. The Commission has, however, pointed out without being contradicted on this point that this argument is based on a misunderstanding of the process described in recital 72. The prices used to determine the price undercutting described in recitals 50 and 51 are domestic prices which contain in particular customs duties and charges (disregarding the adjustments made to take account of transport costs and differences in sales channels). Those prices are normally relevant factors in the calculation of the (individual) injury threshold defined in recital 71. The latter factor is therefore unsuitable for the determination of the anti-dumping duty to be applied since the duty is charged on the net price free-of-frontier at c. i. f. level. The price on which the injury threshold is based must therefore be adjusted to take this into account. The consequence of this calculation for the injury threshold is described in recital 72 of the contested regulation as follows:

'The individual injury threshold was then expressed as a percentage of the weighted average resale price of each exporter at c.i.f. level.'

246. The applicant has not challenged this approach. Its submissions on this point must therefore be rejected.

Third part: Conclusion

247. I. As far as the *substance* is concerned, it follows from all these considerations that the contested regulation is defective because the construction of the normal value as regards the SGA expenses and profit is contrary to Article 2(3)(b)(ii) of the new basic regulation. That regulation must therefore be annulled to the extent claimed, even though in examining the contested regulation I have not otherwise identified any legal defects and in particular the grounds relied upon pursuant to Article 184 of the EEC Treaty for challenging the new basic regulation are not well founded.

248. II. As far as the *decision on costs* is concerned, which must also cover the proceedings in Case C-69/89 R, this is governed by Article 69 of the Rules of Procedure. Since in Case C-69/89 R, the Commission presented neither written nor oral observations, the burden of the costs incurred as a result of her intervention are to be shared; the applicant and the Commission must each bear their own costs. [105]

105 — See the judgment in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 29.

C — Proposed form of order

249. I propose that the Court should:

Annul contested Regulation No 3651/88 (Articles 1 to 3) in so far as it concerns the applicant;

Order the Council to bear the costs of the proceedings in Case C-69/89, with the exception of the interveners' costs which are to be borne by themselves;

Order the applicant to bear the costs of the proceedings in Case C-69/89 R; however, the burden of the costs arising from the Commission's intervention is to be shared equally by the Commission and the applicant.