In order to promote active participation to class discussions and to enhance the comprehension of presented topics, students are strongly encouraged to read the case law enlisted below before the tutorials take place.

**SCHEDULE**

**Thursday 16.12.2010**

1. The effect of international agreements in the EU legal order

2. The ECJ case-law concerning the effects of WTO law within the EU legal order: the rule ...

**Friday 17.12.2010**

3. [follow-up] ... and the exceptions

4. The duty of uniform interpretation of EC law in the light of WTO rules

5. The denial of EC extra-contractual liability for breach of WTO law

**READING MATERIALS**

*On the effect of international agreements:*


*On the effect of WTO agreements:*


Dani, M., *Remedying European legal pluralism. The FIAMM and Fedon litigation and the judicial protection of international trade bystanders*, Jean Monnet Working Paper 06/09

Judgment of the Court of 5 February 1976
Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze

Free movement of goods, Customs Union, Charges having an equivalent effect, Agriculture, Veterinary legislation, External relations, Associated African States and Madagascar

Case 87-75

European Court reports 1976 Page 00129

In case 87/75
Reference to the Court under article 177 of the treaty by the tribunale of genoa for a preliminary ruling in the action pending before it between
Conceria daniele bresciani ( the brothers bresciani , tanners )
and
Amministrazione italiana delle finanze

Subject of the case

On the interpretation of article 13 of the EEC treaty and of article 2 ( 1 ) of the convention of association between the European Economic Community and the African states and Madagascar associated with that Community , signed at Yaoundé on 20 July 1963 and concluded in the name of the Community by the council in its decision of 5 November 1963 ( OJ 1964 , p . 1430 ) and of article 2 ( 1 ) of the convention of association signed at Yaoundé on 29 July 1969 and concluded in the name of the Community by the council in its decision of 29 September 1970 ( OJ 1970 , l 282 , p . 1 ).

Grounds

1 By order of 24 July 1975 , which was received at the Court on 4 august 1975 , the Tribunale of Genoa referred to the Court five questions concerning the interpretation of the concept of ' charges having an effect equivalent to customs duties on imports ' contained in article 13 ( 2 ) of the EEC treaty and in article 2 ( 1 ) of the convention signed at Yaoundé on 20 July 1963 ( OJ , 1964 , p . 1430 ) and of the convention signed at Yaoundé on 29 July 1969 ( OJ , English special edition ( second series , i external relations ( 2 ) ).

2 It appears from the file that, in 1969 and 1970 , and in any case prior to entry into force of the second Yaoundé convention , the plaintiff in the main action imported various consignments of raw cowhides from France and from Senegal , a state associated with the Community under the abovementioned conventions , and had to pay a veterinary and public health inspection duty upon importation .

3 The duty was introduced by Italy as a flat-rate charge to offset the costs of the compulsory public health inspection of imported products of animal origin. The national Court states that similar products of domestic origin are not subject to the same duty. Nevertheless, in Italy , when animals are slaughtered , there are veterinary inspections for which local authorities charge duties and the main purpose of which is to establish whether the meat is fit for consumption .

4 The first question asks whether a pecuniary charge levied for the purposes of a compulsory public health inspection of raw hides as they cross the frontier constitutes a charge having an effect equivalent to customs duties on imports within the meaning of article 13 ( 2 ) of the EEC
treaty.

5 As the Court held in its judgment of 14 December 1972, in Marimex v Amministrazione Italiana delle Finanze (rec. 1972, p. 1309), pecuniary charges imposed for reasons of public health examination of products when they cross the frontier, which are determined according to special criteria applicable to them, which are not comparable to the criteria for determining the pecuniary charges affecting similar domestic products, are to be regarded as charges having an effect equivalent to customs duties.

6 The national Court requests that the three following considerations be taken into account: First, the fact that the charge is proportionate to the quantity of the goods and not to their value distinguishes a duty of the type at issue from charges which fall within the prohibition under article 13 of the EEC treaty. Second, a pecuniary charge of the type at issue is no more than the consideration required from individuals who, through their own action in importing products of animal origin, cause a service to be rendered. In the third place, although there may be differences in the method and time of its application, the duty at issue is also levied on similar products of domestic origin.

7 According to article 9 of the Treaty, the Community is to be based upon a customs union founded upon the prohibition between member states of customs duties and of “all charges having equivalent effect” and the adoption of a common customs tariff in their relations with third countries. Under article 13 (2), charges having an effect equivalent to customs duties on imports, in force between member states, are to be progressively abolished by them during the transitional period. The position of these articles at the beginning of that part of the treaty reserved for the ‘foundations of the Community’ is sufficient to indicate their crucial role in the construction of the common market.

8 The justification for the obligation progressively to abolish customs duties is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods. The obligation progressively to abolish customs duties is supplemented by the obligation to abolish charges having equivalent effect in order to prevent the fundamental principle of the free movement of goods within the common market from being circumvented by the imposition of pecuniary charges of various kinds by a member state. The use of these two complementary concepts thus tends, in trade between member states, to avoid the imposition of any pecuniary charge on goods circulating within the Community by virtue of the fact that they cross a national frontier.

9 Consequently, any pecuniary charge, whatever its designation and mode of application, which is unilaterally imposed on goods imported from another member state by reason of the fact that they cross a frontier, constitutes a charge having an effect equivalent to a customs duty. In appraising a duty of the type at issue it is, consequently, of no importance that it is proportionate to the quantity of the imported goods and not to their value.

10 Nor, in determining the effects of the duty on the free movement of goods, is it of any importance that a duty of the type at issue is proportionate to the costs of a compulsory public health inspection carried out on entry of the goods. The activity of the administration of the state intended to maintain a public health inspection system imposed in the general interest cannot be regarded as a service rendered to the importer such as to justify the imposition of a pecuniary charge. If, accordingly, public health inspections are still justified at the end of the transitional period, the costs which they occasion must by met by the general public which, as a whole, benefits from the free movement of Community goods.
11 The fact that the domestic production is, through other charges, subjected to a similar burden matters little unless those charges and the duty in question are applied according to the same criteria and at the same stage of production, thus making it possible for them to be regarded as falling within a general system of internal taxation applying systematically and in the same way to domestic and imported products.

12 The second question is whether article 13 (2) began to have direct effect on 31 December 1969, the date on which the transitional period ended, or on 1 July 1968, the date on which customs duties were abolished within the Community.

13 Subject to any specific provisions, such effect occurred as from the end of the transitional period, namely 1 January 1970. In fact, the council's decision of 26 July 1966 on the abolition of customs duties in line with the implementation of the common customs tariff on 1 July 1968 (OJ p. 2971) is based on the concept of a selective acceleration of actions which, as a whole, were to be completed by the end of the transitional period at the latest. In these circumstances that decision only applies to measures to which it specifically refers, that is to say, to customs duties as such and to quantitative restrictions.

14 The reply must therefore be that the direct effect of article 13 (2) can only be invoked as from 1 January 1970.

15 The third question is whether the concept of a charge having equivalent effect has the same meaning in article 2 (1) of the Yaoundé convention of 1963 and of the Yaoundé convention of 1969 as in article 13 (2) of the treaty. The fourth question is whether article 2 (1) of the Yaoundé convention of 1963 has immediate effect so as to confer on Community citizens an individual right, which the national courts must protect, not to pay to a member state a charge having an effect equivalent to customs duties. As these questions are related, they must be joined for the purposes of the reply.

16 The first question to be considered is whether article 2 (1) of the Yaoundé convention of 1963 confers on those subject to Community law the right to rely on it in order to challenge the imposition of a national duty. In order to do this, regard must be simultaneously paid to the spirit, the general scheme and the wording of the convention and of the provision concerned.

17 Pursuant to the fourth part of the EEC treaty, certain overseas countries and territories which had special relations with four of the former six member states were associated with the community. By reason of these special economic and political connections, the association was intended, under article 131 of the EEC treaty, to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire. The implementing convention for the association of overseas countries and territories to the community, annexed to the treaty, was concluded for a period of five years.

18 Since, at the end of this period, several of the countries and territories had advanced towards political independence, the Yaoundé convention was concluded in order to maintain the association between certain of those independent African states and Madagascar and the European Economic Community. It was concluded in the name not only of the member states but also of the Community which, in consequence, are bound by virtue of article 228.

19 As far as customs duties and charges having equivalent effect are concerned, article 2 (1) of the 1963 convention provides as follows: 'Goods originating in associated states shall, when imported into member states, benefit from the progressive abolition of customs duties and charges having an effect equivalent to such duties, resulting between member states under the provisions of articles 12, 13, 14, 15 and 17 of the treaty and the decisions which have been or may be adopted to accelerate the rate of
achieving the aims of the treaty.

Article 2 (5) provides as follows:

‘At the request of an associated state, there shall be consultations within the association council regarding the conditions of application of this article.’

20 On the other hand, article 3 (2) limits the obligation on the associated states to abolish customs duties and charges having equivalent effect by providing that ‘each associated state may retain or introduce customs duties and charges having an effect equivalent to such duties which correspond to its development needs or its industrialization requirements or which are intended to contribute to its budget’.

21 Article 61 of the convention provides that the Community and the member states shall undertake the obligations set out in articles 2, 5 and 11 even with respect to associated states which, on the grounds of international obligations applying at the time of the entry into force of the EEC treaty and subjecting them to a particular customs treatment, may consider themselves not yet able to offer the Community the reciprocity provided for by article 3 (2) of the convention.

22 It is apparent from these provisions that the convention was not concluded in order to ensure equality in the obligations which the Community assumes with regard to the associated states, but in order to promote their development in accordance with the aim of the first convention annexed to the treaty.

23 This imbalance between the obligations assumed by the Community towards the associated states, which is inherent in the special nature of the convention, does not prevent recognition by the Community that some of its provisions have a direct effect.

24 Since the provision according to which consultations regarding the conditions of application of article 2 of the convention shall take place only at the request of an associated state, it follows that the abolition of charges having equivalent effect must, on the part of the Community, proceed automatically.

25 By expressly referring, in article 2 (1) of the convention, to article 13 of the treaty, the Community undertook precisely the same obligation towards the associated states to abolish charges having equivalent effect as, in the treaty, the member states assumed towards each other. Since this obligation is specific and not subject to any implied or express reservation on the part of the Community, it is capable of conferring on those subject to Community law the right to rely on it before the courts and to do so with effect from 1 January 1970.

26 The answer to be given to the national Court is, in consequence, that, with effect from 1 January 1970, article 2 (1) of the Yaoundé convention of 1963 confers on Community citizens the right, which the national courts of the Community must protect, not to pay to a member state a charge having an effect equivalent to customs duties.

27 The last question asks whether the prohibition of the imposition of charges having equivalent effect imposed upon the member states by the two Yaoundé conventions has applied without interruption since 1 January 1970.

28 Article 59 of the 1963 convention provides that it shall be concluded for a period of five years from the date of its entry into force. Article 60 provides that the contracting parties shall examine the provisions which might be made for a further period and that the association council shall, if necessary, take any transitional measures required until the new convention enters into force.

29 Since the first convention of association expired on 30 May 1969, before the new convention
was adopted, the association council, so as to prevent any interruption, extended it on two occasions. As these decisions were adopted by the association council under powers conferred on it by the convention, it must be concluded that the obligations imposed upon the member states by the first convention continued to exist without interruption until the second convention came into force.

Decision on costs

Costs
30 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national Court, the decision on costs is a matter for that Court.

Operative part

On those grounds, the Court in answer to the question referred to it by the Tribunale of Genoa hereby rules:
1. Whatever its designation and mode of application, a pecuniary charge which is imposed unilaterally on goods imported from another member state when they cross a frontier constitutes a charge having an effect equivalent to a customs duty.
2. The direct effect of article 30 (2) of the treaty may be invoked only with effect from 1 January 1970.
3. Article 2 (1) of the convention signed at Yaoundé on 20 July 1963 confers, with effect from 1 January 1970, on those subject to Community law the right, which the national courts of the Community must protect, not to pay to a member state a charge having an effect equivalent to customs duties.
4. The obligations imposed upon the member states by the Yaoundé convention of 1963 continued to exist without interruption until the entry into force of the convention signed at Yaoundé on 29 July 1969.
Judgment of the Court of 26 October 1982

Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.

Free trade agreements - Tax discrimination

Case 104/81

European Court reports 1982 Page 03641

In case 104/81
Reference to the Court under article 177 of the EEC treaty by the Bundesfinanzhof for a preliminary ruling in the action pending before that Court between Hauptzollamt Mainz and C. A. Kupferberg & cie. Kg a. A., Mainz,

Subject of the case

On the interpretation of the first paragraph of article 21 of the agreement made on 22 July 1972 between the EEC and the Portuguese Republic (Official Journal, English special edition (31 December), l 301, p. 166) and article 95 of the EEC treaty.

Grounds

1 By order of 24 March 1981, received at the Court on 29 April 1981, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under article 177 of the EEC treaty a number of questions on the interpretation of article 95 of the treaty and the first paragraph of article 21 of the agreement between the European Economic Community and the Portuguese republic which was signed at Brussels on 22 July 1972 and concluded and adopted on behalf of the Community by regulation no 2844/72 of the council of 19 December 1972 (official journal, English special edition 1972 (31 December), l 301, p. 165).

2 The main proceedings are between a German importer and the Hauptzollamt (principal customs office) Mainz on the question of the rate of the duty known as “monopoly equalization duty” (monopolausgleich) which was applied on the release for free circulation, on 26 August 1976, of a consignment of port wines from Portugal.

3 Monopoly equalization duty is levied under paragraph 151(1) of the Branntweinmonopolgesetz (law on the monopoly in spirits) on imported spirits and spirituous products.

4 According to paragraph 151(3) (paragraph 151(2) at the time when the goods in question were released for free circulation) liqueur wines with an alcohol content of more than 14% by volume are among the products which are to be considered as spirituous products. Paragraph 152, point 2, of that law provides that monopoly equalization duty is to be calculated in respect of such wines according to the quantity of alcohol in excess of the aforesaid amount.

5 The monopoly equalization duty corresponds to the spirits surcharge (Branntweinaufschlag) levied under paragraph 73 of the Branntweinmonopolgesetz on national spirits exempt from the obligation of delivery to the monopoly. Paragraph 79(2) however, provides for a reduction of 21% in the surcharge on spirits produced in limited quantities by certain distilleries. They included, at the material time, fruit farm cooperative distilleries which only produced a maximum of three hectolitres per member from the fruit of their own harvest.
Pursuant to the aforesaid paragraphs 151 and 152 the Hauptzollamt Mainz levied on the importation in question the sum of DM 18 103.80 per hectolitre of wine-spirit. The importer brought an action against that decision before the Finanzgericht Rheinland-pfalz (Finance Court, rhineland-palatinate) which varied the decision by reducing the monopoly equalization duty on the basis of paragraph 79 (2) of the Branntweinmonopolgesetz and the first paragraph of article 21 of the agreement between the Community and Portugal which reads as follows:

"The contracting parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one contracting party and like products originating in the territory of the other contracting party".

In doing so the Finanzgericht treated the imported port wines in the same way as it would have treated domestic liqueur wines if there had been added to the latter spirits from fruit farm cooperative distilleries produced within the aforesaid limits.

The Hauptzollamt Mainz appealed on a point of law to the Bundesfinanzhof which referred the following questions to the Court:

1. Is the first paragraph of article 21 of the agreement between the European Economic Community and the Portuguese republic of 22 July 1972, adopted and published by regulation (EEC) no 2844/72 of the council of 19 December 1972, directly applicable law and does it give rights to individual common market citizens? If so, does it contain a prohibition of discrimination in like terms to the first paragraph of article 95 of the EEC treaty and does it also apply to the importation of port wines?

2. If question (1) is answered in the affirmative:
   (a) Is there discrimination, within the meaning of the prohibition of discrimination contained in the first paragraph of article 95 of the EEC treaty or the first paragraph of article 21 of the EEC-Portugal agreement, if under national tax provisions it is possible purely as a matter of legal theory for similar domestic products to be treated more favourably (potential discrimination), or does discrimination within the meaning of those provisions exist only if in an actual tax comparison similar domestic products are in practice found to be treated more favourably from the point of view of tax?
   (b) Does article 95 of the EEC treaty or the first paragraph of article 21 of the EEC-Portugal agreement require a product from another member state or Portugal, which on importation is taxed at the same rate as a directly similar domestic product, to be taxed at the lower rate of taxation which national law imposes on another product which is equally to be regarded as similar, within the meaning of the first paragraph of article 95 of the EEC treaty, to the imported product?

First question

The first question has three parts the first of which relates to the direct applicability of the first paragraph of article 21 of the agreement. In the event of an answer in the affirmative the second part raises the question whether the provision is analogous in scope to the first paragraph of article 95 of the EEC treaty and in the third part of the question it is asked whether the provision also applies to the importation of port wines.

First part of the question

In the first place the Bundesfinanzhof wishes to know whether the German importer may rely on the said article 21 before the German Court in the proceedings which it has brought against the decision of the tax authorities.
agreements made by the Community with the member countries of the European free trade association is in principle capable of having direct effect in the member states of the Community.

11 The treaty establishing the Community has conferred upon the institutions the power not only of adopting measures applicable in the Community but also of making agreements with non-member countries and international organizations in accordance with the provisions of the Treaty. According to article 228 (2) these agreements are binding on the institutions of the Community and on member states. Consequently, it is incumbent upon the Community institutions, as well as upon the member states, to ensure compliance with the obligations arising from such agreements.

12 The measures needed to implement the provisions of an agreement concluded by the Community are to be adopted, according to the state of Community law for the time being in the areas affected by the provisions of the agreement, either by the Community institutions or by the member states. That is particularly true of agreements such as those concerning free trade where the obligations entered into extend to many areas of a very diverse nature.

13 In ensuring respect for commitments arising from an agreement concluded by the Community institutions the member states fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement, as the Court has already stated in its judgment of 30 April 1974 in case 181/73 Haegeman (1974) ECR 449, form an integral part of the Community legal system.

14 It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the member states and, in the latter case, according to the effects in the internal legal order of each member state which the law of that state assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.

15 The governments which have submitted observations to the Court do not deny the Community nature of the provisions of agreements concluded by the Community. They contend, however, that the generally recognized criteria for determining the effects of provisions of a purely Community origin may not be applied to provisions of a free-trade agreement concluded by the Community with a non-member country.

16 In that respect the governments base their arguments in particular on the distribution of powers in regard to the external relations of the Community, the principal of reciprocity governing the application of free-trade agreements, the institutional framework established by such agreements in order to settle differences between the contracting parties and safeguard clauses allowing the parties to derogate from the agreements.

17 It is true that the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question. In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of justice within the framework of its jurisdiction under the treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.
18 According to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means. Subject to that reservation the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.

19 As the governments have emphasized, the free-trade agreements provide for joint committees responsible for the administration of the agreements and for their proper implementation. To that end they may make recommendations and, in the cases expressly provided for by the agreement in question, take decisions.

20 The mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement. The fact that a Court of one of the parties applies to a specific case before it a provision of the agreement involving an unconditional and precise obligation and therefore not requiring any prior intervention on the part of the joint committee does not adversely affect the powers that the agreement confers on that committee.

21 As regards the safeguard clauses which enable the parties to derogate from certain provisions of the agreement it should be observed that they apply only in specific circumstances and as a general rule after consideration within the joint committee in the presence of both parties. Apart from specific situations which may involve their application, the existence of such clauses, which, moreover, do not affect the provisions prohibiting tax discrimination, is not sufficient in itself to affect the direct applicability which may attach to certain stipulations in the agreement.

22 It follows from all the foregoing considerations that neither the nature nor the structure of the agreement concluded with Portugal may prevent a trader from relying on the provisions of the said agreement before a Court in the Community.

23 Nevertheless the question whether such a stipulation is unconditional and sufficiently precise to have direct effect must be considered in the context of the agreement of which it forms part. In order to reply to the question on the direct effect of the first paragraph of article 21 of the agreement between the Community and Portugal it is necessary to analyse the provision in the light of both the object and purpose of the agreement and of its context.

24 The purpose of the agreement is to create a system of free trade in which rules restricting commerce are eliminated in respect of virtually all trade in products originating in the territory of the parties, in particular by abolishing customs duties and charges having equivalent effect and eliminating quantitative restrictions and measures having equivalent effect.

25 Seen in that context the first paragraph of article 21 of the agreement seeks to prevent the liberalization of the trade in goods through the abolition of customs duties and charges having equivalent effect and quantitative restrictions and measures having equivalent effect from being rendered nugatory by fiscal practices of the contracting parties. That would be so if the product imported of one party were taxed more heavily than the similar domestic products which it encounters on the market of the other party.
26 It appears from the foregoing that the first paragraph of article 21 of the agreement imposes on the contracting parties an unconditional rule against discrimination in matters of taxation, which is dependent only on a finding that the products affected by a particular system of taxation are of like nature, and the limits of which are the direct consequence of the purpose of the agreement. As such this provision may be applied by a Court and thus produce direct effects throughout the Community.

27 The first part of the first question should therefore be answered to the effect that the first paragraph of article 21 of the agreement between the Community and Portugal is directly applicable and capable of conferring upon individual traders rights which the courts must protect.

Second part of the question

28 In the event of an answer in the affirmative to the part of the question concerning the direct effect of the provision at issue the Bundesfinanzhof asks further whether that provision contains a prohibit of discrimination analogous to that laid down in the first paragraph of article 95 of the EEC treaty.

29 In that respect it must be observed that although article 21 of the agreement and article 95 of the EEC treaty have the same object inasmuch as they aim at the elimination of tax discrimination, both provisions, which are moreover worded differently, must however be considered and interpreted in their own context.

30 As the Court has already stated in its judgment of 9 February 1982 in case 270/80 Polydor ((1982) ECR 329), the EEC treaty and the agreement on free trade pursue different objectives. It follows that the interpretations given to article 95 of the treaty cannot be applied by way of simple analogy to the agreement on free trade.

31 The second part of the question must therefore be answered to the effect that the first paragraph of article 21 must be interpreted according to its terms and in the light of the objective which it pursues in the system of free trade established by the agreement.

Third part of the question

32 Finally the Bundesfinanzhof raises the question whether the rule against tax discrimination contained in article 21 of the agreement also applies to the importation of port wines.

33 Article 2 of the agreement provides that it applies to products originating in the Community or in Portugal:

“(i) which fall within chapters 25 to 99 of the Brussels nomenclature, excluding the products listed in annex i;
(ii) which are specified in protocols no. 2 and 8, with due regard to the arrangements provided for in those protocols.”

34 Port wines are mentioned in article 4 of protocol no 8 relating to the rules applicable to certain agricultural products. Article 4 provides that duties on imports into the Community of the products listed therein and originating in Portugal are to be reduced in the proportions and within the limits of the tariff quota indicated for each of them.

35 It is apparent from those provisions that the agreement applies to port wines subject to certain limitations regarding the abolition of customs duties. On the other hand the arrangements laid down in the protocol in no way affect the prohibition of tax discrimination contained in the first paragraph of article 21 of the agreement.
36 The last part of the first question must therefore be answered to the effect that the first paragraph of article 21 of the agreement between the Community and Portugal also applies to the importation of port wines.

Second question

37 In this question the Bundesfinanzhof seeks to obtain the criteria for interpretation which it needs in order to be able to decide whether the tax treatment to which the national authorities have subjected imported port wines is contrary to the first paragraph of article 21 of the agreement between the Community and Portugal. In order to answer that question it is necessary to compare the provision as it has been interpreted above with the facts as they appear in the order making the reference.

38 Question 2(a) essentially asks whether the first paragraph of article 21 of the agreement allows the federal republic of Germany to apply to spirits added to port wines the tax on spirits at the full rate or whether that provision requires the member state to apply the reduced rate of tax which paragraph 79(2) of the Branntweinmonopolgesetz provided for alcohol produced by fruit farm cooperative distilleries within the limits of their rights to distil.

39 The particulars in the order making reference do not show whether or not the alcohol added to the imported port wines was produced in conditions comparable to those on which the reduction in the spirits surcharge granted to fruit farm cooperative distilleries depended. On the other hand it is apparent from those particulars that the fruit farm cooperative distilleries referred to by the national law do not produce alcohol suitable for adding to liqueur wines.

40 It thus appears that there was no domestic alcohol on the market of the federal republic of Germany suitable for adding to wine to produce a liqueur wine which was similar to port wine and which could have qualified for the tax reduction provided for fruit farm cooperative distilleries.

41 In those circumstances the fact that the said reduction is not applied to port wines is not such as to have an adverse effect upon the liberalization of trade between the Community and Portugal referred to in the agreement. Having regard to the object of the agreement, the purely theoretical hypothesis that had the same product been manufactured in the federal republic of Germany in special conditions it would have been entitled to the tax reduction is not sufficient to establish an obligation to grant that reduction to the imported product.

42 Question 2(a) must therefore be answered to the effect that there is no discrimination within the meaning of the first paragraph of article 21 of the agreement between the Community and Portugal where a member state does not apply to products originating in Portugal a tax reduction provided for certain classes of producers or kinds of products if there is no like product on the market of the member state concerned which has in fact benefited from such reduction.

43 Question 2(b) asks whether the first paragraph of article 21 of the agreement between the Community and Portugal must be interpreted as requiring the concept of like products to cover not only products "directly" similar but also other products which are to be considered as "equally similar".

44 It is apparent from the order making the reference that the Bundesfinanzhof has put that question on the assumption that port wines may resemble not only other liqueur wines but also wines of a special kind of a high alcohol content resulting from natural fermentation which, in the federal republic of Germany, are not subject to any tax.
45 In that respect it must be emphasized that for the purposes of its application in the Community the concept of similarity contained in the first paragraph of article 21 of the agreement between the Community and Portugal is one of Community law which must be interpreted uniformly and it is for the Court to ensure that this is the case.

46 In view of the purpose of that provision as described above products which differ inter se both as regards the method of their manufacture and their characteristics may not be regarded as like products within the meaning of the said provision. It follows that liqueur wines fortified with spirits on the one hand and wines resulting from natural fermentation on the other may not be regarded as like products within the meaning of the provision at issue.

47 Question 2(b) must therefore be answered to the effect that products which differ inter se both as regards the method of their manufacture and their characteristics may not be regarded as like products within the meaning of the first paragraph of article 21 of the agreement.

Decision on costs

Costs

48 The costs incurred by the governments of the kingdom of Denmark, the Federal Republic of Germany, the French Republic and the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action before the national Court, costs are a matter for that Court.

Operative part

On those grounds, The Court, in answer to the question referred to it by the Bundesfinanzhof by order of 24 march 1981, hereby rules:

1. The first paragraph of article 21 of the agreement between the Community and Portugal is directly applicable and capable of conferring on individual traders rights which the courts must protect.

2. It must be interpreted according to its wording and in the light of the objective which it has in the context of the system of free trade established by the agreement.

3. The provision also applies to the importation of port wines.

4. It must be interpreted as follows:

(a) There is no discrimination within the meaning of the first paragraph of article 21 of the agreement between the Community and Portugal where a member state does not apply to products originating in Portugal a tax reduction provided for certain classes of producers or kinds of products if there is no like product on the market of the member state concerned which has in fact benefited from such reduction.

(b) Products which differ both as regards the method of their manufacture and their characteristics may not be regarded as like products.
Judgment of the Court of 30 September 1987  
*Meryem Demirel v Stadt Schwäbisch Gmünd*

Association agreement between the EEC and Turkey - Freedom of movement for workers.

Case 12/86

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IN CASE 12/86

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE VERWALTUNGSGERICHT (ADMINISTRATIVE COURT) STUTTGART FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN MERYEM DEMIREL, RESIDING AT SCHWAEBISCH GMUEND, AND STADT SCHWAEBISCH GMUEND (CITY OF SCHWAEBISCH GMUEND), ON THE INTERPRETATION OF ARTICLES 7 AND 12 OF THE ASSOCIATION AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND TURKEY, AND ARTICLE 36 OF THE ADDITIONAL PROTOCOL THERETO,


ADVOCATE GENERAL: M. DARMON

REGISTRAR: H.A. RUEHL, PRINCIPAL ADMINISTRATOR

JUDGMENT

Grounds


2 THE QUESTIONS AROSE IN THE COURSE OF AN ACTION FOR THE ANNULMENT OF AN ORDER TO LEAVE THE COUNTRY, ACCOMPANIED BY THE THREAT OF EXPULSION, WHICH THE CITY OF SCHWAEBISCH GMUEND HAD ISSUED AGAINST MRS MERYEM DEMIREL, A TURKISH NATIONAL, ON THE EXPIRY OF HER VISA. MRS DEMIREL IS THE WIFE OF A TURKISH NATIONAL WHO HAD BEEN LIVING AND WORKING IN THE FEDERAL REPUBLIC OF GERMANY SINCE ENTERING THAT COUNTRY IN 1979 FOR THE PURPOSE OF REJOINING HIS FAMILY. SHE HAD COME TO REJOIN HER HUSBAND HOLDING A VISA WHICH WAS VALID ONLY FOR THE PURPOSES OF A VISIT AND WAS NOT ISSUED FOR FAMILY REUNIFICATION.

3 IT APPEARS FROM THE ORDER OF THE VERWALTUNGSGERICHT THAT THE CONDITIONS FOR FAMILY REUNIFICATION IN THE CASE OF NATIONALS OF NON-MEMBER COUNTRIES WHO HAVE THEMSELVES ENTERED THE FEDERAL REPUBLIC OF GERMANY FOR THE PURPOSES OF FAMILY REUNIFICATION WERE TIGHTENED IN 1982 AND 1984 BY AMENDMENTS TO A CIRCULAR ISSUED FOR THE LAND OF BADEN-WUERTTENBERG BY THE MINISTER FOR THE INTERIOR OF THAT LAND PURSUANT TO THE AUSLAENDERGESETZ (ALIENS LAW); THOSE AMENDMENTS RAISED FROM THREE TO EIGHT YEARS THE PERIOD DURING WHICH THE FOREIGN NATIONAL WAS REQUIRED TO HAVE RESIDED CONTINUOUSLY AND LAWFULLY ON GERMAN TERRITORY. MRS DEMIREL’ S HUSBAND DID NOT FULFIL THAT CONDITION AT THE TIME OF THE EVENTS WHICH LED TO THE MAIN PROCEEDINGS.

4 THE VERWALTUNGSGERICHT STUTTGART, TO WHICH APPLICATION WAS MADE FOR ANNULMENT OF THE ORDER THAT MRS DEMIREL LEAVE THE COUNTRY, REFERRED THE FOLLOWING QUESTIONS TO THE COURT OF JUSTICE:
   (1) DO ARTICLE 12 OF THE ASSOCIATION AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND TURKEY AND ARTICLE 36 OF THE ADDITIONAL PROTOCOL THERETO, IN CONJUNCTION WITH ARTICLE 7 OF THE ASSOCIATION AGREEMENT, ALREADY LAY DOWN A PROHIBITION THAT UNDER COMMUNITY LAW IS DIRECTLY APPLICABLE IN THE MEMBER STATES ON THE INTRODUCTION OF FURTHER RESTRICTIONS ON FREEDOM OF MOVEMENT APPLICABLE TO TURKISH WORKERS LAWFULLY RESIDING IN A MEMBER STATE IN THE FORM OF A MODIFICATION OF AN EXISTING ADMINISTRATIVE PRACTICE?
   (2) IS THE EXPRESSION "FREEDOM OF MOVEMENT" IN THE ASSOCIATION AGREEMENT TO BE UNDERSTOOD AS GIVING TURKISH WORKERS RESIDING IN A MEMBER STATE THE RIGHT TO BRING CHILDREN UNDER THE AGE OF MAJORITY AND SPOUSES TO LIVE WITH THEM?

WHICH ARE MENTIONED OR DISCUSSED HEREAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

JURISDICTION OF THE COURT


9 IN THAT CONNECTION IT IS SUFFICIENT TO STATE THAT THAT IS PRECISELY NOT THE CASE IN THIS INSTANCE. SINCE THE AGREEMENT IN QUESTION IS AN ASSOCIATION AGREEMENT CREATING SPECIAL, PRIVILEGED LINKS WITH A NON-MEMBER COUNTRY WHICH MUST, AT LEAST TO A CERTAIN EXTENT, TAKE PART IN THE COMMUNITY SYSTEM, ARTICLE 238 MUST NECESSARILY EMPOWER THE COMMUNITY TO GUARANTEE COMMITMENTS TOWARDS NON-MEMBER COUNTRIES IN ALL THE FIELDS COVERED BY THE TREATY. SINCE FREEDOM OF MOVEMENT FOR WORKERS IS, BY VIRTUE OF ARTICLE 48 ET SEQ. OF THE EEC TREATY, ONE OF THE FIELDS COVERED BY THAT TREATY, IT FOLLOWS THAT COMMITMENTS REGARDING FREEDOM OF MOVEMENT FALL WITHIN THE POWERS CONFERRED ON THE COMMUNITY BY ARTICLE 238. THUS THE QUESTION WHETHER THE COURT HAS JURISDICTION TO RULE ON THE INTERPRETATION OF A PROVISION IN A MIXED AGREEMENT CONTAINING A COMMITMENT WHICH ONLY THE MEMBER STATES COULD ENTER INTO IN THE SPHERE OF THEIR OWN POWERS DOES NOT ARISE.

10 FURTHERMORE, THE JURISDICTION OF THE COURT CANNOT BE CALLED IN QUESTION BY VIRTUE OF THE FACT THAT IN THE FIELD OF FREEDOM OF MOVEMENT FOR WORKERS, AS COMMUNITY LAW NOW STANDS, IT IS FOR THE MEMBER STATES TO LAY DOWN THE RULES WHICH ARE NECESSARY TO GIVE EFFECT IN THEIR TERRITORY TO THE PROVISIONS OF THE AGREEMENT OR THE DECISIONS TO BE ADOPTED BY THE ASSOCIATION COUNCIL.

11 AS THE COURT HELD IN ITS JUDGMENT OF 26 OCTOBER 1982 IN CASE 104/81 HAUPTZOLLAMT MAINZ V KUPFERBERG (1982) ECR 3641, IN ENSURING RESPECT FOR COMMITMENTS ARISING FROM AN AGREEMENT CONCLUDED BY THE COMMUNITY INSTITUTIONS THE MEMBER STATES FULFIL, WITHIN THE COMMUNITY SYSTEM, AN OBLIGATION IN RELATION TO THE COMMUNITY, WHICH HAS ASSUMED RESPONSIBILITY FOR THE DUE PERFORMANCE OF THE AGREEMENT.

12 CONSEQUENTLY, THE COURT DOES HAVE JURISDICTION TO INTERPRET THE PROVISIONS ON FREEDOM OF MOVEMENT FOR WORKERS CONTAINED IN THE AGREEMENT AND THE PROTOCOL.
THE QUESTIONS REFERRED TO THE COURT

13 THE VERWALTUNGSGERICHT’S FIRST QUESTION SEeks ESSENTIALLY TO ESTABLISH WHETHER ARTICLE 12 OF THE AGREEMENT AND ARTICLE 36 OF THE PROTOCOL, READ IN CONJUNCTION WITH ARTICLE 7 OF THE AGREEMENT, CONSTITUTE RULES OF COMMUNITY LAW WHICH ARE DIRECTLY APPLICABLE IN THE INTERNAL LEGAL ORDER OF THE MEMBER STATES.

14 A PROVISION IN AN AGREEMENT CONCLUDED BY THE COMMUNITY WITH NON-MEMBER COUNTRIES MUST BE REGARDED AS BEING DIRECTLY APPLICABLE WHEN, REGARD BEING HAD TO ITS WORDING AND THE PURPOSE AND NATURE OF THE AGREEMENT ITSELF, THE PROVISION CONTAINS A CLEAR AND PRECISE OBLIGATION WHICH IS NOT SUBJECT, IN ITS IMPLEMENTATION OR EFFECTS, TO THE ADOPTION OF ANY SUBSEQUENT MEASURE.

15 ACCORDING TO ARTICLES 2 TO 5 THEREOF, THE AGREEMENT PROVIDES FOR A PREPARATORY STAGE TO ENABLE TURKEY TO STRENGTHEN ITS ECONOMY WITH AID FROM THE COMMUNITY, A TRANSITIONAL STAGE FOR THE PROGRESSIVE ESTABLISHMENT OF A CUSTOMS UNION AND FOR THE ALIGNMENT OF ECONOMIC POLICIES, AND A FINAL STAGE BASED ON THE CUSTOMS UNION AND ENTAINING CLOSER COORDINATION OF ECONOMIC POLICIES.

16 IN STRUCTURE AND CONTENT, THE AGREEMENT IS CHARACTERIZED BY THE FACT THAT, IN GENERAL, IT SETS OUT THE AIMS OF THE ASSOCIATION AND LAYS DOWN GUIDELINES FOR THE ATTAINMENT OF THOSE AIMS WITHOUT ITSELF ESTABLISHING THE DETAILED RULES FOR DOING SO. ONLY IN RESPECT OF CERTAIN SPECIFIC MATTERS ARE DETAILED RULES LAID DOWN BY THE PROTOCOLS ANNEXED TO THE AGREEMENT, LATER REPLACED BY THE ADDITIONAL PROTOCOL.


18 TITLE II OF THE AGREEMENT, WHICH DEALS WITH THE IMPLEMENTATION OF THE TRANSITIONAL STAGE, INCLUDES TWO CHAPTERS ON THE CUSTOMS UNION AND AGRICULTURE, TOGETHER WITH A THIRD CHAPTER CONTAINING OTHER ECONOMIC PROVISIONS, OF WHICH ARTICLE 12 ON THE FREEDOM OF MOVEMENT FOR WORKERS FORMS PART.

19 ARTICLE 12 OF THE AGREEMENT PROVIDES THAT THE CONTRACTING PARTIES AGREE TO BE GUIDED BY ARTICLES 48, 49 AND 50 OF THE TREATY ESTABLISHING THE COMMUNITY FOR THE PURPOSE OF PROGRESSIVELY SECURING FREEDOM OF MOVEMENT FOR WORKERS BETWEEN THEM.

20 ARTICLE 36 OF THE PROTOCOL PROVIDES THAT FREEDOM OF MOVEMENT SHALL BE SECURED BY PROGRESSIVE STAGES IN ACCORDANCE WITH THE PRINCIPLES SET OUT IN ARTICLE 12 OF THE AGREEMENT BETWEEN THE END OF THE 12TH AND THE 22ND YEAR AFTER THE ENTRY INTO FORCE OF THAT AGREEMENT, AND THAT THE COUNCIL OF ASSOCIATION IS TO DECIDE ON THE RULES NECESSARY TO THAT END.


22 THE ONLY DECISION WHICH THE COUNCIL OF ASSOCIATION ADOPTED ON THE MATTER WAS DECISION NO 1/80 OF 19 SEPTEMBER 1980 WHICH, WITH REGARD TO TURKISH WORKERS WHO ARE ALREADY DULY INTEGRATED IN THE LABOUR FORCE OF A MEMBER STATE, PROHIBITS ANY
FURTHER RESTRICTIONS ON THE CONDITIONS GOVERNING ACCESS TO EMPLOYMENT. IN THE SPHERE OF FAMILY REUNIFICATION, ON THE OTHER HAND, NO DECISION OF THAT KIND WAS ADOPTED.

23 EXAMINATION OF ARTICLE 12 OF THE AGREEMENT AND ARTICLE 36 OF THE PROTOCOL THEREFORE REVEALS THAT THEY ESSENTIALLY SERVE TO SET OUT A PROGRAMME AND ARE NOT SUFFICIENTLY PRECISE AND UNCONDITIONAL TO BE CAPABLE OF GOVERNING DIRECTLY THE MOVEMENT OF WORKERS.

24 ACCORDINGLY, IT IS NOT POSSIBLE TO INFERENCE FROM ARTICLE 7 OF THE AGREEMENT A PROHIBITION ON THE INTRODUCTION OF FURTHER RESTRICTIONS ON FAMILY REUNIFICATION. ARTICLE 7, WHICH FORMS PART OF TITLE I OF THE AGREEMENT DEALING WITH THE PRINCIPLES OF THE ASSOCIATION, PROVIDES IN VERY GENERAL TERMS THAT THE CONTRACTING PARTIES ARE TO TAKE ALL APPROPRIATE MEASURES, WHETHER GENERAL OR PARTICULAR, TO ENSURE FULFILMENT OF THE OBLIGATIONS ARISING FROM THE AGREEMENT AND THAT THEY ARE TO REFRAIN FROM ANY MEASURES LIABLE TO JEOPARDIZE THE ATTAINMENT OF THE OBJECTIVES OF THE AGREEMENT. THAT PROVISION DOES NO MORE THAN IMPOSE ON THE CONTRACTING PARTIES A GENERAL OBLIGATION TO COOPERATE IN ORDER TO ACHIEVE THE AIMS OF THE AGREEMENT AND IT CANNOT DIRECTLY CONFER ON INDIVIDUALS RIGHTS WHICH ARE NOT ALREADY VESTED IN THEM BY OTHER PROVISIONS OF THE AGREEMENT.

25 CONSEQUENTLY, THE ANSWER TO BE GIVEN TO THE FIRST QUESTION IS THAT ARTICLE 12 OF THE AGREEMENT AND ARTICLE 36 OF THE PROTOCOL, READ IN CONJUNCTION WITH ARTICLE 7 OF THE AGREEMENT, DO NOT CONSTITUTE RULES OF COMMUNITY LAW WHICH ARE DIRECTLY APPLICABLE IN THE INTERNAL LEGAL ORDER OF THE MEMBER STATES.

26 BY ITS SECOND QUESTION THE NATIONAL COURT WISHES TO ESTABLISH WHETHER THE CONDITIONS SUBJECT TO WHICH THE SPOUSE AND MINOR CHILDREN OF A TURKISH WORKER ESTABLISHED WITHIN THE COMMUNITY MAY JOIN HIM ARE COVERED BY THE CONCEPT OF "FREEDOM OF MOVEMENT" WITHIN THE INTERPRETATION OF THE AGREEMENT.

27 IN THE LIGHT OF THE ANSWER TO THE FIRST QUESTION, THE SECOND QUESTION DOES NOT CALL FOR AN ANSWER.

28 AS TO THE POINT WHETHER ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS HAS ANY BEARING ON THE ANSWER TO THAT QUESTION, IT MUST BE OBSERVED THAT, AS THE COURT RULED IN ITS JUDGMENT OF 11 JULY 1985 IN JOINED CASES 60 AND 61/84 CINETHEQUE V FEDERATION NATIONALE DES CINEMAS FRANCAIS (1985) ECR 2605, AT P. 2618, ALTHOUGH IT IS THE DUTY OF THE COURT TO ENSURE OBSERVANCE OF FUNDAMENTAL RIGHTS IN THE FIELD OF COMMUNITY LAW, IT HAS NO POWER TO EXAMINE THE COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS OF NATIONAL LEGISLATION Lying OUTSIDE THE SCOPE OF COMMUNITY LAW. IN THIS CASE, HOWEVER, AS IS APPARENT FROM THE ANSWER TO THE FIRST QUESTION, THERE IS AT PRESENT NO PROVISION OF COMMUNITY LAW DEFINING THE CONDITIONS IN WHICH MEMBER STATES MUST PERMIT THE FAMILY REUNIFICATION OF TURKISH WORKERS FULLY SETTLED IN THE COMMUNITY. IT FOLLOWS THAT THE NATIONAL RULES AT ISSUE IN THE MAIN PROCEEDINGS DID NOT HAVE TO IMPLEMENT A PROVISION OF COMMUNITY LAW. IN THOSE CIRCUMSTANCES, THE COURT DOES NOT HAVE JURISDICTION TO DETERMINE WHETHER NATIONAL RULES SUCH AS THOSE AT ISSUE ARE COMPATIBLE WITH THE PRINCIPLES ENSRINING IN ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

Decision on costs

COSTS

UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, IN THE NATURE OF A STEP IN THE PROCEEDINGS BEFORE THE NATIONAL COURT, THE DECISION ON COSTS IS A MATTER FOR THAT COURT.

Operative part

On those grounds,
THE COURT,
In answer to the questions referred to it by the Verwaltungsgericht Stuttgart by an order of 11 December 1985, hereby rules:
Article 12 of the Agreement establishing an association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 and concluded on behalf of the Community by a Council Decision of 23 December 1963, and Article 36 of the Additional Protocol, signed at Brussels on 23 November 1970 and concluded on behalf of the Community by Council Regulation No 2760/72 of 19 December 1972, read in conjunction with Article 7 of the Agreement, do not constitute rules of Community law which are directly applicable in the internal legal order of the Member States.
Judgment of the Court of 20 September 1990

S. Z. Sevince v Staatssecretaris van Justitie

EEC-Turkey Association Agreement - Decisions of the Association Council - Direct effect.

Case C-192/89

European Court reports 1990 Page I-03461

In Case C-192/89,
Reference to the Court under Article 177 of the EEC Treaty by the Raad van State, Netherlands, for a preliminary ruling in the proceedings pending before that court between

S. Z. Sevince

and

Staatssecretaris van Justitie,

on the interpretation of certain provisions of Decisions Nos 2/76 and 1/80 of the Council of Association established by the Association Agreement between the European Economic Community and Turkey,

THE COURT


Advocate General: M. Darmon
Registrar: J. A. Pompe, Deputy Registrar,
after considering the observations submitted on behalf of

S. Z. Sevince, by A. W. M. Willems, of the Amsterdam Bar,
the German Government, by E. Roeder, Regierungsdirektor im Bundesministerium fuer Wirtschaft, acting as Agent,
the Netherlands Government, by B. R. Bot, Secretary-General in the Ministry of Foreign Affairs, acting as Agent,
the Commission of the European Communities, by P. J. Kuijper, a member of its Legal Department, acting as Agent,
having regard to the Report for the Hearing,
after hearing oral argument presented on behalf of S. Z. Sevince, the German Government, the Netherlands Government, represented by J. W. De Zwaan, acting as Agent, and the Commission of the European Communities, at the sitting on 22 March 1990,
after hearing the Opinion of the Advocate General delivered at the sitting on 15 May 1990,
gives the following,

Judgment

Grounds

1 By decision of 1 June 1989, which was received at the Court on 8 June 1989, the Raad van State (Netherlands court of last instance in administrative matters) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of certain provisions of Decisions No. 2/76 of 20 December 1976 and 1/80 of 19 September 1980 of the Council of Association established by the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963, concluded on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (English version published in Official Journal 1973 C 113, p. 1, hereinafter referred to as "the Agreement").
2 The questions were raised in proceedings brought by Mr S. Z. Sevince, a Turkish national, against the Staatssecretaris van Justitie (State Secretary of Justice) concerning the latter’s refusal to grant him a permit allowing him to reside in the Netherlands.

3 It is apparent from the documents before the Court that on 11 September 1980 Mr Sevince was refused an extension to the residence permit which had been granted to him on 22 February 1979 on the ground that the family circumstances which had justified the grant of the permit no longer existed. The appeal lodged against that decision, which had full suspensive effect, was definitively dismissed by the Raad van State on 12 June 1986. During the period in which he benefited from the suspensory effect of the appeal, Mr Sevince obtained an employment certificate which remained valid until the abovementioned judgment of the Raad van State was delivered on 12 June 1986.

4 Claiming that he had been in paid employment for a number of years in the Netherlands, on 13 April 1987 Mr Sevince applied for a residence permit. In support of his application, he relied on Article 2(1)(b) of Decision No 2/76, according to which a Turkish worker who has been in legal employment for five years in a Member State of the Community is to enjoy free access in that Member State to any paid employment of his choice, and on the third indent of Article 6(1) of Decision No 1/80, according to which a Turkish worker duly registered as belonging to the labour force of a Member State is to enjoy free access in that Member State to any paid employment of his choice after four years’ legal employment. His application was rejected, by implication, by the Netherlands authorities.

5 An appeal against that decision was brought before the Raad van State, which decided to stay the proceedings until the Court of Justice had given a ruling on the following questions:

"(1) Is Article 177 of the EEC Treaty to be interpreted as meaning that a court or tribunal of a Member State may (and, in this case, must) refer to the Court of Justice for a preliminary ruling a question concerning the interpretation of the decisions of the Council of Association at issue in this case, that is to say, Decision No 2/76 and/or Decision No 1/80, if such a question is raised before it and it considers that a decision on the question is necessary to enable it to give judgment?

(2) If Question 1 is answered in the affirmative:

Are the following to be regarded as provisions applicable in the countries of the European Community to legal disputes: Article 2(1)(b) of Decision No 2/76 and/or Article 6(1) of Decision No 1/80, and Article 7 of Decision No 2/76 and/or Article 13 of Decision No 1/80?

(3) If Question 2 is answered in the affirmative:

What is to be understood by the term ‘legal employment’ in Article 2(1)(b) of Decision No 2/76 and/or Article 6(1) of Decision No 1/80 (in the light of Article 7 of Decision No 2/76 and/or Article 13 of Decision No 1/80)? Is it to be understood as referring to employment while the person concerned was in possession of a residence permit in compliance with the laws relating to aliens - with the subsidiary question whether, more broadly, it includes employment which that person could have had while he was waiting for the decision concerning his residence permit to become final and irreversible - or solely to employment which may be regarded as lawful employment within the terms of the legislation governing the employment of aliens?"

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 The national court’s first question is essentially whether an interpretation of Decisions Nos 2/76 and 1/80 may be given under Article 177 of the of the EEC Treaty.
8 By way of a preliminary observation, it should be borne in mind that, as the Court has consistently held, the provisions of an agreement concluded by the Council under Articles 228 and 238 of the EEC Treaty form an integral part of the Community legal system as from the entry into force of that agreement (see judgments in Case 12/86 Demirel [1987] ECR 3719, paragraph 7 and in Case 30/88 Greece v Commission [1989] ECR 3711, paragraph 12).

9 The Court has also held that, since they are directly connected with the Agreement to which they give effect, the decisions of the Council of Association, in the same way as the Agreement itself, form an integral part, as from their entry into force, of the Community legal system (see judgment in Case 30/88 Greece v Commission, supra, paragraph 13).

10 Since the Court has jurisdiction to give preliminary rulings on the Agreement, in so far as it is an act adopted by one of the institutions of the Community (see judgment in Case 181/73 Haegeman [1974] ECR 449), it also has jurisdiction to give rulings on the interpretation of the decisions adopted by the authority established by the Agreement and entrusted with responsibility for its implementation.

11 That finding is reinforced by the fact that the function of Article 177 of the EEC Treaty is to ensure the uniform application throughout the Community of all provisions forming part of the Community legal system and to ensure that the interpretation thereof does not vary according to the interpretation accorded to them by the various Member States (see judgments in Case 104/81 Kupferberg [1982] ECR 3641 and in Joined Cases 267 to 269/81 SPI and SAMI [1983] ECR 801).

12 It must therefore be stated in reply to the first question submitted by the Raad van State that the interpretation of Decisions Nos 2/76 and 1/80 falls within the scope of Article 177 of the EEC Treaty.

The second question

13 The second question submitted by the Raad van State is whether Articles 2(1)(b) and 7 of Decision No 2/76 and Articles 6(1) and 13 of Decision No 1/80 have direct effect in the territory of the Member States.

14 In order to be recognized as having direct effect, the provisions of a decision of the Council of Association must satisfy the same conditions as those applicable to the provisions of the Agreement itself.

15 In Demirel, supra, the Court held that a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (paragraph 14). The same criteria apply in determining whether the provisions of a decision of the Council of Association can have direct effect.

16 In order to determine whether the relevant provisions of Decisions Nos 2/76 and 1/80 satisfy those criteria, it is first necessary to examine their terms.

17 Article 2(1)(b) of Decision No 2/76 and the third indent of Article 6(1) of Decision No 1/80 uphold, in clear, precise and unconditional terms, the right of a Turkish worker, after a number of years' legal employment in a Member State, to enjoy free access to any paid employment of his choice.
Similarly, Article 7 of Decision No 2/76 and Article 13 of Decision No 1/80 contain an unequivocal "standstill" clause regarding the introduction of new restrictions on access to the employment of workers legally resident and employed in the territory of the contracting States.

The finding that the provisions of the decisions of the Council of Association at issue in the main proceedings are capable of direct application to the situation of Turkish workers duly registered as belonging to the labour force of a Member State is confirmed by the purpose and nature of the decisions of which those provisions form part and of the Agreement to which they relate.

According to Article 2(1) of the Agreement, its purpose is to promote the continuous and balanced strengthening of trade and economic relations between the parties, and it establishes between the European Economic Community and Turkey an association which provides for a preparatory stage to enable Turkey to strengthen its economy with aid from the Community, a transitional stage for the progressive establishment of a customs union and for the alignment of economic policies, and a final stage based on the customs union and entailing close coordination of economic policies (see judgment in Case 12/86 Demirel, supra, paragraph 15). As far as freedom of movement for workers is concerned, Article 12 of the Agreement, forming part of Title II concerning implementation of the transitional stage, provides that the contracting parties agree to be guided by Articles 48, 49 and 50 of the EEC Treaty for the purpose of progressively securing freedom of movement for workers between them. Article 36 of the Additional Protocol signed on 23 November 1970, annexed to the Agreement establishing an association between the European Economic Community and Turkey, concluded by Regulation (EEC) No 2760/72 of the Council of 19 December 1972 (Official Journal 1973 C 113, p. 17, hereinafter referred to as the "Additional Protocol") lays down the time-limits for the progressive attainment of such freedom of movement and provides that the Council of Association is to decide on the rules necessary to that end.

Decisions No. 2/76 and 1/80 were adopted by the Council of Association in order to implement Article 12 of the Agreement and Article 36 of the Additional Protocol which, in its judgment in Demirel, supra, the Court recognized as being intended essentially to set out a programme. Thus, in the preamble to Decision No 2/76 reference is expressly made to Article 12 of the Agreement and Article 36 of the Additional Protocol and Article 1 of the decision lays down the detailed arrangements for the first stage of implementation of Article 36 of the Additional Protocol. The third recital in the preamble to Decision No 1/80 refers to improving, in the social sphere, the conditions available to workers and members of their families in relation to the arrangements introduced by Decision No 2/76. The fact that the abovementioned provisions of the Agreement and the Additional Protocol essentially set out a programme does not prevent the decisions of the Council of Association which give effect in specific respects to the programmes envisaged in the Agreement from having direct effect.

The conclusion that the articles of Decisions No. 2/76 and 1/80 mentioned in the second question referred to the Court can have direct effect cannot be affected by the fact that Article 2(2) of Decision No 2/76 and Article 6(3) of Decision No 1/80 provide that the procedures for applying the rights conferred on Turkish workers are to be established under national rules. Those provisions merely clarify the obligation of the Member States to take such administrative measures as may be necessary for the implementation of those provisions, without empowering the Member States to make conditional or restrict the application of the precise and unconditional right which the decisions of the Council of Association grant to Turkish workers.

Similarly, Article 12 of Decision No 2/76 and Article 29 of Decision No 1/80, which provide that the contracting parties are, each for its own part, to take any measures required for the purposes of implementing the provisions of the decision, merely lay emphasis on the obligation to implement in good faith an international agreement, an obligation which, moreover, is referred to in Article 7 of the Agreement itself.
24 The direct effect of the provisions at issue in the main proceedings cannot, furthermore, be contested merely because Decisions Nos 2/76 and 1/80 were not published. Although non-publication of those decisions may prevent their being applied to a private individual, a private individual is not thereby deprived of the power to invoke, in dealings with a public authority, the rights which those decisions confer on him.

25 As regards the safeguard clauses which enable the contracting parties to derogate from the provisions granting certain rights to Turkish workers duly registered as belonging to the labour force of a Member State, it must be observed that they apply only to specific situations. Otherwise than in the specific situations which may give rise to their application, the existence of such clauses is not in itself liable to affect the direct applicability inherent in the provisions from which they allow derogations (see judgment in Case 104/81 Kupferberg, supra).

26 It follows from the foregoing considerations that it must be stated in reply to the second question submitted by the Raad van State that Article 2(1)(b) of Decision No 2/76 and/or Article 6(1) of Decision No 1/80 and Article 7 of Decision No 2/76 and/or Article 13 of Decision No 1/80 have direct effect in the Member States of the European Community.

The third question

27 The national court’s third question seeks to determine whether the expression “legal employment” contained in Article 2(1)(b) of Decision No 2/76 and in the third indent of Article 6(1) of Decision No 1/80 covers a situation where a Turkish worker is authorized to work during the period for which the operation is suspended of a decision refusing him a right of residence, against which he has appealed.

28 In replying to that question it must first be stated that the abovementioned provisions merely govern the circumstances of the Turkish worker as regards employment, and make no reference to his circumstances concerning the right of residence.

29 The fact nevertheless remains that those two aspects of the personal situation of a Turkish worker are closely linked and that by granting to such a worker, after a specified period of legal employment in the Member State, access to any paid employment of his choice, the provisions in question necessarily imply - since otherwise the right granted by them to the Turkish worker would be deprived of any effect - the existence, at least at that time, of a right of residence for the person concerned.

30 The legality of the employment within the meaning of those provisions, even assuming that it is not necessarily conditional upon possession of a properly issued residence permit, nevertheless presupposes a stable and secure situation as a member of the labour force.

31 In particular, although legal employment over a given period gives rise, at the end of that period, to recognition of a right of residence, it is inconceivable that a Turkish worker could contrive to fulfill that condition, and consequently be recognized as being vested with that right, merely because, having been refused a valid residence permit by the national authorities during that period and having exercised the rights of appeal provided for by national law against such refusal, he benefited from the suspensory effect deriving from his appeal and was therefore able to obtain authorization, on a provisional basis pending the outcome of the dispute, to reside and be employed in the Member State in question.

32 Consequently, the expression “legal employment” contained in Article 2(1)(b) of Decision No 2/76 and in the third indent of Article 6(1) of Decision No 1/80 cannot cover the situation of a Turkish worker who has been legally able to continue in employment only by reason of the
suspensory effect deriving from his appeal pending a final decision by the national court thereon, provided always, however, that that court dismisses his appeal.

33 It must therefore be stated in reply to the third question submitted by the national court that the term “legal employment” in Article 2(1)(b) of Decision No 2/76 and the third indent of Article 6(1) of Decision No 1/80 does not cover the situation of a Turkish worker authorized to engage in employment for such time as the effect of a decision refusing him a right of residence, against which he has lodged an appeal which has been dismissed, is suspended.

Decision on costs

Costs
34 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Kingdom of the Netherlands and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,
in reply to the questions submitted to it by the Raad van State of the Netherlands, by decision of 1 June 1989 hereby rules:

(1) The interpretation of Decision No 2/76 of 20 December 1976 and Decision No 1/80 of 19 September 1980 of the Association Council set up by the Agreement establishing an Association between the European Economic Community and Turkey falls within the scope of Article 177 of the EEC Treaty.

(2) Article 2(1)(b) of Decision No 2/76, cited above, and Article 6(1) of Decision No 1/80, cited above, and Article 7 of Directive No 2/76 and Article 13 of Decision No 1/80 have direct effect in the Member States of the European Community.

(3) The term “legal employment” in Article 2(1)(b) of Decision No 2/76, cited above, and the third indent of Article 6(1) of Decision No 1/80, cited above, does not cover the situation of a Turkish worker authorized to engage in employment for such time as the effect of a decision refusing him a right of residence, against which he has lodged an appeal which has been dismissed, is suspended.
Judgment of the Court of 23 November 1999  
*Portuguese Republic v Council of the European Union*

Commercial policy - Access to the market in textile products - Products originating in India and Pakistan

*Case C-149/96*

European Court reports 1999 Page I-08395

In Case C-149/96, Portuguese Republic, represented by L. Fernandes, Director of the Legal Service of the European Communities Directorate-General in the Ministry of Foreign Affairs, and C. Botelho Moniz, assistant in the Faculty of Law of the Portuguese Catholic University, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer, applicant,  
v  
Council of the European Union, represented by S. Kyriakopoulou, Legal Adviser, and I. Lopes Cardoso, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of A. Morbilli, General Counsel in the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, defendant,  

supported by  
French Republic, represented by C. de Salins, Deputy Director for International Economic Law and Community Law in the Department of Legal Affairs at the Ministry of Foreign Affairs, and G. Mignot, Secretary for Foreign Affairs in the same Department, acting as Agents, with an address for service in Luxembourg at the French Embassy, 88 Boulevard Joseph II,  

and  
Commission of the European Communities, represented by M. de Pauw and F. de Sousa Fialho, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of the same Legal Service, Wagner Centre, Kirchberg,  

interveners,  


THE COURT,  
Advocate General: A. Saggio,  
Registrar: H. von Holstein, Deputy Registrar,  
having regard to the Report for the Hearing,  
after hearing oral argument from the parties at the hearing on 30 June 1998,  
after hearing the Opinion of the Advocate General at the sitting on 25 February 1999,  
gives the following  

Judgment  

Grounds  

1 By application lodged at the Court Registry on 3 May 1996, the Portuguese Republic brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the annulment of Council Decision 96/386/EC of 26 February
1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products (OJ 1996 L 153, p. 47, 'the contested decision').

Legal and factual background

International multilateral agreements in the Uruguay Round

2 On 15 December 1993 the Council unanimously approved the terms of the global commitment on the basis of which the Community and the Member States agreed to end the multilateral trade agreements of the Uruguay Round ('the agreement of principle').

3 On the same day, the Director General of the General Agreement on Tariffs and Trade ('GATT'), Mr Sutherland, announced in Geneva to the committee for multilateral negotiations the closure of the negotiations of the Uruguay Round. In doing so he invited some of the participants to pursue their negotiations on access to the market, with a view to reaching a more complete and better balanced 'market access' package.

4 Following the closure of those negotiations the negotiations on market access for textile and clothing products ('textile products') with, inter alia, the Republic of India and the Islamic Republic of Pakistan were pursued by the Commission, with the assistance of the 'textile committee 113' of the Council ('the textile committee') designated by the Council to represent it in matters concerning the common commercial policy of the Community in the textile sector.

5 On 15 April 1994, at the Marrakesh meeting in Morocco, although the negotiations on access to the market in textiles had not yet been completed with Pakistan and India, the President of the Council and the Member of the Commission responsible for external relations signed the Final Act concluding the multilateral trade agreements of the Uruguay Round ('the Final Act'), the Agreement establishing the World Trade Organisation ('the WTO') and all the agreements and memoranda in Annexes 1 to 4 to the agreement establishing the WTO ('the WTO agreements') on behalf of the European Union, subject to subsequent approval.

6 Among those agreements, included in Annex 1 A to the agreement establishing the WTO, are the Agreement on Textiles and Clothing ('the ATC') and the Agreement on Import Licensing Procedures.


The agreements concluded with Pakistan and India

8 Following the signature of the WTO agreements negotiations with India and Pakistan continued; they were conducted by the Commission with the assistance of the textiles committee.

9 On 15 October and 31 December 1994 the Commission, and India and Pakistan respectively, signed two 'Memoranda of Understanding' between the European Community and India and Pakistan on arrangements in the area of market access for textile products.

10 The Memorandum of Understanding with Pakistan contains a number of commitments on the part of both the Community and Pakistan. In particular, Pakistan undertakes to eliminate all quantitative restrictions applicable to a series of textile products listed specifically in Annex II to
the Memorandum of Understanding. The Commission undertakes ‘to give favourable consideration to requests which the Government of Pakistan might introduce in respect of the management of existing [tariff] restrictions for exceptional flexibility (including carry-over, carry-forward and inter-category transfers)’ (point 6) and to initiate immediately the necessary internal procedures in order to ensure ‘that all restrictions currently affecting the importation of products of the handloom and cottage industries of Pakistan are removed before entry into force of the WTO’ (point 7).

11 The Memorandum of Understanding with India provides that the Indian Government is to bind the tariffs which it applies to the textiles and clothing items expressly listed in the Attachment to the Memorandum of Understanding and that ‘[t]hese rates will be notified to the WTO Secretariat within 60 days of the date of entry into force of the WTO’. It is also provided that the Indian Government may ‘introduce alternative specific duties for particular products’ and that these duties will be indicated ‘as a percentage ad valorem or an amount in Rs per item/square metre/kg, whichever is higher’ (point 2). The European Community agrees to ‘remove with effect from 1 January 1995 all restrictions currently applicable to India’s exports of handloom products and cottage industry products as referred to in Article 5 of the EC-India agreement on trade in textile products’ (point 5). The Community undertakes to give favourable consideration to ‘exceptional flexibilities, in addition to the flexibilities applicable under the bilateral textiles agreement, for any or all of the categories under restraint’, up to the amounts for each quota year indicated in the Memorandum of Understanding for 1995 to 2004 (point 6).

12 On a proposal from the Commission dated 7 December 1995, the Council adopted on 26 February 1996 the contested decision, which was approved by a qualified majority; the Kingdom of Spain, the Hellenic Republic and the Portuguese Republic voted against it.

13 The understandings with India and Pakistan were signed on 8 and 27 March 1996 respectively.

14 The contested decision was published in the Official Journal of the European Communities on 27 June 1996.

Community legislation

15 Council Regulation (EEC) No 3030/93 of 12 October 1993 on common rules for imports of certain textile products from third countries (OJ 1993 L 275, p. 1), as amended by Council Regulation (EC) No 3289/94 of 22 December 1994 (OJ 1994 L 349, p. 85), lays down rules governing imports into the Community of textile products originating in third countries which are linked to the Community by agreements, protocols or arrangements, or which are members of the WTO.

16 Thus, according to Article 1(1) thereof, the regulation applies to imports of textile products listed in Annex I originating in third countries with which the Community has concluded bilateral agreements, protocols or other arrangements as listed in Annex II.

17 Article 2(1) of the regulation provides that the importation into the Community of the textile products listed in Annex V originating in one of the supplier countries listed in that annex is to be subject to the annual quantitative limits laid down in that annex. Under Article 2(2), the release into free circulation in the Community of imports subject to the quantitative limits referred to in Annex V is to be subject to the presentation of an import authorisation issued by the Member States’ authorities in accordance with Article 12.

18 Article 3(1) provides that the quantitative limits referred to in Annex V are not to apply to the cottage industry and folklore products specified in Annexes VI and VIa which are accompanied on importation by a certificate issued in accordance with the provisions of Annexes VI and VIa and which fulfil the other conditions laid down therein.
19 On 10 April 1995, pursuant to what had been agreed in the agreement of principle (paragraph 2 of this judgment) the Council, on a proposal from the Commission, adopted Regulation (EC) No 852/95 on the grant of financial assistance to Portugal for a specific programme for the modernisation of the Portuguese textile and clothing industry (OJ 1995 L 86, p. 10).

20 On 20 December 1995 the Commission adopted Regulation (EC) No 3053/95 amending Annexes I, II, III, V, VI, VII, VIII, IX and XI of Regulation No 3030/93 (OJ 1995 L 323, p. 1). According to the 14th and 16th recitals in the preamble to that regulation, the fact that the arrangement with India as regards access to the market envisaged the abolition of quantitative restrictions on the importation of certain folklore and cottage industry products originating in India was one of the factors which led to the amendment of those annexes as from 1 January 1995.

21 The fifth and sixth indents of Article 1 of Regulation No 3053/95 replace Annex VI to Regulation No 3030/93 by a new Annex V to Regulation No 3053/95, and repeal Annex VIa to that regulation as from 1 January 1995.

22 As Regulation No 3053/95 was vitiated by a procedural defect, the fifth and sixth indents of Article 1 were withdrawn with retroactive effect from 1 January 1995 by Commission Regulation (EC) No 1410/96 of 19 July 1996 concerning the partial withdrawal of Regulation No 3053/95 (OJ 1996 L 181, p. 15, hereinafter "the withdrawal regulation"). According to the first recital in the preamble to the withdrawal regulation, the amendments provided for in the fifth and sixth indents of Article 1 of Regulation No 3053/95 had been adopted at a time when, by virtue of Article 19 of Regulation No 3030/93, the Council was not yet entitled to adopt them, the Council not yet having decided to conclude or apply provisionally the arrangements negotiated by the Commission with India and Pakistan concerning access to the market in textile products.


Substance

24 In support of its application, the Portuguese Republic relies, first, on breach of certain rules and fundamental principles of the WTO and, second, on breach of certain rules and fundamental principles of the Community legal order.

Breach of rules and fundamental principles of the WTO

25 The Portuguese Government claims that the contested decision constitutes a breach of certain rules and fundamental principles of the WTO, in particular those of GATT 1994, the ATC and the Agreement on Import Licensing Procedures.

26 It claims that according to case-law it is entitled to rely on those rules and fundamental principles before the Court.

27 Although the Court held in Case C-280/93 Germany v Council [1994] ECR I-4973, paragraphs 103 to 112, that the GATT rules do not have direct effect and that individuals cannot rely on them before the courts, it held in the same judgment that that does not apply where the adoption of the measures implementing obligations assumed within the context of the GATT is in issue or where a Community measure refers expressly to specific provisions of the general agreement. In such cases, as the Court held in paragraph 111 of that judgment, the Court must review the legality of the Community measure in the light of the GATT rules.
28 The Portuguese Government claims that that is precisely the position in this case, which concerns the adoption of a measure - the contested decision - approving the Memoranda of Understanding negotiated with India and Pakistan following the conclusion of the Uruguay Round for the specific purpose of applying the rules in GATT 1994 and the ATC.

29 The Council, supported by the French Government and by the Commission, relies rather on the special characteristics of the WTO agreements, which in their view provide grounds for applying to those agreements the decisions in which the Court held that the provisions of GATT 1947 do not have direct effect and cannot be relied upon.

30 They claim that the contested decision is of a special kind and is thus not comparable to the regulations at issue in Case 70/87 Fediol v Commission [1989] ECR 1781 and Case C-69/89 Nakajima All Precision v Council [1991] ECR I-2069. The decision is not a Community measure intended to `transpose' certain provisions of the ATC into Community law.

31 The Portuguese Government replies that it is not GATT 1947 that is in issue in the present case but the WTO agreements, which include GATT 1994, the ATC and the Agreement on Import Licensing Procedures. The WTO agreements are significantly different from GATT 1947, in particular in so far as they radically alter the dispute settlement procedure.

32 Nor, according to the Portuguese Government, does the case raise the problem of direct effect: it concerns the circumstances in which a Member State may rely on the WTO agreements before the Court for the purpose of reviewing the legality of a Council measure.

33 The Portuguese Government maintains that such a review is justified in the case of measures such as the contested decision which approve bilateral agreements governing, in relations between the Community and non-member countries, matters to which the WTO rules apply.

34 It should be noted at the outset that in conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the EC Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community (see Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, paragraph 17).

35 It should also be remembered that according to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means (Kupferberg, paragraph 18).

36 While it is true that the WTO agreements, as the Portuguese Government observes, differ significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties.

37 Although the main purpose of the mechanism for resolving disputes is in principle, according to Article 3(7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO), to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that understanding provides that where the
immediate withdrawal of the measures is impracticable compensation may be granted on an interim basis pending the withdrawal of the inconsistent measure.

38 According to Article 22(1) of that Understanding, compensation is a temporary measure available in the event that the recommendations and rulings of the dispute settlement body provided for in Article 2(1) of that Understanding are not implemented within a reasonable period of time, and Article 22(1) shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question.

39 However, Article 22(2) provides that if the member concerned fails to fulfil its obligation to implement the said recommendations and rulings within a reasonable period of time, it is, if so requested, and on the expiry of a reasonable period at the latest, to enter into negotiations with any party having invoked the dispute settlement procedures, with a view to finding mutually acceptable compensation.

40 Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.

41 It follows that the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties.

42 As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to ‘entering into reciprocal and mutually advantageous arrangements’ and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in Kupferberg.

43 It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

44 Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (Kupferberg, paragraph 18).

45 However, the lack of reciprocity in that regard on the part of the Community’s trading partners, in relation to the WTO agreements which are based on ‘reciprocal and mutually advantageous arrangements’ and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules.

46 To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners.
47 It follows from all those considerations that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.

48 That interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800, according to which `by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.

49 It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see, as regards GATT 1947, Fediol, paragraphs 19 to 22, and Nakajima, paragraph 31).

50 It is therefore necessary to examine whether, as the Portuguese Government claims, that is so in the present case.

51 The answer must be in the negative. The contested decision is not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of the WTO, nor does it make express reference to any specific provisions of the WTO agreements. Its purpose is merely to approve the Memoranda of Understanding negotiated by the Community with Pakistan and India.

52 It follows from all the foregoing that the claim of the Portuguese Republic that the contested decision was adopted in breach of certain rules and fundamental principles of the WTO is unfounded.

Breach of rules and fundamental principles of the Community legal order

Breach of the principle of publication of Community legislation

53 The Portuguese Government claims that this principle has been breached because the contested decision and the Memoranda of Understanding which it approves were not published in the Official Journal of the European Communities. In its reply, it merely states that the validity of its argument has been recognised, since the contested decision was published after it lodged its application.

54 In that regard, it is sufficient to observe that the belated publication of a Community measure in the Official Journal of the European Communities does not affect the validity of that measure.

Breach of the principle of transparency

55 The Portuguese Government contends that this principle has been breached because the contested decision approves Memoranda of Understanding which are not adequately structured and are drafted in obscure terms which prevent a normal reader from immediately grasping all their implications, in particular as regards their retroactive application. In support of this plea it relies on the Council Resolution of 8 June 1993 on the quality of drafting of Community legislation (OJ 1993 C 166, p. 1).

56 It should be noted that, as the Council has observed, that resolution has no binding effect and places no obligation on the institutions to follow any particular rules in drafting legislative measures.
57 Furthermore, as the Advocate General observes in point 12 of his Opinion, the decision appears to be clear in every aspect, as regards both the wording of its provisions relating to the conclusion of the two international agreements and as regards the rules contained in the two Memoranda of Understanding, which provide for a series of reciprocal undertakings by the contracting parties with a view to the gradual liberalisation of the market in textile products. Furthermore, the Portuguese Government's complaint that the contested decision fails to indicate precisely what provisions of the earlier measures it amends or repeals is not of such a kind as to vitiate that decision, since such an omission does not constitute a breach of an essential procedural requirement with which an institution must comply if the measure in question is not to be void.

58 The Portuguese Government's claim that the contested decision was adopted in breach of the principle of transparency is therefore unfounded.

Breach of the principle of cooperation in good faith in relations between the Community institutions and the Member States

59 The Portuguese Government maintains that the bilateral agreements with India and Pakistan were concluded without regard for its position concerning the negotiations with those two countries, which it had clearly stated throughout the negotiating procedure, in particular at the meeting of the Council on 15 December 1993 at which it was decided to accede to the WTO agreements and in a letter of 7 April 1994 from the Portuguese Minister for Foreign Affairs to the Council.

60 It consented to the signature of the Final Act of the WTO and the annexes thereto on condition that, inter alia, the obligation imposed on India and Pakistan to open up their markets could not give rise, in the negotiations with those countries, to reciprocal concessions on the part of the Member States other than those provided for in the ATC.

61 In approving the Memoranda of Understanding, which provide for an accelerated process for opening the market in textile products in comparison with the ATC and, consequently, the dismantling of the Community tariff quotas for those products, the contested decision was adopted in breach of the principle of cooperation in good faith in relations between the Community and the Member States as inferred from the wording of Article 5 of the EC Treaty (now Article 10 EC), and should therefore be annulled on that ground.

62 The Portuguese Government also claims that the signature of the Final Act required the consent of all the Member States and not of a qualified majority of the members of the Council. Any change in the equilibrium on the basis of which the Final Act was signed required fresh deliberations in the same voting conditions, that is, with unanimity.

63 The Council considers that the position expressed by the Portuguese Government, in particular in the letter of 7 April 1994 from the Minister for Foreign Affairs, is of a political nature and that, furthermore, it was taken into consideration in so far as it led to the adoption of Regulation No 852/95, whereby the Council granted a series of subsidies to the Portuguese textile industry.

64 The Council also refutes the Portuguese Government's argument that approval of the two Memoranda of Understanding should have been decided unanimously. It claims that since the contested decision constitutes a commercial policy measure it could be adopted by a qualified majority of the members of the Council on the basis of Article 113(4) of the EC Treaty (now, after amendment, Article 133(4) EC). The adoption of both memoranda complied fully with the provisions of the Treaty, moreover, in particular Article 113.

65 The Commission supports the Council's argument and further contends that, even if the Portuguese Republic expressed reservations in concluding the final agreement, the Council's
failure to act in accordance with that agreement could not constitute a ground for annulling the contested decision.

66 The Court observes, first, that the contested decision is a measure of commercial policy, to be adopted by a qualified majority pursuant to Article 113(4) of the Treaty. Accordingly, since it is common ground that the contested decision was adopted in accordance with that provision, the fact that a minority of Member States, including the Portuguese Republic, were opposed to its adoption is not of such a kind as to vitiate that decision and entail its annulment.

67 Second, the Court observes, as did the Advocate General at point 32 of his Opinion, that the principle of cooperation in good faith between the Community institutions and the Member States has no effect on the choice of the legal basis of Community legal measures and, consequently, on the legislative procedure to be followed when adopting them.

68 Accordingly, the Portuguese Republic's claim that the contested decision failed to comply with that principle is unfounded.

Breach of the principle of legitimate expectations

69 The Portuguese Government claims that in adopting the contested decision the Council breached the principle of legitimate expectations as regards economic operators in the Portuguese textile industry.

70 It maintains that the latter were entitled to expect that the Council would not substantially alter the timetable and rate of the opening of the Community market in textile products to international competition, as fixed in the WTO agreements, in particular the ATC, and in the applicable Community legislation, in particular Regulation No 3030/93, as amended by Regulation No 3289/94, which transposed the rules set out in the ATC into Community law.

71 The adoption of the contested decision entailed a significant acceleration of the process of liberalising the Community market and therefore altered the legislative framework established by the ATC by making it significantly tougher. That significant and unforeseeable alteration of the conditions of competition in the Community market in textile products changed the framework in which the Portuguese economic operators implemented the restructuring measures which the Council itself, in adopting Regulation No 852/95, deemed indispensable, rendering those measures less effective and causing serious harm to the operators concerned.

72 The Council contends, first, that Portuguese operators in the textiles sector could not rely on a legitimate expectation that a situation which was still the subject of negotiation would be maintained. Although they assumed that the markets in India and Pakistan would be opened up without any reciprocal concessions, that expectation was not such as to found a legitimate expectation, having regard to the fact that it did not result from any legal commitment given by the Council.

73 Second, the Council contends that the approval of the two Memoranda of Understanding does not call in question the outcome of the Uruguay Round. The memoranda do not contain any provision modifying the level of restrictions in force or the rate of expansion provided for in the bilateral agreements concluded with India and Pakistan. The Memoranda of Understanding provide only that the Commission is prepared to give favourable consideration to requests for exceptional flexibilities (including carry-over, carry-forward and inter-category transfers) introduced by Pakistan or India, within the framework of the existing restrictions and not exceeding, for each quota year, the amounts fixed in each memorandum. Those exceptional flexibilities, and in particular the possibility of carrying them forward, do not modify the restrictions in force and, in particular, do not have the effect of altering the timetable for integration of the categories concerned into GATT 1994.
The Commission maintains that the Portuguese Republic cannot rely on breach of the principle of legitimate expectations of the economic operators because, first, it does not have a direct and personal interest in the protection of their legitimate interests and, second, it failed to forewarn those economic operators, although the information in its possession showed clearly and adequately that in order to reach an agreement the Community would probably have to grant additional concessions.

In that regard, it should be noted that it is settled law that the principle of respect for legitimate expectations cannot be used to make a regulation unalterable, in particular in sectors such as that of textile imports - where continuous adjustment of the rules to changes in the economic situation is necessary and therefore reasonably foreseeable (see to that effect Case C-315/96 Lopex Export [1998] ECR I-317, paragraphs 28 to 30).

Furthermore, for the reasons stated by the Advocate General at point 33 of his Opinion, no appreciable differences in treatment were established between Indian and Pakistani producers, on the one hand, and those from other States which have acceded to the WTO, on the other hand; in any event, if such differences exist they are not of such a kind as to prejudice the expectations of the operators concerned.

It follows that the Portuguese Republic's claim that the contested decision was adopted in breach of the principle of legitimate expectations is unfounded.

The Portuguese Government claims that the principle of the non-retroactivity of legal rules has been breached, since the arrangements introduced by the Memoranda of Understanding approved in the contested decision have retroactive effect and apply to past situations without any reasons being stated for the need to derogate from the principle that legal rules apply only for the future.

Although they were signed on 15 October and 31 December 1994 respectively, and only approved by the Council on 26 February 1996, the Memoranda of Understanding concluded with Pakistan and India ratify the application of a system of exceptional flexibilities which took effect, pursuant to paragraph 6 of each memorandum, as from 1994 in the case of Pakistan and 1995 in the case of India.

In that regard, it is sufficient to point out that the implementation of these international commitments in Community law was to be effected by the Commission, pursuant to Article 19 of Regulation No 3030/93, by the adoption of measures amending the annexes thereto.

Accordingly, it is only in the context of an action against the adoption of such measures that their retroactive effect may be challenged.

The Portuguese Government maintains that the contested decision was adopted in breach of the principle of economic and social cohesion set out in Articles 2 and 3(j) of the EC Treaty (now, after amendment, Articles 2 EC and 3(1)(k) EC), and also of Articles 130a of the EC Treaty (now, after amendment, Article 158 EC), 130b and 130c of the EC Treaty (now Articles 159 EC and 160 EC), and 130d and 130e of the EC Treaty (now, after amendment, Articles 161 EC and 162 EC). The Council itself referred to such a principle in the recitals in the preamble to Regulation No 852/95, when it stated that the adoption of that regulation had become necessary.
owing to the adoption of legal arrangements which aggravated inequalities and jeopardised the economic and social cohesion of the Community.

84 The Council maintains that the Community adopted Regulation No 852/95 in favour of the Portuguese industry in order to strengthen economic and social cohesion. It also observes that the Community's obligation to integrate textile products and clothing within the framework of GATT 1994 in accordance with the provisions of the ATC and Regulation No 3289/94 amending Regulation No 3030/93, was not affected by the commitments contained in the two Memoranda of Understanding.

85 The Commission maintains that, contrary to what the Portuguese Republic claims, the EC Treaty does not set up economic and social cohesion as a fundamental principle of the Community legal order, compliance with which is absolutely binding on the institutions to the extent that any measure capable of having a negative impact on certain less-favoured areas of the Community is automatically void.

86 The Court would observe that although it follows from Articles 2 and 3 of the Treaty, and also from Articles 130a and 130e, that the strengthening of economic and social cohesion is one of the objectives of the Community and, consequently, constitutes an important factor, in particular for the interpretation of Community law in the economic and social sphere, the provisions in question merely lay down a programme, so that the implementation of the objective of economic and social cohesion must be the result of the policies and actions of the Community and also of the Member States.

87 Consequently, the Portuguese Government's claim that the contested decision was adopted in breach of the principle of economic and social cohesion is unfounded.

Breach of the principle of equality between economic operators

88 The Portuguese Government claims that the contested decision favours woollen products over cotton products, since the measures opening the markets of India and Pakistan established by the Memoranda of Understanding benefit virtually exclusively Community producers of wool products. Producers in the cotton sector - in which the essential part of the export capacity of the Portuguese industry is concentrated - are thus doubly penalised.

89 The Council replies that the purpose of the negotiations with India and Pakistan was to improve access to the Indian and Pakistan markets. If the products supplied by those two countries tended to suit a particular category of economic operator, in this case those in the wool sector, that cannot constitute a breach of the principle of equality between economic operators, since the memoranda were not in any way intended to discriminate between them.

90 The Commission maintains that the fact that India and Pakistan offered more favourable treatment for wool products than for cotton products (an allegation which has not been proven by the Portuguese Republic) and thereby established a certain inequality of treatment between different categories of operators in the textile industry cannot be attributed to the Council as discrimination on its part. Even if it could, the discrimination would be justified by the nature of the measure in question and the objective which the Council pursued in approving the Memoranda of Understanding, namely to improve, in the common interest, access to the Indian and Pakistani markets for all products of Community origin.

91 The principle of non-discrimination requires that `comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified' (see, in particular, Germany v Commission, cited above, paragraph 67).

92 In the present case, as the Advocate General observes at point 35 of his Opinion, operators in the textile sector are active in two separate markets, the market in wool and the market in
cotton, and, consequently, any economic prejudice suffered by one of those two categories of producers does not imply a breach of the principle of non-discrimination.

93 Consequently, the Portuguese Republic's claim that the contested decision was adopted in breach of the principle of equality between economic operators is also unfounded.

94 It follows that its claim that the contested decision was adopted in breach of certain rules and fundamental principles of the Community legal order is unfounded; accordingly, the application must be dismissed in its entirety.

Decision on costs

Costs

95 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Council applied for the Portuguese Republic to be ordered to pay the costs and the Portuguese Republic has been unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

Operative part

On those grounds, THE Court hereby:

1. Dismisses the application;

2. Orders the Portuguese Republic to pay the costs;

3. Orders the French Republic and the Commission of the European Communities to bear their own costs.
Judgment of the Court of 22 June 1989

Fédération de l’industrie de l’huilerie de la CEE (Fediol) v Commission of the European Communities

Common commercial policy - Illicit commercial practices - Regulation N° 2641/84

Case 70/87

European Court reports 1989 Page 01781

In Case 70/87

EEC Seed Crushers’ and Oil Processors’ Federation (Fediol), Brussels, represented by D. Ehle, U. C. Feldmann, V. Schiller, P. C. Reszel, B. Hein, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the chambers of E. Arendt and G. Harles, 4 avenue Marie-Thérèse, applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Peter Gilsdorf, assisted by H. J. Rabe and M. Schuette, Rechtsanwälte, of Sozietaet Schoen und Pflueger (Hamburg and Brussels), with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg, defendant,

APPLICATION for the annulment of the Commission’s (unpublished) Decision No 2506 of 22 December 1986 rejecting a request that it initiate an examination procedure in respect of certain illicit commercial practices of Argentina regarding the export of soya cake to the Community, pursuant to Article 3(5) of Council Regulation 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 (Official Journal 1984, L 252, p. 1),

THE COURT


Advocate General: W. Van Gerven

Registrar: D. Louterman, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 23 November 1988, after hearing the Opinion of the Advocate General delivered at the sitting on 7 March 1989, gives the following

Judgment

Grounds

1 By an application lodged at the Court Registry on 6 March 1987 the EEC Seed Crushers’ and Oil Processors’ Federation (hereinafter referred to as “Fediol”) brought an action under the second paragraph of Article 173 of the EEC Treaty, seeking the annulment of the Commission’s (unpublished) Decision No 2506 of 22 December 1986, notified to the applicant on 7 January 1987. By that decision the Commission rejected the applicant’s complaint requesting the Commission to initiate a procedure to examine certain commercial practices of Argentina regarding the export of soya cake to the Community, pursuant to Article 3(5) of Council Regulation 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 (Official Journal 1984, L 252, p. 1).

2 Regulation No 2641/84, described as “a new instrument of commercial policy”, is designed to enable the Community to deal with illicit commercial practices other than dumping and subsidies. According to Article 2(1) of the regulation, “illicit commercial practices” means “any
international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules”.

3 Regulation No 2641/84 lays down the procedure for dealing with commercial practices of that kind. The procedure is initiated by a complaint lodged on behalf of Community producers (Article 3) or at the request of a Member State (Article 4); it consists of two stages.

4 In the first stage the Commission considers (a) whether the complaint or request contains sufficient evidence of the existence of the commercial practices complained of, (b) whether those practices are illicit, (c) whether the complaint or request contains sufficient evidence of consequent injury, or the threat of such injury, to a Community industry, and (d) whether it is necessary in the interest of the Community to initiate an examination procedure. If the answer to those questions is affirmative, the Commission initiates the procedure and assembles all the information needed for the examination.

5 In the second stage, when, at the end of the examination procedure, both an illicit commercial practice and the consequent injury to a Community industry have been substantiated, the Commission decides whether action needs to be taken in the interest of the Community. If that is so, it proposes to the Council the adoption of appropriate commercial policy measures, having, where necessary, implemented formal international procedures for consultation or for the settlement of disputes.

6 The contested decision recites that Fediol’s complaint related to two practices on the part of Argentina which the complainant described as “illicit commercial practices”, namely:

(i) a scheme of differential charges on exports of soya products (soya beans, soya oil and soya cake), whereby the exportation of soya beans - the raw material for the production of soya oil and soya cake - was subject to higher rates of duty than were charged on the exportation of soya oil and cake; the rates were, moreover, calculated on the basis of artificial reference prices, laid down by the Argentine authorities without regard to world market prices; and

(ii) quantitative restrictions on the exportation of soya beans, inter alia in the form of export registrations and sporadic suspension of exports by administrative directives.

7 According to Fediol the abovementioned practices caused serious damage to the European oil-processing industry, because they have the effect of:

(i) discouraging the exportation of soya beans, which increases the supply of such products on the Argentine market and thereby lowers their selling price to the Argentine oil-processing industry, and hence

(ii) guaranteeing the Argentine oil-processing industry large crushing margins for the processing of beans into oil and soya cake, since it can buy the raw material - soya beans - at a price below the world market price; that benefit enabled it not only to offset the low rate of duty levied on exports of oil and cake but also to sell those two products at prices far below their normal value and the prices usually charged by the European oil-processing industry.

8 In its complaint Fediol supports its claim with the argument that the abovementioned practices are contrary to Articles III, XI and XXIII of the General Agreement on Tariffs and Trade (hereinafter referred to as “GATT”), either individually or jointly. In its observations submitted to the Commission on 9 May 1986, Fediol maintained that the practices were also contrary to Articles XX and XXXVI of GATT.

9 By the contested decision the Commission rejected the complaint, both (a) as regards the charging of differential rates of duty (the existence of which it does not deny) on the grounds that it does not run counter to any of the rules of international law upon which Fediol had relied in its complaint, and (b) as regards the existence of quantitative restrictions on the exportation of soya beans, on the grounds that that part of the complaint was not supported by any evidence whatever.
10 During the procedure before the Court the applicant has not put forward any submission to contest the Commission’s contention that there was no proof of the existence of quantitative restrictions on the exportation of soya beans. The substantive challenge is therefore concerned solely with the categorization by the contested decision of the charging of differential rates of duty, according to which that is not contrary to the GATT provisions upon which Fediol had relied.

11 In its application to the Court, Fediol claims that the charging of differential rates of duty is contrary to Articles III, XI and XXIII of GATT; it is in Fediol’s view also contrary to Article XX of GATT to which Fediol had referred in the observations which it submitted to the Commission on 9 May 1986, but which the Commission did not consider in the contested decision.

12 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

13 The Commission contends that the application is inadmissible because none of the submissions relied on are admissible. The Commission maintains that the only submissions which may be made in view of the legal protection conferred on the complainant by Regulation No 2641/84 are those based on disregard of procedural guarantees, manifest infringement of certain provisions of Community law, or a serious misuse of powers on the Commission’s part having the effect of negating the procedural guarantees afforded by the Regulation.

14 According to the Commission the complainant cannot be permitted to make submissions directed against the contents of the Commission’s decisions, because its power to define the interests of the Community in the two procedural phases set out above entails not only the exercise of a broad discretion but also the taking into account of political considerations which are not amenable to review by the Court. The complainant can therefore never rely on submissions concerning the interests of the Community to challenge a definitive decision terminating the procedure. Consequently, the complainant is also precluded from contesting the other assessments made by the Commission during the procedure.

15 In that connection it should be pointed out that the decision at issue contains no assessment regarding the Community’s interest in the initiation of an examination procedure or even regarding the injury or threat of injury to the Community industry concerned arising from the practice in question. The contested decision confines itself to the finding that the charging of differential rates of duty is not contrary to the GATT provisions.

16 Since that finding was made prior to, and independently of, the assessment of the Community’s interests, it requires separate consideration. The question whether or not the Commission’s assessment of the Community interest is amenable to review by the Court is not therefore at issue.

17 That submission of inadmissibility must therefore be rejected.

18 The Commission further maintains that when, as in this case, its decision deals with the interpretation of GATT provisions, the complainant cannot be permitted to put forward submissions calling that interpretation in question, because the interpretation which the Commission, pursuant to Regulation No 2641/84, places on the term ‘illicit commercial practice’ and on the rules of international law, in particular those of GATT, is subject to review by the Court only in so far as the disregard or misapplication of those rules amounts to an infringement of the provisions of Community law which vest rights in individuals, directly and specifically;
however, the GATT rules themselves are not sufficiently precise to give rise to such rights on the part of individuals.

19 It should be recalled that the Court has certainly held, on several occasions, that various GATT provisions were not capable of conferring on citizens of the Community rights which they can invoke before the courts (judgments of 12 December 1972 in Joined Cases 21 to 24/72 International Fruit Company (1972) ECR 1219; 24 October 1973 in Case 9/73 Schlueter (1973) ECR 1135; 16 March 1983 in Case 266/81 SIOT (1983) ECR 731; and 16 March 1983 in Joined Cases 267 to 269/81 SPI and SAMI (1983) ECR 801). Nevertheless, it cannot be inferred from those judgments that citizens may not, in proceedings before the Court, rely on the provisions of GATT in order to obtain a ruling on whether conduct criticized in a complaint lodged under Article 3 of Regulation No 2641/84 constitutes an illicit commercial practice within the meaning of that regulation. The GATT provisions form part of the rules of international law to which Article 2(1) of that regulation refers, as is borne out by the second and fourth recitals in its preamble, read together.

20 It is also appropriate to note that the Court did indeed hold in the abovementioned judgments of 12 December 1972 International Fruit Company, 24 October 1973 Schlueter and 16 March 1983 SPI and SAMI, that a particular feature of GATT is the broad flexibility of its provisions, especially those concerning deviations from general rules, measures which may be taken in cases of exceptional difficulty, and the settling of differences between the contracting parties. That view does not, however, prevent the Court from interpreting and applying the rules of GATT with reference to a given case, in order to establish whether certain specific commercial practices should be considered incompatible with those rules. The GATT provisions have an independent meaning which, for the purposes of their application in specific cases, is to be determined by way of interpretation.

21 Lastly, the fact that Article XXIII of GATT provides a special procedure for the settlement of disputes between contracting parties is not such as to preclude its interpretation by the Court. As the Court held in the judgment of 26 October 1982 in Case 104/81 Kupferberg (1982) ECR 3641, in the context of the joint committees which are set up by free-trade agreements and given responsibility for the administration and proper implementation of those agreements, the mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement.

22 It follows that, since Regulation No 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them, those same economic agents are entitled to request the Court to exercise its powers of review over the legality of the Commission’s decision applying those provisions.

23 In the light of the foregoing the objection of inadmissibility raised by the Commission must be rejected.

Substance

24 As far as the substantive issues are concerned, the applicant submits that the commercial practices at issue are incompatible with certain provisions of GATT.

Article III of GATT

25 The applicant asserts that the charging of differential rates of duty is contrary to Article III of GATT.

26 Article III(1) provides as follows: "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale,
offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production “.

27 It should be noted that Article III(1) relates only to taxes, other charges and rules which relate to the internal market and have a protective effect. Consequently, since the contested Argentine duties are levied exclusively on exported products, they do not fall within the ambit of that provision.

28 The applicant, however, maintains that Article III of GATT seeks not only to eliminate any discrimination against imported products by means of a system of internal charges but also to prevent the protection of national products through a system of differential export duties - such as the one at issue here - from causing injury to the industry of a third country to which those products are exported.

29 That argument cannot be accepted. The purpose of Article III of GATT is to avoid any discrimination against imported products in favour of domestic ones, in the form of internal charges and rules; it cannot therefore be applied to a case such as the present one, which concerns a system of differential export duties levied solely on certain categories of domestic products.

30 Consequently, the applicant’s submission alleging the infringement of Article III of GATT must be rejected.

Article XI of GATT

31 Under Article XI(1), “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party”.

32 According to the applicant some aspects of the system of differential duties, and in particular the fixing of artificial reference prices as a basis for the calculation of the differential rates of duty levied on soya products intended for exportation are distinct in character from the charges excluded from the prohibition set out in Article XI of GATT, and constitute measures having equivalent effect to a quantitative restriction. They are therefore contrary to Article XI which, by referring to “restrictions … made effective through … other measures”, lays the emphasis on the effects rather than the form of the measures in question.

33 In this connection it should be observed that, as may be seen from its wording, Article XI(1) of GATT excludes from its scope any restrictions arising inter alia from taxes or other charges, and this is not denied by the applicant. In the present case, however, the measures in dispute are export duties which, contrary to the applicant’s assertions, do not cease to be such duties by virtue of being calculated artificially.

34 That submission must therefore be rejected.

Article XX of GATT

35 Article XX provides that any contracting party may adopt measures derogating from the GATT provisions provided that they do not constitute either a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. The permitted derogations include those
“(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan, provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination “.

36 According to the applicant, that provision entails a general prohibition on measures involving export restrictions whose effect is to protect the national industry in question, unless the conditions for derogation are fulfilled.

37 It is sufficient to note in this connection that Article XX(i) of GATT provides for an exception to the prohibitions arising under the other provisions of GATT; it therefore presupposes a prohibition imposed by some other provision, to which it lays down for an exception. Accordingly, it is not possible to infer from that article a general prohibition existing in its own right.

38 That submission, too, must therefore be rejected.

Article XXIII of GATT

39 Article XXIII(1) of GATT is worded as follows:

"If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it “.

40 Article XXIII(2) establishes the procedure to be followed “if no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article “.

41 The applicant puts forward a series of contentions based on the premise that those provisions prohibit any conduct nullifying or impairing any benefit accruing under GATT or any of its objectives. The applicant claims that, in the present case, a benefit accruing under GATT has been jeopardized, either because the charging of differential duties is contrary to certain obligations arising under GATT (Article XXIII(1)(a)), or because it infringes the legitimate expectation of the Community (Article XXIII(1)(b) and (c)).

42 In that connection it is sufficient to note that Article XXIII of GATT does not, in itself, contain any specific substantive rule, contravention of which would establish the existence of an illicit commercial practice. The purpose of Article XXIII is merely to lay down the procedure which a contracting party may use, within the framework of GATT, when a benefit accruing to it under GATT is being nullified or impaired by the conduct of another contracting party, even in cases where the conduct in question does not conflict with the provisions of GATT.

43 Consequently, that submission must be rejected.
Decision on costs

Costs

44 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under the first subparagraph of Article 69(3), where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs in whole or in part. Since the Commission has failed in its submissions contesting the admissibility of the application, the parties must be ordered to bear their own costs.

Operative part

On those grounds, THE Court hereby:

(1) Dismisses the application;

(2) Orders the parties to bear their own costs.
Judgment of the Court of 7 May 1991

Nakajima All Precision Co. Ltd v Council of the European Communities

Dumping - Definitive duty - Imports of serial-impact dot-matrix printers originating in Japan

Case C-69/89

European Court reports 1991 Page I-02069

In Case C-69/89, Nakajima All Precision Co. Ltd, a company incorporated under Japanese law, whose registered office is in Tokyo, represented by C.-E. Gudin, of the Paris Bar and also established in Brussels, with an address for service in Luxembourg at the Chambers of R. Faltz, 6 Rue Heine, applicant,

v

Council of the European Communities, represented by H.-J. Lambers, Director in its Legal Department, and E.H. Stein, Legal Adviser, acting as Agents, assisted by J. Voillemot and A. Michel, of the Paris Bar, with an address for service in Luxembourg at the office of J. Kaeber, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg, defendant,

supported by the

Commission of the European Communities, represented by E. de March and Eric White, members of its Legal Department, acting as Agents, assisted by R. Wagner, a German civil servant on secondment to the Commission’s Legal Department under the exchange scheme for national civil servants, with an address for service in Luxembourg at the office of G. Berardis, a member of the Commission’s Legal Department, Wagner Centre, Kirchberg,

and by the

Committee of European Printer Manufacturers (Europrint), whose registered office is in Cologne (Federal Republic of Germany), represented by D. Ehle, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Arendt & Harles, 4 Avenue Marie-Thérèse, interveners,

APPLICATION for:
(i) a declaration, pursuant to Article 184 of the EEC Treaty, that Articles 2(3)(b)(ii) and 19 of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1988 L 209, p. 1) are not applicable to the applicant, and
(ii) a declaration, pursuant to the second paragraph of Article 173 of the EEC Treaty, that Council 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 (Official Journal 1988 L 317, p. 33) is void in so far as it concerns the applicant,

THE COURT,


Advocate General: C.O. Lenz,

Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the hearing,

after hearing the parties submit oral argument at the hearing on 5 July 1990,

after hearing the opinion of the Advocate General delivered at the sitting on 5 December 1990,

gives the following

Judgment
Grounds

1 By application lodged at the Court Registry on 7 March 1989, Nakajima All Precision Co. Ltd (hereinafter referred to as “Nakajima”), whose registered office is in Tokyo, brought an action seeking
(i) a declaration, pursuant to Article 184 of the EEC Treaty, that Articles 2(3)(b)(ii) and 19 of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1988 L 209, p. 1) are not applicable to it, and

2 Nakajima, which manufactures only typewriters and printers, produces four models of bottom-of-the-range serial-impact dot-matrix printers. According to the applicant, particular features of its business are that it is engaged exclusively in production and has no distribution or sales structure. It claims that it has only a limited number of customers and that it begins production only once it has received orders, so that its production costs are very low. In addition, it claims that it is now several years since it sold printers on the Japanese market and that its production is destined exclusively for export. Most of its printers are sold as Original Equipment Manufacture (hereinafter referred to as “OEM”) to foreign manufacturers or independent distributors who market the products under their own brand names, and the remainder of its production is also marketed by independent distributors under the brand name “All”. Nakajima points out that in 1986 the EEC market accounted for 41.7% of its printer sales.

3 In 1987, the Committee of European Printer Manufacturers (hereinafter referred to as “Europrint”) lodged with the Commission, on behalf of European manufacturers of serial-impact dot-matrix printers, a complaint in which it requested that an anti-dumping proceeding be initiated in respect of Japanese exporters of that type of printer, including Nakajima.

4 The anti-dumping proceeding was initiated by the Commission on the basis of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984 L 201, p. 1, hereinafter referred to as “the former basic regulation”). That proceeding resulted in the adoption, pursuant to the former basic regulation, of Commission Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan (Official Journal 1988 L 130, p. 12, hereinafter referred to as “the regulation imposing the provisional duty”). That regulation imposed on Nakajima a provisional anti-dumping duty of 12.3%.

5 On 11 July 1988, the Council adopted Regulation No 2423/88, cited above (hereinafter referred to as “the new basic regulation”), which replaced the former basic regulation. The new basic regulation entered into force on 5 August 1988 and applies, according to the second paragraph of Article 19, “to proceedings already initiated”.


7 Following a proposal by the Commission and pursuant to the new basic regulation, the Council, on 23 November 1988, adopted Regulation No 3651/88, cited above (hereinafter referred to as “the regulation imposing the definitive duty”). Under that regulation, which entered into force
on 25 November 1988, the definitive rate of anti-dumping duty applicable to Nakajima was fixed at 12% and the amounts secured by way of provisional anti-dumping duty under the regulation imposing the provisional duty were to be collected at the rate of duty definitively imposed.

8 By an application lodged at the Court Registry on 6 April 1989, Nakajima applied for the adoption of interim measures, seeking, in the first place, suspension of the application to it of the regulation imposing the definitive duty and, in the alternative, any other interim measures which might prove necessary until the Court had ruled on the substance of the case. That application was dismissed by order of the President of the Court of 8 June 1989.

9 By orders of the Court of 17 May and 4 October 1989 respectively, the Commission and Europrint were given leave to intervene in support of the forms of order sought by the Council.

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas in law and arguments of the parties, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court.

I - The claim for a declaration that the new basic regulation is inapplicable to the applicant

11 In support of its claim that Articles 2(3)(b)(ii) and 19 of the new basic regulation should be declared inapplicable to it, Nakajima submits three pleas in law: infringement of essential procedural requirements, breach of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred as “the Anti-Dumping Code”), approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (Official Journal 1980 L 71, p. 1) and, finally, breach of certain general principles of law.

1. The plea that the new basic regulation is unlawful on account of the infringement of essential procedural requirements

12 In support of this plea in law, Nakajima argues first of all that Article 2(3)(b)(ii) of the new basic regulation is vitiates by illegality for lack of reasoning.

13 The applicant argues in this regard that Article 2(3)(b)(ii) introduces a new method of calculating the constructed normal value, differing fundamentally from that applicable under the former basic regulation, in the case where there are no sales of like products in the ordinary course of trade on the domestic market of the exporting country or country of origin. The new method, which takes account, for the purpose of calculating the constructed normal value, of the expenses incurred and the profits realized by other producers and exporters in the exporting country or country of origin on profitable sales of the like product, is likely to lead to unreasonable and discriminatory results in a case such as this in which the structure of the reference undertakings is in no respect comparable to that of the undertaking concerned. Nakajima stresses that it does not have any marketing structure for its products as its entire production output is sold at the “ex-factory” stage to independent distributors, whereas all of the reference undertakings have a vertically-integrated structure designed to ensure distribution of their products within Japan. From this Nakajima concludes that the Council ought to have specified in the new basic regulation the reasons why it adopted this new method of calculation and ought to have explained how the application of that method did not involve discrimination against undertakings such as Nakajima.

14 On this point, it should be noted first of all that the Court has consistently held (see, in particular, the judgment in Case C-156/87 Gestetner Holdings plc v Council and Commission
[1990] ECR I-781, at paragraph 69) that the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Court to exercise its supervisory jurisdiction.

15 Next, it should be noted that Article 2(3)(b)(iii), as it appears in both the former and new basic regulations, sets out the methods of calculating the constructed normal value of the product concerned when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison. The constructed normal value is determined by adding together the cost of production and a reasonable margin of profit.

16 In the version contained in the former basic regulation, the cost of production was to be increased by a reasonable amount for selling, general and administrative expenses (hereinafter referred to as “SGA expenses”). The profit was not to exceed the normal profit where sales of products of the same category on the domestic market of the country of origin were normally profitable; in other cases, the text provided that the profit was to be “determined on any reasonable basis, using available information”.

17 After adopting the same method of calculating the cost of production as the former basic regulation, the new basic regulation goes on to provide that the SGA expenses and profit are to 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 (third sentence of Article 2(3)(b)(iii)) and that, if such data are unavailable or unreliable or are not suitable for use, they are to be calculated by reference to the expenses incurred and profit realized by other producers or exporters in the country of origin or export on profitable sales of the like product (fourth sentence of Article 2(3)(b)(iii)). The new basic regulation adds that, if neither of those two methods can be applied, the expenses incurred and the profit realized are to be calculated by reference to the sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export or on any other reasonable basis.

18 It will be evident from a comparison of the two versions of Article 2(3)(b)(ii) in the former and new basic regulations that the method of calculating the constructed normal value set out in the latter regulation does not differ substantially from the earlier method, which left full discretion to the Community authorities by providing for the calculation of SGA expenses and profits on a “reasonable” basis. The amended wording of the provision in question in the new basic regulation simply sets out more clearly the scope of the previous version by referring to the different methods of calculation designed to determine the “reasonable amount” for SGA expenses and the “reasonable margin of profit” in individual cases.

19 That conclusion is borne out by the fourth and thirty-third recitals in the preamble to the new basic regulation, which present the new wording of Article 2(3)(b)(ii) as a mere clarification of the version of that provision in the former basic regulation. Furthermore, the Council pointed out, without being contradicted, that the method of calculation to which Nakajima takes exception in the present case had already been applied by the Community authorities under the former basic regulation. Moreover, the Court has already ruled that there was nothing in Article 2(3)(b)(ii) of the former basic regulation which precluded the use of the profit normally realized by a company other than the one to which the anti-dumping investigation related as the reasonable margin of profit (judgment in Case 301/85 Sharp Corporation v Council [1988] ECR 5813, at paragraph 8).

20 So far as concerns the alleged failure to state reasons in explanation of the discriminatory effect which, in Nakajima’s view, the application of Article 2(3)(b)(ii) of the new basic regulation might entail, it is sufficient to point out that Article 190 of the Treaty does not
require the Community authorities to justify specifically every provision which may result in discrimination, since a breach of the principle of equal treatment constitutes an independent ground for annulment of the provision in question.

21 In those circumstances, the first part of the plea in law, alleging a lack of a statement of reasons for Article 2(3)(b)(ii) of the new basic regulation, must be rejected.

22 Nakajima submits, in the second place, that Article 19 of the new basic regulation, which provides that the regulation is to apply "to proceedings already initiated" on the day of its entry into force, does not set out the grounds on which it is based in so far as it fails to specify the reasons which would justify the retroactive application of that regulation. In support of this argument, the applicant contends that Article 2(3)(b)(ii) of the new basic regulation, by amending fundamentally the method of calculating the constructed value, introduces new substantive rules which cannot be applied retroactively in the absence of a specific statement of reasons.

23 In this connection, it suffices to recall, as the Court found with regard to the first part of Nakajima’s plea, that Article 2(3)(b)(ii) of the new basic regulation is no more than a clarification designed to codify the previous practice of the Community institutions. Thus, to the extent to which, precisely, the new wording of that provision could not be regarded as a substantial alteration of the provision previously in force, its application "to proceedings already initiated" did not require a specific statement of reasons.

24 In those circumstances, the second part of the plea in law, based on the absence of a statement of reasons for Article 19 of the new basic regulation, is also without foundation.

25 It follows from the foregoing that the plea that the new basic regulation is unlawful on account of the infringement of essential procedural requirements must be rejected.

2. The plea that the new basic regulation is unlawful for being in breach of the Anti-Dumping Code

26 Nakajima submits in this regard that Article 2(3)(b)(ii) of the new basic regulation cannot be applied in the present case because it is at variance with a number of the provisions in the Anti-Dumping Code. In particular, the applicant argues that Article 2(3)(b)(ii) is incompatible with Article 2(4) and (6) of the Anti-Dumping Code.

27 The Council takes the view that, as is the case with the General Agreement, the Anti-Dumping Code does not confer on individuals rights which may be relied on before the Court and that the provisions of that Code are not directly applicable within the Community. From this the Council concludes that Nakajima cannot place in question the validity of the new basic regulation on the ground that it may be in breach of certain provisions in the Anti-Dumping Code.

28 It should, however, be pointed out that Nakajima is not relying on the direct effect of those provisions in the present case. In making this plea in law, the applicant is in fact questioning, in an incidental manner under Article 184 of the Treaty, the applicability of the new basic regulation by invoking one of the grounds for review of legality referred to in Article 173 of the Treaty, namely that of infringement of the Treaty or of any rule of law relating to its application.

29 It ought to be noted in this regard that, in its judgment in Joined Cases 21 to 24/72 International Fruit Company NV and Others v Produktschap voor Groenten en Fruit [1972] ECR 1219, the Court ruled (at paragraph 18) that the provisions of the General Agreement had the effect of binding the Community. The same conclusion must be reached in the case of the Anti-
Dumping Code, which was adopted for the purpose of implementing Article VI of the General Agreement and the recitals in the preamble to which specify that it is designed to “interpret the provisions of ... the General Agreement” and to “elaborate rules for their application in order to provide greater uniformity and certainty in their implementation”.

30 According to the second and third recitals in the preamble to the new basic regulation, it was adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code.

31 It follows that the new basic regulation, which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures (see the judgments in Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, at paragraph 11, and in Case 266/81 SIOT v Ministero delle Finanze and Others [1983] ECR 731, at paragraph 28).

32 In those circumstances, it is necessary to examine whether the Council went beyond the legal framework thus laid down, as Nakajima claims, and whether, by adopting the disputed provision, it acted in breach of Article 2(4) and (6) of the Anti-Dumping Code.

33 Nakajima first of all argues in this connection that Article 2(3)(b)(ii) of the new basic regulation infringes Article 2(4) of the Anti-Dumping Code in so far as, by providing (in order to determine the constructed normal value) for account to be taken of the SGA expenses and profits of producers or exporters whose structures may be radically different from those of the undertaking in question, Article 2(3)(b)(ii) limits the discretion of the Community authorities and results in account being taken of accounting data which are not reasonable within the meaning of Article 2(4) of the Anti-Dumping Code.

34 Article 2(4) of the Anti-Dumping Code provides as follows:

"When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin".

35 It follows clearly from the wording of Article 2(3)(b)(ii) of the new basic regulation that each of the methods of calculating the constructed normal value there listed must be applied in such a way as to keep the calculation reasonable, an idea which is also expressly mentioned in the first two sentences and the final sentence of that provision.

36 According to Article 2(3)(b)(ii), it is thus necessary to set aside the first method of calculation, referred to in the new basic regulation, in favour of the second method, at issue in the present case, if data on the expenses incurred and the profit realized by the producer or exporter on the sales of like products on the domestic market “is unavailable or unreliable or is not suitable for use”, which means, in essence, that the taking of such accounting data into consideration would not be reasonable - a word which is expressly used in the German version of the provision in question. The search for reasonableness in the method of calculation also governs the application of the third method of calculation set out in the provision in question, which may be implemented only “if neither of these two [previous] methods can be applied”. Finally, apart from the application of this third method, the Community authorities may always determine expenses and profits “on any other reasonable basis” pursuant to the final sentence of
the provision; the use of the word “other” in this context confirms that, in any event, the calculation of the constructed value may be made only if it is reasonable in nature.

37 It thus follows that Article 2(3)(b)(ii) of the new basic regulation is in conformity with Article 2(4) of the Anti-Dumping Code inasmuch as, without going against the spirit of the latter provision, it confines itself to setting out, for the various situations which might arise in practice, reasonable methods of calculating the constructed normal value.

38 Secondly, Nakajima argues that Article 2(3)(b)(ii) of the new basic regulation is incompatible with Article 2(6) of the Anti-Dumping Code in so far as the application to a simple economic production unit of the SGA expenses incurred and the profit realized by other undertakings with vertically-integrated distribution structures fails to comply with the obligation to establish the comparison between the normal value and the export price at the same level of trade.

39 In order to examine whether that argument is well founded, it should be recalled that Article 2(6) of the Anti-Dumping Code provides as follows: “In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI(1)(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. ...”.

40 It suffices to point out in this regard that Nakajima’s argument alleging incompatibility of Article 2(3)(b)(ii) of the new basic regulation with Article 2(6) of the Anti-Dumping Code lacks any relevance in view of the fact that the objectives of the two provisions cited by the applicant are fundamentally different.

41 The objective of Article 2(3)(b)(ii) of the new basic regulation is to determine the constructed normal value of the product in question, whereas Article 2(6) of the Anti-Dumping Code lays down the rules to be complied with when a comparison is made between the normal value and the export price. That comparison is dealt with in Article 2(9) and (10) of the new basic regulation; however, the applicant has not in any way called in question the validity of those provisions on the ground that they fail to comply with Article 2(6) of the Anti-Dumping Code.

42 For those reasons, the plea in law alleging that the new basic regulation is unlawful for being in breach of the Anti-Dumping Code must also be rejected.

3. The plea that the new basic regulation is unlawful on the ground that it is in breach of certain general principles of law

43 In support of this plea in law, the applicant contends first of all that the Commission infringed the rights of the defence in several respects during the course of this anti-dumping proceeding. It then goes on to argue that the principle of legal certainty was infringed in the present case through the application of the second method of calculating the constructed normal value set out in Article 2(3)(b)(ii) of the new basic regulation, whereas in an earlier case the Community authorities had recognized the applicant’s special economic structure and had for that reason closed the anti-dumping proceeding initiated against it. Finally, Nakajima alleges infringement of the principle of equal treatment inasmuch as the application of the method of calculating the constructed normal value chosen in this case discriminated against it in view of the fact that account was taken of accounting data relating to undertakings with structures different from its own.
44 It is sufficient to note in this regard that the applicant, by this plea in law, is in fact criticizing the application by the Community authorities of Article 2(3)(b)(ii) of the new basic regulation in the anti-dumping proceeding which resulted in the adoption of the regulations imposing the provisional and definitive duties. Such arguments, however, cannot be relied on to call in question the validity of a regulation under Article 184 of the Treaty.

45 In those circumstances, the plea that the new basic regulation is illegal for infringement of certain general principles of law must be rejected.

46 Since none of the pleas in law submitted in support of the claim for a declaration that the new basic regulation is inapplicable has proved capable of being upheld, that claim must be dismissed as being unfounded.

II - The claim for the annulment of the regulation imposing the definitive duty

47 Nakajima bases its claim for the annulment of the regulation imposing the definitive duty on ten pleas in law: infringement of essential procedural requirements, incorrect definition of the like products taken into consideration, irregularities vitiating the calculation of the constructed normal value, errors in the comparison between the normal value and the export price, errors in the evaluation of the Community production of printers, errors relating to the injury suffered by the Community industry, errors relating to the Community’s interest in putting an end to the injury caused by dumping practices, errors relating to the amount of the anti-dumping duty, infringements of a number of general principles of law and misuse of powers.

1. The plea alleging infringement of essential procedural requirements

48 Nakajima contends first of all that the Council acted in breach of Articles 2 and 8 of its Rules of Procedure (Official Journal 1979 L 268, p. 1) because the Commission proposal for the adoption of the regulation imposing the definitive duty was communicated to the Council outside the period laid down for the drawing-up of the provisional agenda for the meeting and because not all the language versions of the document in question were available on the day when the regulation was adopted.

49 With regard to this point, it should be noted that the purpose of the rules of procedure of a Community institution is to organize the internal functioning of its services in the interests of good administration. The rules laid down, particularly with regard to the organization of deliberations and the adoption of decisions, have therefore as their essential purpose to ensure the smooth conduct of the procedure while fully respecting the prerogatives of each of the members of the institution.

50 It follows that natural or legal persons may not rely on an alleged breach of those rules since they are not intended to ensure protection for individuals.

51 Nakajima’s argument that the Council failed to comply with its Rules of Procedure must therefore be rejected.

52 Nakajima then submits that Article 2(3)(b)(ii) of the new basic regulation and recitals 21 and 22 of the regulation imposing the definitive duty do not provide reasons to explain why the former method of calculating the constructed normal value was abandoned and how the Community authorities intended to avoid discrimination between undertakings by applying to the applicant a method of calculating the constructed normal value which was based on the expenses and profits of other producers whose structures differed radically from its own.
53 That argument is not well founded. So far as Article 2(3)(b)(ii) of the new basic regulation is concerned, the complaint made by Nakajima has already been rejected at paragraphs 14 to 21 of this judgment. With regard to recitals 21 and 22 of the regulation imposing the definitive duty, it is clear from their wording that the Council was referring expressly to Article 2(3)(b)(ii) of the new basic regulation, which lays down the method of calculating the constructed normal value applied in the present case and indicates that in this instance this is the method normally applied by the Commission. It might be added that, as the Court has stated at paragraphs 18 and 19 of this judgment, that provision simply clarifies the previous practice of the Community institutions and is for that reason likely to increase legal certainty for the undertakings concerned. Finally, the Council set out its views, in the recitals referred to by the applicant, on the question of discrimination raised by Nakajima by pointing out that the fact that a particular exporter does not sell the product concerned on the domestic market and consequently does not have a domestic sales organization should not alter the basis for calculating the SGA expenses and profit in the construction of that exporter’s normal value. In those circumstances, the grounds given by the Council point clearly to the reasoning of the Community institution and allow the Court fully to exercise its supervisory jurisdiction.

54 Nakajima argues finally that recital 60 of the regulation imposing the definitive duty lacks an adequate statement of reasons inasmuch as the Council, notwithstanding the existence of imports of cheap printers from third countries other than Japan, failed to assess the extent of the injury which those imports caused to Community producers.

55 That argument cannot be accepted either. In the recital in question, the Council made it quite clear that the absence of injury to the Community market arising from imports of printers from other third countries was attributable to the fact that such imports became significant only after the end of the period covered by the investigation in the present case and that they had been restricted to one Member State. Consequently, recital 60 must be regarded as being sufficiently reasoned.

56 The plea alleging an infringement of essential procedural requirements must therefore be rejected.

2. The plea alleging that the like products taken into consideration were incorrectly defined

57 Nakajima claims that the Council committed a manifest error of assessment by treating bottom-of-the-range and top-of-the-range printers as like products. According to the applicant, the lower and upper segments of the market in printers can be distinguished according to the destination of the machines, the target customers and the market structure.

58 This plea in law is not well founded. In its statement of defence, the Council pointed out that there were no generally accepted criteria by which printers could be grouped in distinct categories, a fact which Nakajima, in any event, recognized in its reply. Consequently, all serial-impact dot-matrix printers, which possess the same characteristics and are intended for the same use, could validly be treated as like products.

3. The plea in law alleging irregularities vitiating the calculation of the constructed normal value

59 The applicant submits that the Council wrongly applied to it the second method of calculating the constructed normal value set out in the fourth sentence of Article 2(3)(b)(ii) of the new basic regulation. In support of this plea in law, Nakajima argues that the application of that method was unreasonable in the present case and was consequently at variance with both the basic regulation and the Anti-Dumping Code. Nakajima claims that it has special structural characteristics and that the Council failed to take account of these when it calculated the constructed normal value of the printers covered by the proceeding in the present case in so far
as in determining the expenses and profit of Nakajima it used the accounting data of undertakings with structures radically different from its own.

60 For the purpose of determining whether this plea in law is well founded, it should be noted at the outset that the Council correctly calculated the normal value pursuant to Article 2(3)(b)(ii) of the new basic regulation, since it is accepted that the applicant does not sell printers on the Japanese market, which excludes the possibility of applying Article 2(3)(a) of the new basic regulation, and since in cases where 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 the Community authorities may choose between the solutions set out in indents (i) and (ii) of Article 2(3)(b) of the new basic regulation.

61 Moreover, it follows from the wording of Article 2(3)(b)(ii) of the new basic regulation that the three methods of calculating the constructed normal value there set out must be considered in the order in which they are presented. It is only in the case where none of those methods can be applied that recourse must be had to the general provision set out at the end of Article 2(3)(b)(ii), according to which expenses and profit may be calculated “on any other reasonable basis”.

62 In this regard, it should first be pointed out that in this case the Council rightly did not apply the first method of calculation set out in Article 2(3)(b)(ii) of the new basic regulation, since the applicant does not sell on the Japanese market products similar to those covered by these proceedings.

63 Next, so far as the application to Nakajima of the second method of calculation is concerned, it should be pointed out first of all that the Court has consistently held that Article 2(3)(b)(ii) of the former basic regulation, according to which a reasonable amount for SGA expenses had to be included in the constructed normal value, allowed the Community institutions a wide margin of discretion in evaluating that amount (see in particular the judgment in Joined Cases 260/85 and 106/86 TEC and Others v Council [1988] ECR 5855, at paragraph 33). That conclusion applies with equal validity to Article 2(3)(b)(ii) of the new basic regulation, the wording of which is identical, and applies in like manner to the taking of profits into account by the Community institutions for the purpose of constructing the normal value.

64 Secondly, it is necessary to point out that the Court has already ruled that, according to the scheme of Regulation No 2176/84, cited above, “the purpose of constructing the normal value is to determine the selling price of a product as it would be if that product were sold in its country of origin or in the exporting country” and that “consequently, it is the expenses relating to sales on the domestic market which must be taken into account” (judgment in Case 250/85 Brother Industries Ltd v Council [1988] ECR 5683, at paragraph 18; judgment in Joined Cases 277/85 and 300/85 Canon Inc. and Others v Council [1988] ECR 5731, at paragraph 26; judgment in TEC, cited above, at paragraph 24; and judgment in Joined Cases 273/85 and 107/86 Silver Seiko Ltd and Others v Council [1988] ECR 5927, at paragraph 16). Since those principles have remained unchanged under the new basic regulation, that conclusion is equally valid for that regulation.

65 From this it follows that the normal value of a product must in all cases be constructed as if the product was intended for distribution and sale within the domestic market, regardless of whether or not the producer has, or has access to, a distribution structure. Undertakings which sell only for the purposes of exportation and those which market a product - if only similar - on the domestic market must be treated in the same way. If the producer for whom a normal price is constructed sold his products on the domestic market, he would inevitably have to adapt to the conditions imposed on other undertakings operating on that market. There would therefore be discrimination between undertakings if the normal value for a producer operating on the domestic market were to be calculated on the basis of all the expenses and profits included in
the price of the product in question whilst in the case of an OEM exporter the normal value were to be calculated without having regard to those accounting data.

66 With regard, finally, to the Community institutions' assertion that it is impossible to be present on the Japanese market in finished electrical products without having an integrated sales structure, which in the present case meant that the expenses and profits of similar undertakings with such a structure were taken into account for the purpose of constructing the normal value of the applicant's printers, it must be pointed out that Nakajima has failed to establish that such a finding was incorrect.

67 It follows from the foregoing that it is consistent with the scheme of both the Anti-Dumping Code and the new basic regulation to calculate the constructed normal value of the products of an undertaking, which sells exclusively for the purposes of exportation and does not engage in the marketing of its own products, by reference to the expenses and profits of other undertakings, similar in nature, which sell their products on the domestic market.

68 In those circumstances, the plea in law alleging the existence of irregularities vitiating the calculation of the constructed normal value of Nakajima's printers must be rejected.

4. The plea in law alleging the existence of errors in the comparison between the normal value and the export price

69 According to Nakajima, the application of the new basic regulation to the present case resulted in a breach of Article 2(6) of the Anti-Dumping Code in so far as the Council did not compare the normal value and the export price at the same level of trade.
Nakajima claims, in effect, that the Council established the export price at the "ex-factory" level, whereas the normal value would have been constructed on the basis of the distribution or resale price, taking into account the SGA expenses and profits of other undertakings whose sales are made at a stage later than the "ex-factory" stage. Nakajima adds that the subtraction only of sales expenditure represented by Commission and salaries paid to sales staff, to the exclusion of all other general and sales expenditure and the portion of profit contained in sales made at a stage later than the "ex-factory" stage, represents an adjustment which is too incomplete and for that reason cannot satisfy the requirement of a comparison at the same level of trade.

70 In this connection, it must be pointed out that, with regard to a producer which does not sell on the Japanese market the product which is the subject of the anti-dumping proceeding, the Court has ruled that the correct comparison between the normal value and the export price at the "ex-factory" level presupposes that those two values are compared at the level of the first sale to an independent purchaser (see, in particular, the judgment in TEC, cited above, at paragraph 30). This view, developed by the Court in the context of the former basic regulation, also holds good for the interpretation of Article 2(6) of the Anti-Dumping Code, the content of which is identical to that of Article 2(9) of the former basic regulation on which the Court ruled in its judgment in TEC.

71 In the present case, the normal value of Nakajima's printers was constructed on the basis of the SGA expenses and profits of other undertakings which sell like products on the Japanese market. In addition, since all of Nakajima's printers destined for the Community had been sold to independent distributors, the export price was calculated according to the price when the goods left those companies.

72 Thus, in the present case, both the constructed normal value and the export price were determined at the "distributor" level, as recital 34 of the regulation imposing the definitive duty also makes quite clear. It is therefore incorrect to claim that the Community institutions compared the normal value and the export price at two different levels of trade.
Furthermore, it is an established and undisputed fact that at no stage in the administrative proceedings did the applicant ask for adjustments to be made to compensate for the alleged difference in the level of trade in the comparison made between the normal value and the export price or, consequently, prove that such a claim could be justified, as required by Article 2(9)(b) of the new basic regulation. Furthermore, during the procedure before the Court, Nakajima likewise did not produce any evidence to suggest that the Council ought in this case to have made more adjustments to its calculations than it actually did.

In those circumstances, the first part of this plea in law is unfounded.

The applicant then goes on to argue that the Council committed a manifest factual error by drawing a distinction, for the purpose of calculating the normal value, between OEM and non-OEM products. Since all of Nakajima's products are sold at the "ex-factory" stage, the imputation to them of distribution costs amounts to a factual error of such a kind as to distort the comparison and consequently the determination of the dumping margin. With particular regard to OEM sales, the fact that marketing expenses of vertically-integrated undertakings are taken into consideration results in an over-estimation of Nakajima's SGA expenses. According to the applicant, those expenses are below 5%, whereas the Council applied to it a figure in excess of 15%.

It is sufficient to note in this regard, as the Council pointed out during the written procedure, that the normal value must be constructed with reference to the conduct of other producers present on the market and upon the basis of a distinction between OEM and non-OEM sales, since marketing under a company's own brand name involves appreciably higher costs than the sale of printers as OEM products. So far as concerns the account taken, for OEM sales, of the SGA expenses of vertically-integrated undertakings, the Council, in exercising the power of appraisal which it is recognized as having when evaluating complex economic situations (see, for example, the Court's judgment in Case 258/84 Nippon Seiko KK v Council [1987] ECR 1923, at paragraph 21), was quite entitled to take the view that it was necessary to take account of the costs which a presence on the Japanese market would involve.

The second part of the plea in law is therefore unfounded as well.

It follows that the plea alleging the existence of errors in the comparison between the normal value and the export price must be rejected.

The plea in law alleging the existence of errors in the evaluation of the Community production of printers

Nakajima complains that the Council wrongly stated in the regulation imposing the definitive duty that the four Community producers and members of Europrint represented 65% of Community production of serial-impact dot-matrix printers. According to the applicant, it appears from the study carried out by the firm of Ernst & Whinney at the request of the Committee of Japanese Printers in connection with the anti-dumping proceeding in the present case that two members of Europrint, Mannesmann-Tally and Philips, imported a large number of Japanese printers into the Community, so that they could no longer be regarded as Community producers. In addition, contrary to what is set out in recital 45 of the regulation imposing the definitive duty, the Ernst & Whinney study demonstrates that the imports by Mannesmann-Tally and Philips do not belong exclusively to the lower market segment but also belong in part to the middle market segment. Furthermore, the Council made an error in asserting that the lower market segment is the one which is expanding most rapidly, when, according to the Ernst & Whinney study, it is experiencing a slower progression than the upper segment and the market as a whole.
80 In this regard, it should be borne in mind first of all that the Court has consistently held, in particular in its judgment in Gestetner, cited above, at paragraph 43, that it is for the Commission and the Council, in the exercise of their discretion, to determine whether they should exclude from the Community industry producers who are themselves importers of the dumped product. That discretion must be exercised on a case-by-case basis, by reference to all the relevant facts.

81 Next, it must be pointed out that Nakajima has in this case failed to prove that the Community authorities committed a manifest error in the exercise of that discretion. According to the statements made by the Community authorities, which have not seriously been contested by the applicant, the European undertakings which imported Japanese printers must be included in the Community production, since, as is made clear in the preambles to the regulations imposing the provisional and definitive duties, those imports were measures of self-defence designed to fill gaps in the range of products of the undertakings concerned brought about by the abandonment of their own production in certain sectors which was forced on them by the dumping practices of Japanese exporters.

82 In those circumstances, the Community producers who imported Japanese printers did not intend to inflict injury on themselves by causing, through those imports, a reduction in the use of their own capacity, price falls or the abandonment of projects designed to increase their own production or the development of new products. For those reasons, imports by Community producers could not have contributed to the injury incurred by the Community industry and there was consequently no reason to exclude those undertakings from the group of Community producers.

83 With regard to the arguments concerning the determination of the market segment to which imported products belong as well as the size and growth of the various segments, it must be recalled, as paragraph 58 of this judgment makes clear, that the division of the market into segments is aleatory because there is no precise definition in this regard, so that such arguments cannot cast doubt on the justification for the position taken by the Community institutions on this point.

84 It follows that the plea alleging the existence of errors in the evaluation of Community production of printers is unfounded.

6. The pleas in law alleging the existence of errors relating to the injury suffered by the Community industry and the Community’ s interest in bringing it to an end

85 In support of the plea alleging errors of fact and manifest errors of appraisal in the determination of the injury incurred by the Community industry, the applicant argues in the first place that the Council wrongly took account of the year 1983 in its finding that there had been injury, whereas the investigation carried out in the administrative proceeding did not relate to that year.

86 On this point it ought to be recalled, as has been stressed above at paragraph 76, that the institutions have a wide discretion when evaluating complex economic situations. This is so in particular when the period to be taken into consideration for the purposes of determining injury in an anti-dumping proceeding is determined (see in particular the judgment in Case C-121/86 Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE and Others v Council [1989] ECR 3919, at paragraph 20).

87 That discretion was not exceeded in the present case. Thus, the Council demonstrated convincingly that the injury suffered by the Community industry had to be determined over a period longer than that covered by the investigation into the existence of dumping practices. According to Article 4(2)(c) of the new basic regulation, an examination of injury presupposes a
study of “actual or potential trends in the relevant economic factors” which must, therefore, be carried out over a sufficiently long period. The Council also demonstrated that it was justified in taking account of data for the year 1983 in view of the fact that the exclusive rights of Seiko Epson to manufacture printers compatible with IBM personal computers were phased out in 1984, as is expressly stated in recital 104 of the regulation imposing the provisional duty. The year 1983 therefore typifies the situation which existed prior to the opening of a substantial share of the printer market in the wake of the expiry of Seiko Epson’s exclusive rights, with the result that the Community authorities did not commit any error of appraisal in selecting that year as their starting point for an evaluation of subsequent developments within the market in question.

88 Nakajima’s argument must therefore be rejected.

89 Nakajima goes on to cast doubt on the accuracy of the figures concerning the trends in market shares which are set out in recital 47 of the regulation imposing the definitive duty. It takes the view that the members of Europrint did not in fact suffer any reduction in their market share but that, on the contrary, they experienced a slight increase in production. Furthermore, in view of the fact that they had ceased activity prior to the investigation period, the European undertakings ought to have been excluded from the evaluation of injury.

90 That argument is unfounded. It must be pointed out that the figures given in recital 47 of the regulation imposing the definitive duty agree in full with those set out in the Ernst & Whinney study relied on by Nakajima. That study refers to a substantial loss of market share by Community manufacturers between 1983 and 1986 while, over the same period, there was a sizeable increase in the market share of Japanese exporters. It would also appear from the figures supplied by the applicant itself that the Community producers lost market share, even without taking account of the figures for the two undertakings Triumph-Adler and Logabax, which had ceased activity prior to the investigation period.

91 Nakajima also argues that the points made by the Council on price trends are incorrect in so far as the decline in the prices of printers on the Community market, which was smaller than the figures given in the regulation imposing the definitive duty would indicate, was due to an appreciable fall in production costs rather than to an increase in the market shares of the Japanese exporters. Nakajima also emphasizes that the prices of its printers increased between 1984 and 1986. In addition, it claims that the Council committed an error of appraisal with regard to price-undercutting, mentioned in recitals 51 and 53 of the regulation imposing the definitive duty, by comparing a price at the “ex-factory” level with a price at the distributor level.

92 In this connection it must be pointed out first of all that Nakajima’s conclusion that the decline in prices was not so great as that calculated by the Council can be explained by the fact that the applicant’s calculations do not take the year 1983 into account. Secondly, Nakajima’s contention that the decline in prices on the Community market was due to an appreciable fall in production costs and not to an increase in the market share of Japanese exporters remained a bare assertion. Furthermore, even if it were proved that Nakajima’s prices did increase between 1984 and 1986, the Council correctly pointed out that the applicant’s price-undercutting was still 41%. Finally, so far as concerns the argument alleging the existence of discrimination in the comparison of prices, that argument must be rejected on the same grounds as those which underlie the reasoning developed in paragraphs 70 to 74 of this judgment.

93 For those reasons, the argument alleging the existence of errors in the appraisal of price trends must be rejected.

94 Nakajima also alleges that errors were made in the appraisal of the other important economic factors mentioned in recitals 54 and 55 of the regulation imposing the definitive duty.
It argues that the Community producers increased their production capacity between 1984 and 1986 and did not suffer any damage since they had sufficient resources for investment and had even engaged in over-investment.

95 On this point, it suffices to note that the applicant has neither cited the source of the figures submitted in support of its arguments nor provided any serious justification for those figures.

96 In those circumstances, the argument alleging the existence of a manifest error in the appraisal of the economic facts must be rejected.

97 Finally, Nakajima calls in question the finding that the injury alleged by Europrint was caused by Japanese imports of serial-impact dot-matrix printers and argues that that injury resulted from imports of printers from third countries other than Japan. Referring to recital 60 of the regulation imposing the definitive duty, Nakajima complains in particular that the Council failed to examine the injury caused by imports of printers from third countries other than Japan and takes the view that the Council overestimated the injury caused by Japanese producers.

98 That argument cannot be accepted. The Council has demonstrated convincingly that imports of printers from third countries other than Japan could not have caused any injury on the Community market, since they were restricted to one Member State and did not become significant until after the conclusion of the period covered by the investigation in the proceeding in this case.

99 Furthermore, Nakajima did not adduce any evidence of dumping over the period in question in connection with the importation of printers from third countries other than Japan. The applicant has thus failed to prove that the factors alleged actually contributed to the injury found to have occurred.

100 In support of the plea alleging the existence of errors concerning the Community’s interest in having the injury caused by dumping brought to an end, Nakajima claims that, contrary to the views expressed by the Council in recitals 63 to 66 of the regulation imposing the definitive duty, the loss of profitability by Community producers was attributable to their own mismanagement and not to any dumping by Japanese exporters.

101 It is sufficient to point out in this regard that the Court has already found, at paragraph 90 of this judgment, that the Council did not exceed the bounds of its discretion by reaching the conclusion in this case that the loss of market share incurred by the Community industry was attributable to dumping by Japanese exporters. Moreover, the applicant has failed to substantiate in any way its allegation of mismanagement on the part of Community producers.

102 It follows from all the above considerations that the pleas in law alleging the existence of errors concerning the injury suffered by the Community industry and the Community’s interest in seeing it brought to an end are unfounded and must therefore be rejected.

7. The plea in law alleging the existence of errors concerning the amount of the anti-dumping duty

103 Nakajima complains that for the purpose of determining the level of duties necessary to eliminate the injury the Council attributed the decline in the price of printers on the Community market to dumping, as is clear from recital 68 of the regulation imposing the definitive duty, and failed to carry out a detailed study of the real reasons for this fall in prices. Nakajima also criticizes the method set out in recital 72 of the regulation imposing the definitive duty for the calculation of the injury threshold of each exporter by means of a comparison between the weighted average selling price to the first buyer and the average c.i.f. value of the sales in
question. Nakajima believes that if this method had been applied correctly, its injury threshold should have been zero.

104 The first part of this plea in law must be rejected in view of the reasoning developed during the examination of Nakajima’s plea alleging the existence of errors relating to the injury suffered by the Community industry. Furthermore, the preambles to the regulations imposing the provisional and definitive duties explain clearly and in detail the connection in this case between the increase in the market shares of Japanese products and the decline in the prices of printers.

105 With regard to the injury threshold, the Council pointed out, without being contradicted, that the applicant’s arguments were based on a misunderstanding of the method of calculation set out in recital 72 of the regulation imposing the definitive duty. The injury threshold represents the increase which Japanese products within the Community must undergo in order to offset the amount by which they undercut the prices of Community products. This injury threshold, which was calculated during the investigation, cannot be used as such to express the rate of duty because it is obtained by reference, not to the free-at-Community-frontier price ("the c.i.f. price"), but to the price to the first independent buyer in the Community, which will necessarily be higher than the c.i.f. price because it includes customs duties and charges. Anti-dumping duties, on the other hand, are imposed on the net free-at-Community-frontier price before duty, that is to say, on the customs value (c.i.f. price) of the imports. It follows that, in order to determine the rate of anti-dumping duty, the injury threshold must be converted arithmetically into a percentage of the price of each exporter at c.i.f. level.

106 The plea alleging the existence of errors concerning the amount of the anti-dumping duty is therefore unfounded.

8. The plea alleging infringements of a number of general principles of law

107 In the first part of this plea in law Nakajima argues that in this case the Community authorities infringed the applicant’s rights of defence in several respects. Thus, it claims that the authorities in this case did not let it know in due time that they were abandoning the method of calculating the constructed normal value applied in an earlier anti-dumping proceeding concerning electronic typewriters which led to the judgment in TEC, cited above. Account had been taken in that proceeding of Nakajima’s particular structure and this had resulted in the termination of the investigation into that undertaking (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, Official Journal 1986 L 40, p. 29). Nakajima also criticizes the institutions for having failed to inform it in good time of the names of the undertakings whose accounting data were taken into consideration for the purpose of constructing the normal value in the proceeding in the present case. In addition, Nakajima did not have an opportunity effectively to put forward its views on the special nature of its structure and the Commission adopted delaying tactics, in particular by leading the applicant to believe that it would still be able to set out its arguments at the disclosure conference, which was not held until after the date of the Commission proposal for the new basic regulation. Finally, with regard to the determination of the injury, the Commission used data other than those included in the Ernst & Whinney study and based itself in particular on information obtained during an investigation carried out on the premises of the producers concerned.

108 In this connection, it should be recalled at the outset that, according to established case-law, the rights of the defence are respected if the undertaking concerned has been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts and circumstances alleged and, if necessary, on the documents used (see,
for example, the judgment in Case 85/76 Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461, at paragraph 11).

109 It would appear in this case from the minutes of the meetings between Nakajima and the Community institutions, as well as from the correspondence between the parties, that the applicant was involved at every stage of the proceeding and was therefore in a position to make its point of view known.

110 Furthermore, Nakajima had all the information which it required to defend itself effectively and in good time. The applicant acknowledged at the hearing that it had been informed of the method of calculating the constructed value by 15 March 1988 at the latest. In addition, the Commission supplied all the details of this calculation in recitals 36, 38 and 40 of the regulation imposing the provisional duty. Finally, Nakajima had already set out, in a letter of 21 June 1988, all the arguments which it repeated in the procedure before the Court.

111 It should be added that the method of calculating the constructed normal value applied to the applicant is expressly provided for by Article 2(3)(b)(ii) of the new basic regulation, which was published more than three months before the regulation imposing the definitive duty was adopted. Nakajima was therefore able to make known in good time its views on that issue.

112 It must also be stressed that Nakajima cannot complain that the Community authorities failed to provide it with all the information which it requested, except, of course, information of a confidential nature. It must be pointed out in that regard that the applicant did not request information on the method used to determine the SGA expenses and profit until 2 September 1988, which was therefore after the expiry of the period of one month following imposition of the provisional duty laid down in Article 7(4)(c)(i)(cc) of the new basic regulation. Furthermore, details relating to the costs and profits of Nakajima’s competitors had to be treated as confidential, within the meaning of Article 8(3) of the new basic regulation, and for that reason could not be divulged to the applicant (see, in particular, paragraph 20 of the judgment in TEC, cited above).

113 In any event, the fact that a different method of calculating the constructed normal value may have been applied under the previous legislation is irrelevant in this case since economic agents may not claim a right to have rules applied to them which may be altered by decisions taken by the Community institutions in the exercise of their powers (see, for example, the judgment in Case 256/84 Koyo Seiko Company Limited v Council [1987] ECR 1899, at paragraph 20).

114 Finally, with regard to the use of accounting data other than those included in the Ernst & Whinney study, it is clear from the Commission’s letter of 28 September 1988 to Nakajima that the Community authorities at no time had the intention of relying exclusively on the contents of that study. 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 the new basic regulation, contained non-confidential summaries of information on the various European manufacturers. The applicant thus had access to all the material on which the finding of injury was based.

115 In those circumstances, the first part of this plea in law is unfounded.

116 In support of the second part of its plea in law, Nakajima argues that there was a failure to comply with the principle of legal certainty in this case, on the ground that in the anti-dumping proceeding on which the Court had to rule in the TEC case the Council and Commission had taken into account the applicant’s particular structure and had for that reason terminated the proceeding in so far as it concerned Nakajima. Since Nakajima’s structure had not changed since the time of that case, it had acquired a right in the present case to have its special
character recognized and was entitled to entertain a legitimate expectation that decisions reached under the former basic regulation would continue to be applied. Moreover, the principle of non-retroactivity had been infringed by the application, after 15 March 1988, of a new method of calculating the constructed normal value which did not feature in the basic regulation then in force and which was completely at variance with the previous interpretation by the Community institutions.

117 Those arguments cannot be accepted. It must be stressed first of all that, contrary to the applicant’s contentions, the Court, in its judgment in the TEC case, to which Nakajima was not a party, ruled exclusively on Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1986 L 163, p. 1) and expressly left open the question whether there were grounds for terminating the proceeding in respect of Nakajima (paragraph 18 of the judgment in TEC).

118 In any event, the procedure followed in that case with regard to Nakajima cannot constitute a precedent capable of binding the institutions, since the Court has ruled that the basic regulation on dumping allows the Community institutions a margin of discretion, particularly in calculating the amount of SGA expenses to be included in the constructed normal value (see paragraph 33 of the judgment in TEC) and that the fact that an institution exercises that discretion without explaining in detail and in advance the criteria which it intends to apply in every specific situation does not constitute a breach of the principle of legal certainty (see the judgment in Brother, cited above, at paragraph 29).

119 Next, with regard to the alleged breach of vested rights, it is sufficient to point out that the Court has consistently held that in cases where the Community authorities have a wide margin of discretion economic agents cannot claim a vested right to the maintenance of an advantage which they obtained from the Community legislation in question in the form in which it existed at a given point in time (see, in particular, the judgment in Joined Cases 133 to 136/85 Walter Rau Lebensmittelwerke and Others v Bundesanstalt fuer landwirtschaftliche Marktordnung [1987] ECR 2289, at paragraph 18). In those circumstances, the method of calculating the constructed normal value applied in an earlier anti-dumping proceeding cannot create for Nakajima a vested right to the application of the same method in the present case.

120 Likewise, according to the consistent case-law of the Court referred to in paragraph 113 of this judgment, economic agents are not entitled to hold a legitimate expectation in the maintenance of an existing situation which may be altered by decisions taken by the Community institutions in the exercise of their discretion.

121 Finally, it follows from paragraphs 23 and 24 of this judgment that the argument based on an alleged breach of the principle of non-retroactivity is unfounded.

122 The second part of Nakajima’s plea in law must therefore be rejected.

123 Thirdly, Nakajima contends that the principle of equal treatment has been infringed because the method of calculating the constructed normal value adopted in this case discriminates against it in view of the fact that under that method accounting data derived from undertakings with structures different from its own were used and the comparison between the normal value and the export price was made at two different levels of trade.

124 That argument is unfounded. It is clear from paragraphs 60 to 67 of this judgment that the method of calculating the constructed normal value applied in this case is not discriminatory since, in accordance with the case-law, it is designed to place Nakajima in the position in which it would have been if it had sold printers in Japan, and the Community institutions were entitled to take the view that it was impossible to have a presence on the Japanese market in electrical products without having an integrated sales structure. The Court has also already ruled at
paragraphs 70 to 72 of this judgment that the comparison between the normal value and the export price in this case was not made at two different levels of trade.

125 In those circumstances, no breach of the principle of equal treatment was committed in this case.

126 Fourthly, Nakajima submits that the definitive regulation failed to comply with the principle of proportionality in so far as an anti-dumping duty of 12% was imposed on it without any account being taken of its particular structure, whereas if account had been taken of its own expenses and a reasonable profit margin this would at least have resulted in a negligible dumping margin and the exclusion of Nakajima from the proceeding in the present case.

127 That argument, however, cannot be accepted for the reasons more fully explained in paragraphs 60 to 67 of this judgment.

128 Fifthly, Nakajima contends that the principle requiring Community law to be applied fairly and equitably was infringed because the application to it of a new method of calculating the constructed value was inappropriate and grossly unfair in this case.

129 As will be clear from paragraphs 60 to 67 of this judgment, however, that argument, which is based on false premisses, must be rejected.

130 In conclusion, Nakajima contends that the principle of estoppel was infringed because it was misled by the treatment accorded to it during the anti-dumping proceeding concerning electronic typewriters.

131 That argument, which overlaps with the argument alleging infringement of the principle of legal certainty, must also be rejected for the reasons more fully explained in paragraphs 117 to 121 of this judgment.

132 Since none of the arguments relied on by Nakajima has been upheld, the plea alleging the infringement of a number of general principles of law must be rejected.

9. The plea alleging misuse of powers

133 In this plea in law Nakajima complains that the Community authorities showed a serious lack of caution in its regard tantamount to a failure to have due regard to the purpose of the legislation in question. In particular, the applicant claims that the Commission failed to examine fairly and in good faith the need to impose an anti-dumping duty on it and that, through lack of care or gross negligence, it instituted a proceeding with the purpose of imposing such a duty on it, contrary to previous practice. The Community authorities therefore deliberately harmed the applicant’s interests and sought to avoid being in the same situation in which they found themselves in the proceeding which resulted in the TEC judgment.

134 The applicant’s contentions, however, lack any foundation. It is sufficient to note that in this case Nakajima has been unable to satisfy the requirements laid down in the Court’s caselaw (see in particular the judgment in Case C-323/88 SA Sermes v Directeur des Services des Douanes de Strasbourg [1990] ECR I-3027, at paragraph 33) with regard to proof of the existence of a misuse of powers, for it has failed to indicate, on the basis of objective, relevant and conclusive evidence, the circumstances and reasons for presuming that the measure in question was adopted in order to achieve purposes other than those for which it was intended.

135 In alleging the existence of a misuse of powers, Nakajima merely makes assertions without substantiating them. Moreover, the fact that the Community authorities refused to accept
Nakajima’s arguments, which they considered to be unfounded, cannot constitute a misuse of powers.

136 In any event, it follows from the Court’s findings in this case that the Community legislation was applied correctly and in accordance with the purpose for which it was adopted. In the preambles to the regulations imposing the provisional and definitive duties, the institutions set out the reasons which led them to take the view that the Community’s interests in this case necessitated the adoption, under the basic legislation, of measures capable of protecting Community producers against the dumping of imported products.

137 It follows that the plea in law alleging the existence of misuse of powers must be rejected.

138 Since none of Nakajima’s pleas in law has been upheld, the action must be dismissed in its entirety.

Decision on costs

Costs

139 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs, including those of the proceedings for the adoption of interim measures and those of the intervener, the Commission. Europrint, which also intervened but did not apply for costs, must bear its own costs.

Operative part

On those grounds, THE Court hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, including those relating to the proceedings for the adoption of interim measures and those of the intervener, the Commission;

3. Orders the intervener, Europrint, to bear its own costs.
Judgment of the Court of 16 June 1998

Hermès International (a partnership limited by shares) v FHT Marketing Choice BV

Agreement establishing the World Trade Organisation - TRIPS Agreement - Article 177 of the Treaty - Jurisdiction of the Court of Justice - Article 50 of the TRIPS Agreement - Provisional measures

Case C-53/96

European Court reports 1998 Page I-03603

In Case C-53/96, reference to the Court under Article 177 of the EC Treaty by the Arrondissementsrechtbank te Amsterdam for a preliminary ruling in the proceedings pending before that Court between Hermès International (a partnership limited by shares) and FHT Marketing Choice BV "on the interpretation of Article 50(6) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, as set out in Annex 1 C to the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, in Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1),
THE COURT,
Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,
after considering the written observations submitted on behalf of:
- Hermès International, by L. van Bunnen, of the Brussels Bar,
- the Netherlands Government, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
- the French Government, by C. de Salins, Deputy Director in the Department of Legal Affairs at the Ministry of Foreign Affairs, and G. Mignot, Secretary for Foreign Affairs in the same department, acting as Agents,
- the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent,
- the Commission of the European Communities, by P.J. Kuyper, Legal Adviser, and B.J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,
after hearing the oral observations of Hermès International, represented by L. van Bunnen, the Netherlands Government, represented by M. Fierstra, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, the French Government, represented by G. Mignot, the United Kingdom Government, represented by J. Collins, Assistant Treasury Solicitor, acting as Agent, and R. Plender QC, the Council of the European Union, represented by G. Houttuin, of its Legal Service, acting as Agent, and the Commission, represented by P.J. Kuyper and B.J. Drijber, at the hearing on 27 May 1997,
after hearing the Opinion of the Advocate General at the sitting on 13 November 1997,
gives the following

Judgment

Grounds

1 By order of 1 February 1996, received at the Court on 22 February 1996, the Arrondissementsrechtbank (District Court) Amsterdam referred to the Court for a preliminary

2 That question was raised in proceedings between Hermès International (hereinafter `Hermès'), a partnership limited by shares governed by French law, and FHT Marketing Choice BV (hereinafter `FHT'), a company incorporated under Netherlands law, concerning trade-mark rights owned by Hermès.

Legal background

3 Article 99(1) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) states, under the heading `Provisional and protective measures', as follows:

`Application may be made to the courts of a Member State, including Community trade mark courts, for such provisional, including protective, measures in respect of a Community trade mark or Community trade mark application as may be available under the law of that State in respect of a national trade mark, even if, under this Regulation, a Community trade mark Court of another Member State has jurisdiction as to the substance of the matter.'

4 Under Article 143(1) that regulation was to enter into force on the 60th day following the day of its publication in the Official Journal of the European Communities. The regulation was published on 14 January 1994 and therefore entered into force on 15 March 1994.

5 Article 1 of Decision 94/800 provides as follows:

`The following multilateral agreements and acts are hereby approved on behalf of the European Community with regard to that portion of them which falls within the competence of the European Community:
- the Agreement establishing the World Trade Organisation, and also the Agreements in Annexes 1, 2 and 3 to that Agreement.
...

6 Article 50 of the TRIPs Agreement provides:

`1. The judicial authorities shall have the authority to order prompt and effective provisional measures:
(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
(b) to preserve relevant evidence in regard to the alleged infringement.
2. The judicial authorities shall have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.
3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.
4. Where provisional measures have been adopted inaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.
6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7 The Final Act embodying the results of the Uruguay Round of multilateral trade negotiations (hereinafter 'the Final Act') and, subject to conclusion, the WTO Agreement were signed in Marrakesh on 15 April 1994 by the representatives of the Community and of the Member States.

8 Article 289(1) of the Netherlands Code of Civil Procedure (hereinafter 'the Code') provides as follows:

'In all cases in which, having regard to the interests of the parties, an immediate provisional measure is necessary on grounds of urgency, the application may be made at a hearing which the President shall hold for that purpose on working days which he shall fix.'

9 In such a case, Article 290(2) of the Code provides that the parties may appear before the President under his 'voluntary jurisdiction' to grant interim measures, in which case the applicant must be represented at the hearing by counsel, whereas the defendant may appear in person or be represented by counsel.

10 According to Article 292 of the Code, an interim measure adopted by the President does not prejudice the examination of the merits of the main proceedings.

11 Lastly, under Article 295 of the Code, an appeal against the provisional order may be lodged before the Gerechtshof (Court of Appeal) within two weeks of the delivery of that decision.

The facts in the main proceedings

12 By virtue of international registrations R 196 756 and R 199 735 designating the Benelux, Hermès is proprietor of the name 'Hermès' and the name and device 'Hermès' as trade marks.

13 Hermès applies those trade marks to inter alia neckties which it markets through a selective distribution system. In the Netherlands, 'Hermès' neckties are sold by Galerie & Faïence BV and by the boutique Le Duc in Scheveningen and Zeist respectively.

14 On 21 December 1995, Hermès, believing that FHT was marketing copies of its ties, seized, with leave of the President of the Arrondissementsrechtbank te Amsterdam, 10 ties in the possession of FHT itself and attached 453 ties held by PTT Post BV to the order of FHT.

15 On 2 January 1996, Hermès then applied to the President of the same Court for an interim order requiring FHT to cease infringement of its copyright and trade mark. Hermès also requested the adoption of all measures necessary to bring the infringement definitively to an end.

16 In the order for reference, the President of the Arrondissementsrechtbank found that Hermès' claim that the ties seized at its request were counterfeit was plausible and that FHT could not reasonably argue that it had acted in good faith. He therefore granted Hermès' application and ordered FHT to cease any present or future infringement of Hermès' exclusive copyright and trade-mark rights.
17 In the same proceedings Hermès also requested the President of the Arrondissementsrechtbank to fix a period of three months from the date of service of the interim decision as the period within which FHT could, under Article 50(6), request revocation of those provisional measures and a period of 14 days as the period within which Hermès could initiate proceedings on the merits of the case, that period to run from the date on which FHT requested revocation.

18 The President of the Arrondissementsrechtbank considers that this last request of Hermès' cannot be granted, because Article 50(6) of the TRIPs Agreement does not place any time-limit on the defendant's right to request revocation of provisional measures. He considers that the intention of that provision is, on the contrary, to allow the defendant to request revocation of a provisional measure at any time prior to delivery of judgment in the main proceedings. The period envisaged in that provision for initiation of proceedings on the merits cannot therefore be determined by reference to a period within which the defendant must request revocation of the provisional measures.

19 Nevertheless, the President of the Arrondissementsrechtbank is uncertain whether a period should be fixed within which Hermès must initiate proceedings on the merits. Such an obligation would be required if the measure ordered in the interim proceedings in question constituted a 'provisional measure' within the meaning of Article 50 of the TRIPs Agreement.

20 The President of the Arrondissementsrechtbank observes that in interim proceedings under Netherlands law the defendant is summoned to appear, the parties have the right to be heard, and the judge hearing the application for interim measures makes an assessment of the substance of the case, which he also sets out in a reasoned written decision, against which an appeal may be lodged. Moreover, although the parties then have the right to initiate proceedings on the merits, in matters falling within the scope of the TRIPs Agreement they normally abide by the interim decision.

21 In those circumstances, the national Court decided to stay proceedings and to refer the following question to the Court for a preliminary ruling: 'Does an interim measure, as, for example, provided for in Article 289 et seq. of the Code of Civil Procedure, whereby an immediate, enforceable measure may be sought, fall within the scope of the expression "provisional measures" within the meaning of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights?'

Jurisdiction of the Court of Justice

22 The Netherlands, French and United Kingdom Governments have submitted that the Court of Justice has no jurisdiction to answer the question.

23 They refer in that regard to paragraph 104 of Opinion 1/94 of 15 November 1994 ([1994] ECR I-5267), in which the Court held that the provisions of the TRIPs Agreement relating to 'measures ... to secure the effective protection of intellectual property rights', such as Article 50, essentially fall within the competence of the Member States and not that of the Community, on the ground that at the date when that Opinion was delivered, the Community had not exercised its internal competence in this area apart from in Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods (OJ 1986 L 357, p. 1). According to the Netherlands, French and United Kingdom Governments, since the Community has still not adopted any further harmonising measures in the area in question, Article 50 of the TRIPs Agreement does not fall within the scope of application of Community law and the Court of Justice therefore has no jurisdiction to interpret that provision.
24 It should be pointed out, however, that the WTO Agreement was concluded by the Community and ratified by its Member States without any allocation between them of their respective obligations towards the other contracting parties.

25 Equally, without there being any need to determine the extent of the obligations assumed by the Community in concluding the agreement, it should be noted that when the Final Act and the WTO Agreement were signed by the Community and its Member States on 15 April 1994, Regulation No 40/94 had been in force for one month.

26 Article 50(1) of the TRIPs Agreement requires that judicial authorities of the contracting parties be authorised to order `provisional measures' to protect the interests of proprietors of trade-mark rights conferred under the laws of those parties. To that end, Article 50 lays down various procedural rules applicable to applications for the adoption of such measures.

27 Under Article 99 of Regulation No 40/94, rights arising from a Community trade mark may be safeguarded by the adoption of `provisional, including protective, measures'.

28 It is true that the measures envisaged by Article 99 and the relevant procedural rules are those provided for by the domestic law of the Member State concerned for the purposes of the national trade mark. However, since the Community is a party to the TRIPs Agreement and since that agreement applies to the Community trade mark, the courts referred to in Article 99 of Regulation No 40/94, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPs Agreement (see, by analogy, Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, paragraph 9, and Case C-61/94 Commission v Germany [1996] ECR I-3989, paragraph 52).

29 It follows that the Court has, in any event, jurisdiction to interpret Article 50 of the TRIPs Agreement.

30 It is immaterial that the dispute in the main proceedings concerns trade marks whose international registrations designate the Benelux.

31 First, it is solely for the national Court hearing the dispute, which must assume responsibility for the order to be made, to assess the need for a preliminary ruling so as to enable it to give its judgment. Consequently, where the question referred to it concerns a provision which it has jurisdiction to interpret, the Court of Justice is, in principle, bound to give a ruling (see, to that effect, Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR I-3763, paragraphs 34 and 35, and Case C-231/89 Gmurzynska-Bscher [1990] ECR I-4003, paragraphs 19 and 20).

32 Second, where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply (see, to that effect, Case C-130/95 Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I-4291, paragraph 28, and Case C-28/95 Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen [1997] ECR I-4161, paragraph 34). In the present case, as has been pointed out in paragraph 28 above, Article 50 of the TRIPs Agreement applies to Community trade marks as well as to national trade marks.

33 The Court therefore has jurisdiction to rule on the question submitted by the national court.
The question referred for a preliminary ruling

34 The national Court asks whether a measure whose purpose is to put an end to alleged infringements of a trade-mark right and which is adopted in the course of a procedure distinguished by the following features:
- the measure is characterised under national law as an ‘immediate provisional measure’ and its adoption must be made ‘on grounds of urgency’,
- the opposing party is summoned and is heard if he appears before the court,
- the decision adopting the measure is reasoned and given in writing following an assessment of the substance of the case by the judge hearing the interim application,
- an appeal may be lodged against the decision, and
- although the parties remain free to initiate proceedings on the merits of the case, the decision is usually accepted by the parties as a ‘final’ resolution of their dispute,

is to be regarded as a ‘provisional measure’ within the meaning of Article 50 of the TRIPs Agreement.

35 It should be stressed at the outset that, although the issue of the direct effect of Article 50 of the TRIPs Agreement has been argued, the Court is not required to give a ruling on that question, but only to answer the question of interpretation submitted to it by the national Court so as to enable that Court to interpret Netherlands procedural rules in the light of that article.

36 According to Article 50(1) of the TRIPs Agreement, that article applies to ‘prompt and effective’ measures, whose purpose is to ‘prevent an infringement of any intellectual property right from occurring’.

37 A measure such as the order made by the national Court in the main proceedings meets that definition. Its purpose is to put an end to an infringement of trade mark rights; it is expressly characterised in national law as an ‘immediate provisional measure’; and it is adopted ‘on grounds of urgency’.

38 Furthermore, it is common ground that the parties have the right, whether or not they make use of it, to initiate, following the adoption of the measure in question, proceedings on the merits of the case. Thus, in law, the measure is not regarded as definitive.

39 The conclusion that a measure such as the order made by the national Court is a ‘provisional measure’ within the meaning of Article 50 of the TRIPs Agreement is not affected by the other characteristics of that order.

40 First, as to the fact that the other party is summoned and is entitled to be heard, it should be observed that Article 50(2) of the TRIPs Agreement provides that ‘where appropriate’ provisional measures may be ordered ‘inaudita altera parte’ and that Article 50(4) lays down specific procedures in that regard. Although those provisions allow for the adoption, where appropriate, of provisional measures inaudita altera parte that cannot mean that only measures adopted in that way are to be characterised as provisional for the purposes of Article 50 of the TRIPs Agreement. It is, on the contrary, clear from those provisions that in all other cases provisional measures are to be adopted in accordance with the principle audi alteram partem.

41 Second, the fact that the judge hearing the application for interim measures gives a reasoned decision in writing does not preclude that decision being characterised as a ‘provisional measure’ within the meaning of Article 50 of the TRIPs Agreement, since that provision lays down no rule as to the form of the decision ordering such a measure.

42 Third, there is nothing in the wording of Article 50 of the TRIPs Agreement to indicate that the measures to which that article refers must be adopted without an assessment by the judge of the substantive aspects of the case. On the contrary, Article 50(3), in terms of which the
judicial authorities are to have authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that his right is being infringed or that such infringement is imminent, implies that the ‘provisional measures’ are based, at least to a certain extent, upon such an assessment.

43 Fourth, as regards the fact that an appeal may be brought against a measure such as that in question in the main proceedings in this case, it should be observed that, although Article 50(4) of the TRIPs Agreement expressly provides for the possibility of requesting a ‘review’ where the provisional measure has been adopted inaudita altera parte, no provision of that article precludes that ‘provisional measures’ should in general be open to appeal.

44 Lastly, any possible willingness of the parties to accept the interim judgment as a ‘final’ resolution of their dispute cannot alter the legal nature of a measure characterised as ‘provisional’ for the purposes of Article 50 of the TRIPs Agreement.

45 The answer to the question submitted must therefore be that a measure whose purpose is to put an end to alleged infringements of a trade-mark right and which is adopted in the course of a procedure distinguished by the following features:

- the measure is characterised under national law as an ‘immediate provisional measure’ and its adoption must be required ‘on grounds of urgency’,
- the opposing party is summoned and is heard if he appears before the court,
- the decision adopting the measure is reasoned and given in writing following an assessment of the substance of the case by the judge hearing the interim application,
- an appeal may be lodged against the decision, and
- although the parties remain free to initiate proceedings on the merits of the case, the decision is usually accepted by the parties as a ‘final’ resolution of their dispute, is to be regarded as a ‘provisional measure’ within the meaning of Article 50 of the TRIPs Agreement.

Decision on costs

Costs

46 The costs incurred by the Netherlands, French and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds, THE COURT, in answer to the question referred to it by the Arrondissementsrechtbank te Amsterdam by order of 1 February 1996, hereby rules:

A measure whose purpose is to put an end to alleged infringements of a trade-mark right and which is adopted in the course of a procedure distinguished by the following features:

- the measure is characterised under national law as an ‘immediate provisional measure’ and its adoption must be required ‘on grounds of urgency’,
- the opposing party is summoned and is heard if he appears before the court,
- the decision adopting the measure is reasoned and given in writing following an assessment of the substance of the case by the judge hearing the interim application,
- an appeal may be lodged against the decision, and
- although the parties remain free to initiate proceedings on the merits of the case, the decision is usually accepted by the parties as a ‘final’ resolution of their dispute, is to be regarded as a ‘provisional measure’ within the meaning of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, as set out in Annex 1 C to the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, in Council Decision 94/800/EC of 22 December 1994.
Judgment of the Court of 14 December 2000

*Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*

Agreement establishing the World Trade Organisation - TRIPs Agreement - Article 177 of the EC Treaty (now Article 234 EC) - Jurisdiction of the Court of Justice - Article 50 of the TRIPs Agreement - Provisional measures - Interpretation - Direct effect

Joined cases C-300/98 and C-392/98

European Court reports 2000 Page I-11307

In Joined Cases C-300/98 and C-392/98, REFERENCES to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arrondissementsrechtbank 's-Gravenhage (Netherlands) (C-300/98) and the Hoge Raad der Nederlanden (Netherlands) (C-392/98) for preliminary rulings in the proceedings pending before those courts between Parfums Christian Dior SA and Tuk Consultancy BV (C-300/98) and between Assco Gerüste GmbH, Rob van Dijk, trading as Assco Holland Steigers Plettac Nederland, and Wilhelm Layher GmbH & Co. KG, Layher BV (C-392/98), on the interpretation of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, as set out in Annex 1 C to the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward (Rapporteur), J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and F. Macken, Judges, Advocate General: G. Cosmas, Registrar: H. von Holstein, Deputy Registrar, after considering the written observations submitted on behalf of: Tuk Consultancy BV, by K.T.M. Stöpetie and M. van Empel, of the Amsterdam Bar (Case C-300/98), Assco Gerüste GmbH and Mr Van Dijk, by G. van der Wal, of the Brussels Bar (Case C-392/98), the Netherlands Government, by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent (Case C-392/98), the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and S. Seam, Foreign Affairs Secretary in the same directorate, acting as Agents (Case C-392/98), the Portuguese Government, by L.I. Fernandes, Director of the Legal Service in the Directorate-General for the European Communities of the Ministry of Foreign Affairs, and T. Moreira and M.J. Palma, Assistant Director-General and Lawyer respectively in the Directorate-General for International Economic Relations, acting as Agents (Case C-300/98), the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, D. Anderson, Barrister (Case C-300/98), and M. Hoskins, Barrister (Case C-392/98), the Council of the European Union, by J. Huber and G. Houttuin, Legal Advisers, acting as Agents (Cases C-300/98 and C-392/98),
the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, acting as Agent (Cases C-300/98 and C-392/98),

having regard to the Report for the Hearing, after hearing the oral observations of Assco Gerüste GmbH and Mr Van Dijk, represented by G. van der Wal and G.A. Zonnekeyn, of the Brussels Bar; the Netherlands Government, represented by M.A. Fierstra; the Danish Government, represented by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent; the Spanish Government, represented by N. Díaz Abad, Abogado del Estado, acting as Agent; the French Government, represented by S. Seam; the United Kingdom Government, represented by J.E. Collins and M. Hoskins; the Council, represented by G. Houttuin; and the Commission, represented by H. van Vliet, of its Legal Service, acting as Agent, at the hearing on 23 May 2000, after hearing the Opinion of the Advocate General at the sitting on 11 July 2000, gives the following

Judgment

Grounds

1 The Arrondissementsrechtbank ’s-Gravenhage (District Court, The Hague), by judgment of 25 June 1998, received at the Court on 29 July 1998 (C-300/98), and the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), by judgment of 30 October 1998, received at the Court on 5 November 1998 (C-392/98), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) one and three questions respectively on the interpretation of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPs), as set out in Annex 1 C to the Agreement establishing the World Trade Organisation (hereinafter the WTO Agreement), approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1).

2 In Case C-300/98, the question submitted was raised in proceedings between the companies Parfums Christian Dior SA (hereinafter Dior) and Tuk Consultancy BV (hereinafter Tuk).

3 In Case C-392/98, the questions were raised in proceedings brought by Assco Gerüste GmbH and Mr Van Dijk (hereinafter jointly referred to as Assco) against Wilhelm Layher GmbH & Co. KG (hereinafter Layher Germany) and its subsidiary Layher BV (hereinafter Layher Netherlands).

Relevant provisions

4 The 11th recital in the preamble to Decision 94/800 states: Whereas, by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.

5 The first indent of Article 1(1) of that decision provides: The following multilateral agreements and acts are hereby approved on behalf of the European Community with regard to that portion of them which falls within the competence of the European Community: the Agreement establishing the World Trade Organisation, and also the Agreements in Annexes 1, 2 and 3 to that Agreement.

6 Article 50 of TRIPs states: 1. The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
(b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant’s right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted inaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member’s law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7 The Final Act embodying the results of the Uruguay Round of multilateral trade negotiations and, subject to conclusion, the WTO Agreement were signed in Marrakesh (Morocco) on 15 April 1994 by the representatives of the Community and of the Member States.

8 Until 1 January 1975, protection against straightforward copying of products was afforded in the Netherlands by the general law, in particular the law relating to wrongful acts. These included Article 1401 of the Burgerlijk Wetboek (hereinafter the Civil Code), replaced from 1 January 1992 by Article 162 of Book 6 of the Civil Code (hereinafter Article 6:162 of the Civil Code).

9 Until 1 January 1992, Article 1401 of the Civil Code provided:
Where a wrongful act causes damage to another person, the person through whose fault the damage occurred shall be obliged to make it good.

10 Since 1 January 1992, Article 6:162 of the Civil Code has provided, so far as relevant in the present case:
1. Any person who commits a wrongful act in relation to another person which is attributable to him shall be required to make good the damage suffered by that other person as a result of the said act.
2. Any infringement of a right and any act or omission contrary to a legal obligation or to the requirements of unwritten law in social and economic life shall be considered to be a wrongful act, without prejudice in each case to the existence of a ground of justification.
3. A wrongful act may be attributed to its perpetrator if it is due to his fault or to a circumstance for which he must answer by virtue of the law or views held by society.

11 Article 289(1) of the Wetboek van Burgerlijke Rechtsvordering (hereinafter the Code of Civil Procedure) provides:
In all cases where, having regard to the interests of the parties, an immediate interim measure is necessary as a matter of urgency, the application may be made at a hearing before the President on such working days as he shall fix for that purpose.
12. In accordance with Article 290(2) of the Code of Civil Procedure, the parties may appear before the President under his voluntary jurisdiction to grant interim measures. The applicant must then be legally represented at the hearing; the defendant may appear in person or be legally represented.

13. Under Article 292 of the Code of Civil Procedure, interim decisions are without prejudice to the decision in the substantive proceedings.

14. Finally, under Article 295 of the Code of Civil Procedure, an appeal against an interim decision may be brought before the Gerechtshof (Court of Appeal) within 14 days following its delivery.

Main proceedings

Case C-300/98

15. Dior is the proprietor of the trade marks for the perfumery products Tendre Poison, Eau Sauvage and Dolce Vita (hereinafter the Dior trade marks), which have been the subject of various international registrations, in particular for Benelux. It markets its products in the European Community through a selective distribution system. Dior products carry prestige, and enjoy a luxury image.

16. Tuk sold and supplied perfume bearing the Dior trade marks to, amongst others, Digros BV, a company established in Hoofddorp (Netherlands).

17. In the proceedings before the Dutch court, Dior submitted that Tuk had infringed the Dior trade marks by selling perfume bearing those marks, since the perfume had not been put on the market in the European Economic Area (hereinafter the EEA) by Dior or with its consent.

18. In the main proceedings Tuk showed that it had acquired some of the products concerned in the Netherlands, and therefore within the EEA. However, it appears that some of the perfume which it supplied to Digros BV came from outside the EEA.

19. The Arrondissementsrechtbank 's-Gravenhage considered that the main proceedings raised the issue of the direct effect of Article 50(6) of TRIPs, which entered into force in the Netherlands on 1 January 1996. It therefore decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Is Article 50(6) of the TRIPs Agreement to be interpreted as having direct effect in the sense that the legal consequences set out therein take effect even in the absence of any corresponding provision of national law?

Case C-392/98

20. Layher Germany designs and manufactures various types of scaffolding, including one known as the Allroundsteiger. Layher Netherlands is the exclusive importer of the Allroundsteiger for the Netherlands.


22. Assco Gerüste GmbH manufactures a type of scaffolding known as the Assco Rondosteiger. That product, whose interlocking assembly and measurement system is identical to that of Layher Germany's Allroundsteiger, is marketed in the Netherlands by Mr Van Dijk, who trades under the name of Assco Holland Steigers Plettac Nederland.
23 On 14 March 1996 Layher Germany and Layher Netherlands applied to the President of the Rechtbank te Utrecht (Utrecht District Court, Netherlands) for interim measures prohibiting Assco from importing into the Netherlands, selling, offering for sale or otherwise trading in the Assco Rondsteiger as then manufactured.

24 The basis of their application was that Assco was acting wrongfully towards them in marketing a type of scaffolding which was a straightforward imitation of the Allroundsteiger. It appears that, under Netherlands law, the provisions of national law cited in paragraphs 10 and 11 above can be invoked to prevent wrongful copying of an industrial design.

25 The President of the Rechtbank te Utrecht granted the application. He also ruled that the period referred to in Article 50(6) of TRIPs was to be one year.

26 Assco appealed against that decision to the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal, Netherlands). By judgment of 9 January 1997 the Gerechtshof in substance upheld the interim decision, setting it aside only in so far as it fixed the applicable period under Article 50(6) of TRIPs.

27 Assco appealed on a point of law to the Hoge Raad der Nederlanden, which decided to stay proceedings and to refer the following three questions to the Court of Justice for a preliminary ruling:

(1) Does the jurisdiction of the Court of Justice to interpret Article 50 of the TRIPs Agreement also extend to the provisions of that article where they do not concern provisional measures to prevent infringement of trade-mark rights?
(2) Does Article 50 of the TRIPs Agreement, in particular Article 50(6), have direct effect?
(3) Where an action lies under national civil law against the copying of an industrial design, on the basis of the general rules concerning wrongful acts, and in particular those relating to unlawful competition, must the protection thus afforded to the holder of the right be regarded as an “intellectual property right” within the meaning of Article 50(1) of the TRIPs Agreement?

28 The questions submitted by the two national courts raise three points, concerning respectively:

the jurisdiction of the Court of Justice to interpret Article 50 of TRIPs and the conditions for exercising that jurisdiction (the first question in Case C-392/98);
whether Article 50(6) of TRIPs has direct effect (the only question in Case C-300/98 and the second question in Case C-392/98); and
the interpretation of the term intellectual property right in Article 50(1) of TRIPs (the third question in Case C-392/98).

Admissibility of the reference for a preliminary ruling in Case C-300/98

29 The Council and the Commission, supported at the hearing by the Netherlands Government, have contested the admissibility of the reference in Case C-300/98 on the ground that the order for reference does not indicate why an answer to the question submitted is necessary in order to enable the national Court to give judgment.

30 It appears, however, that in the main proceedings the national court, which was called upon to order interim measures pursuant to national law, found, first, that Article 50(6) of TRIPs imposes limits on the life-time of such measures and, second, that those limits do not appear in the provisions of national law concerning the grant of interim measures. Its question is therefore designed to ascertain whether, under those conditions, it is required, when delivering judgment, to comply with the time-limits imposed by Article 50(6) of TRIPs. Besides, its question is in essence identical to the second question in Case C-392/98, whose admissibility is not disputed.
31 In those circumstances, the questions submitted in both cases should be answered. It is appropriate to deal with them in the order indicated in paragraph 28 above.

Jurisdiction of the Court to interpret Article 50 of TRIPs

32 The first question asked by the national Court in Case C-392/98 is designed to ascertain whether the scope of the judgment in Case C-53/96 Hermès v FHT [1998] ECR I-3603, relating to the jurisdiction of the Court of Justice to interpret Article 50 of TRIPs, is restricted solely to situations covered by trade-mark law.

33 TRIPs, which is set out in Annex 1 C to the WTO Agreement, was concluded by the Community and its Member States under joint competence (see Opinion 1/94 [1994] ECR I-5267, paragraph 105). It follows that where a case is brought before the Court in accordance with the provisions of the Treaty, in particular Article 177 thereof, the Court has jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret TRIPs.

34 In particular, the Court has jurisdiction to interpret Article 50 of TRIPs in order to meet the needs of the courts of the Member States when they are called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under Community legislation falling within the scope of TRIPs (see Hermès, paragraphs 28 and 29).

35 Likewise, where a provision such as Article 50 of TRIPs can apply both to situations falling within the scope of national law and to situations falling within that of Community law, as is the case in the field of trade marks, the Court has jurisdiction to interpret it in order to forestall future differences of interpretation (see Hermès, paragraphs 32 and 33).

36 In that regard, the Member States and the Community institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they concluded the WTO Agreement, including TRIPs (see, to that effect, Opinion 1/94, cited above, paragraph 108).

37 Since Article 50 of TRIPs constitutes a procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law, that obligation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation.

38 Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation.

39 The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs is thus not restricted solely to situations covered by trade-mark law.

40 The answer to the first question in Case C-392/98 must therefore be that, where the judicial authorities of the Member States are called upon to order provisional measures for the protection of intellectual property rights falling within the scope of TRIPs and a case is brought before the Court of Justice in accordance with the provisions of the Treaty, in particular Article 177 thereof, the Court of Justice has jurisdiction to interpret Article 50 of TRIPs.

Direct effect of Article 50(6) of TRIPs

41 By the second question in Case C-392/98 and the only question in Case C-300/98, the national courts seek in essence to ascertain whether, and to what extent, the procedural requirements of Article 50(6) of TRIPs have entered the sphere of Community law so that, whether on application by the parties or of their own motion, the national courts are required to apply them.
42 It is settled case-law that a provision of an agreement entered into by the Community with non-member countries must be regarded as being directly applicable when, regard being had to the wording, purpose and nature of the agreement, it may be concluded that the provision contains a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in that regard, Case 12/86 Demirel v Stadt Schwäbisch Gmünd [1987] ECR 3719, paragraph 14, and Case C-162/96 Racke v Hauptzollamt Mainz [1998] ECR I-3655, paragraph 31).

43 The Court has already held that, having regard to their nature and structure, the WTO Agreement and the annexes thereto are not in principle among the rules in the light of which the Court is to review measures of the Community institutions pursuant to the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) (see Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 47).

44 For the same reasons as those set out by the Court in paragraphs 42 to 46 of the judgment in Portugal v Council, the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.

45 However, the finding that the provisions of TRIPs do not have direct effect in that sense does not fully resolve the problem raised by the national courts.

46 Article 50(6) of TRIPs is a procedural provision intended to be applied by Community and national courts in accordance with obligations assumed both by the Community and by the Member States.

47 In a field to which TRIPs applies and in respect of which the Community has already legislated, as is the case with the field of trade marks, it follows from the judgment in Hermès, in particular paragraph 28 thereof, that the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs.

48 On the other hand, in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.

49 The answer to the second question in Case C-392/98 and the only question in Case C-300/98 must therefore be that: in a field to which TRIPs applies and in respect of which the Community has already legislated, the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs, but in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.

Interpretation of the term intellectual property right
50 The third question in Case C-392/98 is designed to ascertain whether the right to sue under general provisions of national law concerning wrongful acts, in particular unlawful competition, in order to protect an industrial design against copying is to be classified as an intellectual property right within the meaning of Article 50(1) of TRIPs.

51 Thus defined, the question falls into two parts. The first issue is whether an industrial design, such as that in question in the main proceedings, falls within the scope of TRIPs. If it does, it must then be determined whether the right to sue under general provisions of national law, such as those relied on in the main proceedings, in order to protect a design against copying constitutes an intellectual property right within the meaning of Article 50 of TRIPs.

52 As regards the first issue, the national Court has correctly pointed out that, according to Article 1(2) of TRIPs, the term intellectual property in Article 50 refers to all categories of intellectual property that are the subject of Sections 1 to 7 of Part II of that agreement. Section 4 concerns industrial designs.

53 Article 25 sets out the conditions for protection of an industrial design under TRIPs. Article 26 concerns the nature of the protection, possible exceptions and the duration of the protection.

54 It is for the national Court to determine whether the industrial design at issue in the main proceedings satisfies the requirements laid down in Article 25.

55 As to the second issue, TRIPs contains no express definition of what constitutes an intellectual property right for the purpose of that agreement. It is therefore necessary to interpret this term, which appears many times in the preamble and in the main body of TRIPs, in its context and in the light of its objectives and purpose.

56 According to the first recital in its preamble, the objectives of TRIPs are to reduce distortions and impediments to international trade, ... taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. In the second recital, the Contracting Parties recognise the need for new rules and disciplines concerning:

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

57 In the third and fourth recitals, the Contracting Parties recognise the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods and the fact that intellectual property rights are private rights.

58 Article 1(1), concerning the nature and scope of obligations, provides that members are to be free to determine the appropriate method of implementing the provisions of TRIPs within their own legal system and practice.

59 Article 62, which constitutes Part IV of TRIPs, entitled Acquisition and maintenance of intellectual property rights and related inter partes procedures, provides in the first and second paragraphs that the Contracting Parties may make the acquisition or maintenance of intellectual property rights conditional on compliance with reasonable procedures and formalities, including procedures for grant or registration. Such procedures are not, however, an essential
requirement for the acquisition or maintenance of an intellectual property right within the meaning of TRIPs.

60 It is apparent from the foregoing provisions as a whole that TRIPs leaves to the Contracting Parties, within the framework of their own legal systems and in particular their rules of private law, the task of specifying in detail the interests which will be protected under TRIPs as intellectual property rights and the method of protection, provided always, first, that the protection is effective, particularly in preventing trade in counterfeit goods and, second, that it does not lead to distortions of or impediments to international trade.

61 Legal proceedings to prevent alleged copying of an industrial design may serve to prevent trade in counterfeit goods and may also impede international trade.

62 It follows that a right to sue under general provisions of national law concerning wrongful acts, in particular unlawful competition, in order to protect an industrial design against copying may qualify as an intellectual property right within the meaning of Article 50(1) of TRIPs.

63 It follows from all of the foregoing considerations that the answer to the third question in Case C-392/98 must be that Article 50 of TRIPs leaves to the Contracting Parties, within the framework of their own legal systems, the task of specifying whether the right to sue under general provisions of national law concerning wrongful acts, in particular unlawful competition, in order to protect an industrial design against copying is to be classified as an intellectual property right within the meaning of Article 50(1) of TRIPs.

**Decision on costs**

Costs

64 The costs incurred by the Netherlands, Danish, Spanish, French, Portuguese and United Kingdom Governments and by the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decisions on costs are a matter for those courts.

**Operative part**

On those grounds, THE COURT, in answer to the questions referred to it by the Arrondissementsrechtbank 's-Gravenhage by judgment of 25 June 1998 and the Hoge Raad der Nederlanden by judgment of 30 October 1998, hereby rules:

1. Where the judicial authorities of the Member States are called upon to order provisional measures for the protection of intellectual property rights falling within the scope of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), as set out in Annex 1 C to the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994, and a case is brought before the Court of Justice in accordance with the provisions of the EC Treaty, in particular Article 177 thereof (now Article 234 EC), the Court of Justice has jurisdiction to interpret Article 50 of the TRIPs Agreement.

2. In a field to which the TRIPs Agreement applies and in respect of which the Community has already legislated, the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of the TRIPs Agreement.
In a field in which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of the TRIPs Agreement or that it should oblige the courts to apply that rule of their own motion.

3. Article 50 of the TRIPs Agreement leaves to the Contracting Parties, within the framework of their own legal systems, the task of specifying whether the right to sue under general provisions of national law concerning wrongful acts, in particular unlawful competition, in order to protect an industrial design against copying is to be classified as an intellectual property right within the meaning of Article 50(1) of the TRIPs Agreement.
Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (C-120/06 P), Giorgio Fedon & Figli SpA and Fedon America, Inc. (C-121/06 P) v Council of the European Union and Commission of the European Communities

Appeals - Recommendations and rulings of the World Trade Organisation (WTO) Dispute Settlement Body - Determination of the Dispute Settlement Body that the Community regime governing the import of bananas was incompatible with WTO rules - Imposition by the United States of America of retaliatory measures in the form of increased customs duty levied on imports of certain products from various Member States - Retaliatory measures authorised by the WTO - No non-contractual Community liability - Duration of the proceedings before the Court of First Instance - Reasonable period - Claim for fair compensation.

Joined cases C-120/06 P and C-121/06 P

European Court reports 2008 Page I-06513

In Joined Cases C-120/06 P and C-121/06 P,
TWO APPEALS under Article 56 of the Statute of the Court of Justice, brought on 24 and 27 February 2006 respectively,
Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), established in Montecchio Maggiore (Italy),
Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, formerly Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies), established in East Haven, Delaware (United States of America), represented by I. Van Bael, A. Cevese and F. Di Gianni, avocats, appellants,
the other parties to the proceedings being:
Council of the European Union, represented by A. Vitro, S. Marquardt and A. De Gregorio Merino, acting as Agents,
Commission of the European Communities, represented by P.J. Kuijper, V. Di Bucci, C. Brown and E. Righini, acting as Agents, with an address for service in Luxembourg,
defendants at first instance,
Kingdom of Spain, represented by E. Braquehais Conesa and M. Muñoz Pérez, acting as Agents, with an address for service in Luxembourg,
intervener at first instance (C-120/06 P),
and
Giorgio Fedon & Figli SpA, established in Vallesella di Cadore (Italy),
Fedon America, Inc., established in Wilmington, Delaware (United States of America), represented by I. Van Bael, A. Cevese, F. Di Gianni and R. Antonini, avocats, appellants,
the other parties to the proceedings being:
Council of the European Union, represented by A. Vitro, S. Marquardt and A. De Gregorio Merino, acting as Agents,
Commission of the European Communities, represented by P.J. Kuijper, V. Di Bucci, C. Brown and E. Righini, acting as Agents, with an address for service in Luxembourg,
defendants at first instance,
supported by:
Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent, with an address for service in Luxembourg,
intervener on appeal (C-121/06 P),
THE Court (Grand Chamber),

having regard to the written procedure and further to the hearing on 3 July 2007, after hearing the Opinion of the Advocate General at the sitting on 20 February 2008, gives the following

Judgment

Grounds

1. By their appeals, Fabbrica italiana accumulatori motocarri Montecchio SpA and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (together referred to as ‘FIAMM’) and Giorgio Fedon & Figli SpA and Fedon America, Inc. (together referred to as ‘Fedon’) respectively request the Court to set aside the judgment of the Court of First Instance of the European Communities of 14 December 2005 in Case T-69/00 FIAMM and FIAMM Technologies v Council and Commission [2005] ECR II-5393 (Case C-120/06 P) and the judgment of the Court of First Instance of 14 December 2005 in Case T-135/01 Fedon & Figli and Others v Council and Commission (Case C-121/06 P). By those judgments (‘the FIAMM judgment’ and ‘the Fedon judgment’ respectively or, together, ‘the judgments under appeal’), the Court of First Instance dismissed the actions brought by FIAMM and Fedon seeking compensation for the damage allegedly suffered by them on account of the increased customs duty which the Dispute Settlement Body (‘the DSB’) of the World Trade Organisation (WTO) authorised the United States of America to levy on imports of their products, following a finding by the DSB that the Community regime governing the import of bananas was incompatible with the agreements and understandings annexed to the Agreement establishing the WTO.

2. By order of the President of the Court of Justice of 8 August 2006, the Kingdom of Spain was granted leave to intervene in support of the forms of order sought by the Council of the European Union and the Commission of the European Communities in Case C-121/06 P.

3. By order of the President of the Court of Justice of 12 April 2007, Cases C-120/06 P and C-121/06 P were joined for the purposes of the oral procedure and the judgment.

Legal context

The WTO agreements

4. By Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-94) (OJ 1994 L 336, p. 1), the Council approved the Agreement establishing the WTO and the agreements in Annexes 1 to 4 to that agreement (‘the WTO agreements’).

5. Article 3(2) and (7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (‘the DSU’), which forms Annex 2 to the Agreement establishing the WTO, provides:

‘2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

...
7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorisation by the DSB of such measures.

6. Article 7 of the DSU provides that panels established at the request of a complaining party are to make such findings as will assist the DSB in making recommendations or in giving rulings on the matters submitted to that body. Under Article 12(7) of the DSU, where the parties to the dispute do not manage to develop a mutually satisfactory solution, the panel is to submit its findings in the form of a written report to the DSB.

7. Under Article 16(4) of the DSU, within 60 days after the date of circulation of a panel report to WTO members, the report is to be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

8. Article 17 of the DSU provides for the establishment of a standing Appellate Body responsible for hearing appeals from panel cases. Under Article 17(6), an appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel. As is apparent from Article 17(13), in the report which it is called upon to provide the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

9. Article 17(14) of the DSU provides:
‘An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. …’

10. Article 19(1) of the DSU states:
‘Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.’

11. Article 21 of the DSU, which is headed ‘Surveillance of Implementation of Recommendations and Rulings’, provides:
‘1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

3. At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:
(a) the period of time proposed by the Member concerned, … approved by the DSB; or, in the absence of such approval,
(b) a period of time mutually agreed by the parties to the dispute …; or, in the absence of such agreement,
(c) a period of time determined through binding arbitration …

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. …

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. … Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB’s agenda until the issue is resolved. …

12. Article 22 of the DSU, headed ‘Compensation and the Suspension of Concessions’, provides:

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;
(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(f) for purposes of this paragraph, “sector” means:
(i) with respect to goods, all goods;
...

4. The level of the suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorisation to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However,
if the Member concerned objects to the level of suspension proposed, or claims that the
principles and procedures set forth in paragraph 3 have not been followed where a complaining
party has requested authorisation to suspend concessions or other obligations ... the matter shall
be referred to arbitration. ... Concessions or other obligations shall not be suspended during the
course of the arbitration.
7. ... The DSB shall ... upon request, grant authorisation to suspend concessions or other
obligations where the request is consistent with the decision of the arbitrator, unless the DSB
decides by consensus to reject the request.
8. The suspension of concessions or other obligations shall be temporary and shall only be
applied until such time as the measure found to be inconsistent with a covered agreement has
been removed, or the Member that must implement recommendations or rulings provides a
solution to the nullification or impairment of benefits, or a mutually satisfactory solution is
reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under
surveillance the implementation of adopted recommendations or rulings, including those cases
where compensation has been provided or concessions or other obligations have been suspended
but the recommendations to bring a measure into conformity with the covered agreements have
not been implemented.
...' The Community legislation on the common organisation of the market in bananas, and the
related dispute within the WTO
organisation of the market in bananas (OJ 1993 L 47, p. 1), Title IV of which was devoted to
trade with third countries and contained preferential provisions for bananas originating in
certain African, Caribbean and Pacific States ('ACP States') that were co-signatories to the
14. Following complaints lodged in February 1996 by several WTO members, including the United
States of America, the regime governing that trade became the subject of a dispute settlement
procedure.
15. In its report, the Appellate Body found that certain elements of that trading regime were
incompatible with the obligations entered into by the Community under the WTO agreements
and recommended that the DSB request the Community to bring the regime into conformity with
those obligations. This report was adopted by decision of the DSB on 25 September 1997 ('the
DSB’s decision of 25 September 1997').
16. On 16 October 1997, the Community informed the DSB, in accordance with Article 21(3) of
the DSU, that it would respect its international obligations.
17. Pursuant to Article 21(3)(c) of the DSU, the reasonable period of time within which the
Community had to comply with its obligations was set by arbitral award as expiring on 1 January
1999.
18. As is apparent from recital 2 in its preamble, Council Regulation (EC) No 1637/98 of 20 July
1998 amending Regulation No 404/93 (OJ 1998 L 210, p. 28) altered the regime governing trade
in bananas with third countries having regard to the fact that ‘the Community’s international
commitments under the [WTO] and to the other signatories [to] the Fourth ACP-[EEC]
Convention should be met, whilst achieving at the same time the purposes of the common
organisation of the market in bananas’.
the implementation of Regulation No 404/93 regarding imports of bananas into the Community
20. Since the United States of America took the view that the new Community regime governing the import of bananas that had thereby been established preserved the unlawful elements of the previous regime, in breach of the WTO agreements and the DSB’s decision of 25 September 1997, on 14 January 1999 it requested the DSB, pursuant to Article 22(2) of the DSU, to authorise suspension of the application to the Community and its Member States of tariff concessions and related obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the General Agreement on Trade in Services (GATS), in respect of trade amounting to USD 520 million.

21. As the Community objected to that amount and maintained that the principles and procedures laid down in Article 22(3) of the DSU had not been observed, the DSB decided, on 29 January 1999, to refer this matter to arbitration, on the basis of Article 22(6) of the DSU.

22. By decision of 9 April 1999, the arbitrators found that several provisions of the new Community regime governing the import of bananas were contrary to provisions of the WTO agreements and set the level of nullification or impairment suffered by the United States of America at USD 191.4 million per year.

23. On 19 April 1999, the DSB authorised the United States of America to levy customs duty in respect of trade amounting to up to USD 191.4 million per year on imports originating in the Community.

24. On the same day, the United States authorities imposed ad valorem import duty at a rate of 100% on various products. These products, originating in Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden or the United Kingdom, included ‘lead-acid storage batteries other than of a kind used for starting piston engines or as the primary source of power for electric vehicles’ and ‘articles of a kind normally carried in the pocket …, with outer surface of sheeting of plastic, of reinforced or laminated plastics’.


26. Recitals 1 to 6 in the preamble to Regulation No 216/2001 state:

‘(1) There have been numerous close contacts with supplier countries and other interested parties to settle the disputes arising from the import regime established by Regulation (EEC) No 404/93 … and to take account of the conclusions of the [panel] set up under the dispute settlement system of the [WTO].

(2) Analysis of all the options presented by the Commission suggests that establishment in the medium term of an import system founded on the application of a customs duty at an appropriate rate and application of a preferential tariff to imports from ACP [States] provides the best guarantees, firstly of achieving the objectives of the common organisation of the market as regards Community production and consumer demand, secondly of complying with the rules on international trade, and thirdly of preventing further disputes.

(3) However, such a system must be introduced upon completion of negotiations with the Community’s partners in accordance with WTO procedures, in particular Article XXVIII of the [GATT 1994]. ...

(4) Until the entry into force of that regime, the Community should be supplied under several tariff quotas open to imports from all origins and managed in line with the recommendations made by the [DSB]. ...

(5) In view of the contractual obligations towards the ACP [States] and the need to guarantee them proper conditions of competition, application to imports of bananas originating in those countries of a tariff preference of EUR 300 per tonne would allow the trade flows in question to
be maintained. This will entail in particular the application to such imports of zero duty under the ... tariff quotas.

(6) The Commission should be authorised to open negotiations with supplier countries having a substantial interest in supplying the Community market to endeavour to achieve a negotiated allocation of the first two tariff quotas. …’

27. On 11 April 2001, the United States of America and the Community concluded a memorandum of understanding identifying ‘the means by which the long-standing dispute over the EC’s banana import regime can be resolved’. That memorandum provided that the Community undertook to ‘introduce a tariff-only regime for imports of bananas no later than 1 January 2006’. The memorandum defined the measures which the Community undertook to take during the interim period expiring on 1 January 2006. In return, the United States of America undertook to suspend provisionally the imposition of the increased customs duty which it was authorised to levy on Community imports.

28. Following the adoption of Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Regulation No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6), the United States of America suspended application of its increased customs duty. From 1 July 2001, import duty on stationary batteries and articles of a kind normally carried in the pocket originating in the Community was reduced to its initial rate of 3.5% and 4.6% respectively.

The actions brought before the Court of First Instance, the course of the proceedings before it and the judgments under appeal

The actions

29. The business activities of FIAMM relate in particular to stationary batteries, and those of Fedon to spectacle cases and associated accessories falling within the category of articles of a kind normally carried in the pocket.

30. Since FIAMM and Fedon considered the Community to be liable for the damage which they claimed to have suffered as a result of the fact that these products were among those subject to the increased customs duty imposed by the United States authorities between 19 April 1999 and 30 June 2001, they brought before the Court of First Instance actions for compensation, founded on Article 235 EC in conjunction with the second paragraph of Article 288 EC, against the Council and the Commission.

31. The principal claim advanced by FIAMM and Fedon was that the Community had incurred non-contractual liability by reason of the unlawful conduct of its institutions. As is apparent from paragraphs 69 and 92 to 95 of the FIAMM judgment and paragraphs 63 and 85 to 88 of the Fedon judgment, they contended more specifically, as regards the unlawful conduct alleged, that the failure of the Council and the Commission to adopt amendments to the Community regime governing the import of bananas such as to bring it into conformity with the obligations entered into by the Community under the WTO agreements within the time-limit laid down by the DSB infringed the principle pacta sunt servanda, the principles of the protection of legitimate expectations and of legal certainty, their rights to property and pursuit of an economic activity and, finally, the principle of proper administration.

32. In the alternative, FIAMM and Fedon claimed, in particular, that the Community had incurred non-contractual liability even in the absence of unlawful conduct of its institutions. Proceedings before the Court of First Instance
33. It is apparent from paragraphs 48 to 59 of the FIAMM judgment and paragraphs 48 to 55 of the Fedon judgment that the proceedings before the Court of First Instance took the following course.

34. FIAMM’s action was brought on 23 March 2000 (Case T-69/00). The Kingdom of Spain was granted leave to intervene in that case by order of 11 September 2000.

35. Fedon’s action was brought on 18 June 2001 (Case T-135/01).

36. Following a request made by the Commission pursuant to the second subparagraph of Article 51(1) of the Rules of Procedure of the Court of First Instance, both cases were reassigned to a chamber in extended composition, composed of five judges, by decisions of the Court of First Instance of 4 July and 7 October 2002.

37. Following the departure from office of the Judge-Rapporteur initially designated in those cases, a new Judge-Rapporteur was appointed on 13 December 2002.

38. By order of 3 February 2003, the case which gave rise to the FIAMM judgment and the cases which gave rise to the judgments of the Court of First Instance of 14 December 2005 in Laboratoire du Bain v Council and Commission (Case T-151/00) and Groupe Fremaux and Palais Royal v Council and Commission (Case T-301/00) were joined for the purposes of the oral procedure. A hearing was held in those cases on 11 March 2003.

39. By decisions of 23 March and 1 April 2004, the Court of First Instance reopened the oral procedure in those cases and referred to the Grand Chamber of the Court of First Instance both them and the related cases which gave rise to the judgments of the Court of First Instance of 14 December 2005 in CD Cartondruck v Council and Commission (Case T-320/00) and Beamglow v Parliament and Others (Case T-383/00) and to the Fedon judgment. These six cases were joined for the purposes of the oral procedure by order of 19 May 2004.

40. The hearing was held on 26 May 2004.

The judgments under appeal

41. By the judgments under appeal, the Court of First Instance dismissed the actions brought by FIAMM and Fedon.

42. The Court first dismissed, in paragraphs 84 to 150 of the FIAMM judgment and paragraphs 77 to 143 of the Fedon judgment, those applicants’ actions for compensation in so far as they were founded on the regime governing non-contractual liability for unlawful conduct of the Community institutions.

43. Paragraph 100 of the FIAMM judgment is worded as follows:
‘The applicants observe that all the principles infringed by the defendants are higher-ranking and are designed to protect individuals. Before the United States increased the import duty, the WTO regime directly granted the applicants the right to import their products into the United States paying the original import duty at the reduced rate of 3.5%. Even if the WTO agreements are not to be regarded as directly applicable, such effect must be accorded to the [DSB’s] decision [of 25 September 1997] that found against the Community, which meets all the conditions laid down for that purpose by Community case-law.’

44. Paragraph 93 of the Fedon judgment is couched in the following terms:
‘The applicants observe that, even if the WTO agreements were to be considered not to have direct effect, the DSB’s decision [of 25 September 1997] that found against the Community should on the other hand be recognised as having such a property. The Court of Justice has
acknowledged that it has the power to review the legality of actions of the Community institutions where, as here, they intended to implement a specific obligation assumed within the framework of the GATT.’

45. Ruling on the preliminary question as to whether the WTO rules could be relied upon, the Court of First Instance held in particular, in paragraphs 108 to 115 of the FIA judgment and paragraphs 101 to 108 of the Fedon judgment:

‘108 [101] Before examining the legality of the conduct of the Community institutions, it is necessary to decide whether the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules.

109 [102] The applicants rely in this connection on the principle pacta sunt servanda, which is one of the rules of law with which the Community institutions must comply when carrying out their functions, being a fundamental principle of all legal orders and particularly of the international legal order (Case C-162/96 Racke [1998] ECR I-3655, paragraph 49).

110 [103] However, the principle pacta sunt servanda cannot be asserted against the defendants in the present case since, in accordance with settled case-law, the WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions ([judgment in Case C-149/96] Portugal v Council [1999] ECR I-8395, paragraph 47; order in Case C-307/99 OGT Fruchthandelsgesellschaft [2001] ECR I-3159, paragraph 24; and judgments in Joined Cases C-27/00 and C-122/00 Omega Air and Others [2002] ECR I-2569, paragraph 93, Case C-76/00 P Petrotub and Republica v Council [2003] ECR I-79, paragraph 53, and Case C-93/02 P Biret International v Council [2003] ECR I-10497, paragraph 52).

111 [104] First, the Agreement establishing the WTO is founded on reciprocal and mutually advantageous arrangements which distinguish it from those agreements concluded between the Community and non-member States that introduce a certain asymmetry of obligations. It is common ground that some of the most important commercial partners of the Community do not include the WTO agreements among the rules by reference to which their courts review the legality of their rules of domestic law. To review the legality of actions of the Community institutions in the light of those rules could therefore lead to an unequal application of the WTO rules depriving the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners ( Portugal v Council , cited … above, paragraphs 42 to 46).

112 [105] Second, to require the courts to refrain from applying rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of the DSU of entering into negotiated arrangements, even on a temporary basis, in order to arrive at mutually acceptable compensation ( Portugal v Council , cited … above, paragraphs 39 and 40).


114 [107] It is only where the Community intends to implement a particular obligation assumed in the context of the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Court can review the legality of the conduct of the defendant institutions in the light of the WTO rules (see, as regards the GATT 1947, Case 70/87 Fediol v Commission [1989] ECR 1781, paragraphs 19 to 22, and [Case C-69/89] Nakajima v Council [1991] ECR I-2069), paragraph 31, and, as regards the WTO agreements, Portugal v Council , cited … above, paragraph 49, and Biret International v Council , cited … above, paragraph 53).
115 [108] However, notwithstanding the existence of a decision of the DSB finding the measures taken by a member to be incompatible with WTO rules, neither of those exceptions is applicable in this instance.’

46. The Court of First Instance then stated the reasons why it considered that neither of those exceptions could apply.

47. With regard to the exception based on an intention to implement a specific obligation assumed within the WTO, the Court held as follows in paragraphs 116, 121, 122 and 125 to 137 of the **FIAMM** judgment and paragraphs 109, 114, 115 and 118 to 130 of the Fedon judgment:

“116 [109] In undertaking, after the adoption of the [DSB’s] decision of 25 September 1997, to comply with the WTO rules, the Community did not intend to assume a specific obligation in the context of the WTO capable of justifying an exception to the principle that WTO rules cannot be relied upon before the Community courts and of allowing the latter to review the legality of the conduct of the Community institutions by reference to those rules.

...  
121 [114] The DSU ... allows the WTO member involved several methods of implementing a recommendation or ruling of the DSB finding a measure incompatible with WTO rules.
122 [115] Where immediate withdrawal of the incompatible measure is impracticable, the DSU envisages, in Article 3(7), that the member harmed may be granted compensation or may be authorised to suspend the application of concessions or other obligations on an interim basis pending the withdrawal of the incompatible measure (see Portugal v Council, cited ... above, paragraph 37).

...  
125 [118] Even on expiry of the period of time set for bringing the measure declared incompatible into conformity with WTO rules and after authorisation and adoption of measures granting compensation or suspending concessions under Article 22(6) of the DSU, considerable importance is still accorded to negotiation between the parties to the dispute.
126 [119] Article 22(8) of the DSU thus makes it clear that the suspension of concessions or other obligations is temporary in nature and states that the suspension is only to be applied “until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached”.
127 [120] Article 22(8) further provides that, in accordance with Article 21(6), the DSB is to continue to keep the implementation of adopted recommendations or rulings under surveillance.
128 [121] In the event of disagreement as to the compatibility with a WTO agreement of measures taken to comply with the DSB’s recommendations and rulings, Article 21(5) of the DSU provides that the dispute is to be decided “through recourse to these dispute settlement procedures”, which include pursuit by the parties of a negotiated solution.
129 [122] Neither the expiry of the period set by the DSB for the Community to bring its banana import regime into conformity with the DSB’s decision of 25 September 1997 nor the decision of 9 April 1999, by which the DSB arbitrators expressly found that the new mechanism for banana imports established by Regulations No 1637/98 and No 2362/98 was incompatible with WTO rules, resulted in exhaustion of the methods for settling disputes made available by the DSU.
130 [123] To that extent, review by the Community courts of the legality of the conduct of the defendant institutions by reference to WTO rules could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute that is consistent with WTO rules.
131 [124] In those circumstances, to require courts to refrain from applying the rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded in particular by Article 22 of the DSU of entering into a negotiated arrangement even on a temporary basis (Portugal v Council, cited ... above, paragraph 40).
132 [125] The applicants are therefore wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO member to comply, within a specified period, with the recommendations
and rulings of the WTO bodies and in contending that DSB rulings are enforceable unless the contracting parties unanimously oppose this.

133 [126] Moreover, in again amending, by Regulation No 216/2001, the banana import regime, the Council sought to reconcile various divergent objectives. The preamble to Regulation No 216/2001 thus states, in the first recital, that there were numerous close contacts in order, in particular, “to take account of the conclusions of the [panel]” and, in the second recital, that the new import system envisaged provides the best guarantees both “of achieving the objectives of the [COM for bananas] as regards Community production and consumer demand” and “of complying with the rules on international trade”.

134 [127] It was, ultimately, in return for the Community’s undertaking to establish a tariff-only regime for imports of bananas before 1 January 2006 that the United States of America agreed, as set out in the memorandum of understanding concluded on 11 April 2001, to suspend provisionally the imposition of the increased customs duty.

135 [128] Such an outcome could have been jeopardised by intervention of the Community courts in reviewing the legality by reference to WTO rules of the conduct of the defendant institutions in the present case with a view to awarding compensation for the loss sustained by the applicants.

136 [129] The Court notes in this regard that, as the United States of America has expressly stated, the memorandum of understanding of 11 April 2001 does not in itself constitute a mutually agreed solution for the purposes of Article 3(6) of the DSU and that the question of implementation by the Community of the DSB’s recommendations and rulings was still included on 12 July 2001, that is to say after the present action had been brought, on the agenda of the meeting of the DSB.

137 [130] It follows that the defendant institutions did not intend, by amending the Community regime at issue governing the import of bananas, to implement specific obligations arising from the WTO rules and in the light of which the DSB had found that regime to be incompatible with those rules.’

48. The Court also ruled out any application of the exception derived from express reference to specific provisions of the WTO agreements, after having in particular found in paragraph 142 of the FIAMM judgment and paragraph 135 of the Fedon judgment that ‘the preambles to the various regulations amending the banana import regime do not show that the Community legislature referred to specific provisions of the WTO agreements when it purported to bring the regime into conformity with those agreements’.

49. The Court thus concluded, in paragraphs 144 and 145 of the FIAMM judgment and paragraphs 137 and 138 of the Fedon judgment, that, ‘notwithstanding a finding of incompatibility made by the DSB, the WTO rules do not in the present case, whether because of particular obligations which the Community intended to implement or because of an express reference to specific provisions, amount to rules of law by reference to which the legality of the institutions’ conduct may be assessed’ and that ‘the applicants are not entitled to argue, for the purposes of their claim for compensation, that the conduct of which the Council and the Commission are accused is contrary to WTO rules’.

50. After observing in paragraph 146 of the FIAMM judgment and paragraph 139 of the Fedon judgment that ‘the complaints advanced by the applicants based on breach of the principles of the protection of legitimate expectations and of legal certainty, on infringement of the right to property and to pursuit of an economic activity and, finally, on failure to observe the principle of proper administration all rest on the premiss that the conduct of which the defendant institutions are accused is contrary to WTO rules’, the Court deduced, in paragraphs 147 and 140 of those judgments, that, ‘inasmuch as those rules are not among the rules by reference to which the Community courts review the legality of the Community institutions’ conduct, these complaints [would] therefore be rejected’.
51. In the light of the foregoing, the Court found, in paragraph 149 of the FIAMM judgment and paragraph 142 of the Fedon judgment, that, ‘since it [had] not been proved that the conduct of which the defendant institutions [were] accused was unlawful, one of the three cumulative conditions of non-contractual liability of the Community for unlawful conduct [was] not met’. Consequently, it dismissed the applicants’ first head of claim.

52. As regards the head of claim founded on a regime providing for non-contractual Community liability even in the absence of unlawful conduct of the institutions, the Court first of all affirmed the existence of such a regime in paragraphs 157 to 160 of the FIAMM judgment and paragraphs 150 to 153 of the Fedon judgment, stating as follows:

‘157 [150] Where, as in the present case, it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets can in no circumstances obtain compensation by virtue of the Community’s non-contractual liability (see, to this effect, Case 81/86 De Boer Buizen v Council and Commission [1987] ECR 3677, paragraph 17).

158 [151] The second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on the “general principles common to the laws of the Member States” and therefore does not restrict the ambit of those principles solely to the rules governing non-contractual Community liability for unlawful conduct of those institutions.

159 [152] National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage.

160 [153] When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met (Case C-237/98 P Dorsch Consult v Council and Commission [2000] ECR I-4549, paragraph 19).’

53. The Court then concluded that the applicants had sustained actual and certain damage.

54. It further held that a direct causal link existed between the conduct of the Community institutions with regard to the importing of bananas into the Community and the damage thereby sustained by the applicants.

55. Finally, the Court held that the damage incurred by FIAMM and Fedon was not unusual in nature, and therefore rejected their claims in so far as they were founded on the regime providing for liability of the Community in the absence of unlawful conduct of its institutions.

56. In reaching this conclusion, the Court held in particular, in paragraphs 205 and 207 of the FIAMM judgment and paragraphs 194 and 196 of the Fedon judgment:

‘205 [194] … the possibility, which has come about in the present case, of tariff concessions being suspended as provided for by the WTO agreements is among the vicissitudes inherent in the current system of international trade. Accordingly, the risk of this vicissitude has to be borne by every operator who decides to sell his products on the market of one of the WTO members.

207 [196] In addition, it is clear from Article 22(3)(b) and (c) of the DSU, an international instrument which was publicised appropriately so as to ensure that Community operators were aware of it, that the complaining member of the WTO may seek to suspend concessions or other obligations in sectors other than that in which the panel or Appellate Body has found a violation by the member concerned, whether under the same agreement or another WTO agreement.’

The forms of order sought and the course of the proceedings before the Court of Justice
57. **FIAMM**, in Case C-120/06 P, and Fedon, in Case C-121/06 P, claim respectively that the **FIAMM** judgment and the Fedon judgment should be set aside. They each put forward two pleas in law in support of their appeal.

58. By their first plea, they submit that the judgments under appeal lack reasoning and are unfounded so far as concerns one of the main arguments - regarding direct effect of decisions of the DSB - underlying their respective applications for damages by reason of unlawful conduct of the Community.

59. By their second plea, **FIAMM** and Fedon submit that, in concluding that the damage incurred by them was not unusual in nature and accordingly rejecting their claim for compensation founded on a liability regime applicable in the absence of unlawful conduct of the Community institutions, the Court of First Instance gave reasons that were insufficiently explained, illogical and at variance with the relevant settled case-law.

60. They each further claim that the Court should:
- give a substantive ruling confirming their entitlement to compensation arising out of the defendants’ liability for an unlawful act or for a lawful act;
- in any event, order the defendants to pay the costs both of the appeal proceedings and of the proceedings at first instance.

61. In the alternative, **FIAMM** and Fedon request the Court to grant them fair compensation on account of the unreasonable duration of the proceedings before the Court of First Instance and to grant such further relief as fairness might require.

62. The Council contends that the Court should:
- replace certain of the Court of First Instance’s grounds or partially set aside the judgments under appeal, declaring that non-contractual liability of the Community in the absence of an unlawful act is inapplicable in respect of a failure to take legislative action or, in the alternative, declaring that the factors required for such liability are not present;
- dismiss the appeals as unfounded;
- order the appellants to pay the costs.

63. The Commission contends that the Court should:
- dismiss the appeals, altering, in so far as is necessary, the grounds of the judgments under appeal;
- in the alternative, dismiss the claims put forward at first instance seeking compensation for damage;
- in the further alternative, refer the cases back to the Court of First Instance in order for the proceedings to be resumed and the damage for which compensation may be awarded to be quantified, in accordance with Article 61 of the Statute of the Court of Justice;
- order the appellants to pay the costs.

64. Both in Case C-120/06 P, in which it lodged a response in its capacity as a party to the proceedings before the Court of First Instance, and in Case C-121/06 P, in which it has the status of intervener before the Court of Justice, the Kingdom of Spain contends that the Court should:
- dismiss the appeal in so far as it relates to liability for an unlawful act of the defendant institutions;
- partially set aside the judgment under appeal and find that liability for a lawful act does not exist in Community law or, in the alternative, dismiss the appeal in so far as it relates to the liability of the defendant institutions for a lawful act or, in the further alternative, dismiss the appellants’ claim for compensation for a lawful act;
- declare the claim for compensation based on the unreasonable duration of the proceedings before the Court of First Instance to be inadmissible;
- order the appellants to pay the costs.

65. After the Council and the Commission had lodged their responses in Cases C-120/06 P and C-121/06 P and the Kingdom of Spain had lodged its response in Case C-120/06 P, FIAMM and Fedon were, upon application by them, granted the right to submit a reply under Article 117(1) of the Rules of Procedure of the Court of Justice.

66. In Case C-120/06 P, the Court Registry received by fax, within the periods referred to in Article 117(1) and (2) respectively of the Rules of Procedure, FIAMM’s reply and its response to the cross-appeal brought by the Council. The originals of those pleadings were not, however lodged at the Court Registry within the period of 10 days referred to in Article 37(6) of the Rules of Procedure. Consequently, those pleadings, and the originals thereof belatedly received at the Registry, were excluded from the proceedings and returned to FIAMM.

67. In Case C-121/06 P, Fedon lodged neither a reply nor a response to the Council’s cross-appeal. Fedon and the Commission lodged observations on the statement in intervention of the Kingdom of Spain.

The first plea in the main appeals
Arguments of the parties

68. By their first plea, FIAMM and Fedon submit that the judgments under appeal lack reasoning and are unfounded as regards one of the main arguments put forward in support of their respective applications for damages in respect of unlawful conduct of the Community.

69. They state that, as the Court of First Instance indeed noted in paragraph 100 of the FIAMM judgment and paragraph 93 of the Fedon judgment, during both the written procedure and the hearing they dwelt on the specific legal effects attaching to the DSB’s decision of 25 September 1997 that found against the Community. They thus submitted that the existence of such a decision constitutes, alongside the two types of exception already laid down by Fediol v Commission and Nakajima v Council, a third case where it is appropriate to allow a breach of the WTO agreements by the Community institutions to be pleaded before the Community courts, in particular exclusively for purposes of compensation.

70. The assessments of the Court of First Instance and the mere reference to previous case-law contained in paragraphs 110 to 112 of the FIAMM judgment and paragraphs 103 to 105 of the Fedon judgment are irrelevant in this regard, since that case-law rules on a different question, namely whether a substantive rule contained in the WTO agreements can be relied upon for the purpose of reviewing the legality of Community legislation and of declaring, where appropriate, such legislation to be inapplicable.

71. As is apparent, in particular, from paragraphs 114 and 115 of the FIAMM judgment and paragraphs 107 and 108 of the Fedon judgment, the Court of First Instance took the DSB’s decision of 25 September 1997 into consideration only in order to determine whether, given its existence, either of the exceptions already established in the case-law to the rule that the WTO agreements lack direct effect could apply here.

72. In so doing, the Court of First Instance did not take appropriate account of the arguments of FIAMM and Fedon to the effect that, after the expiry of the reasonable period of time allowed for implementing the DSB’s decision of 25 September 1997, the Community then had just two options, namely to comply or not to comply with that decision. The flexibility of the WTO dispute settlement system, a feature which in particular enables the parties to pursue negotiated solutions and upon which the case-law recalled in paragraph 112 of the FIAMM judgment and paragraph 105 of the Fedon judgment, establishing that it is not possible to review the legality of Community legislation in the light of the WTO agreements, is founded, is
accordingly lacking here. In those circumstances there is nothing to preclude direct effect being accorded to a decision of the DSB.

73. Furthermore, a finding of unlawfulness which merely takes note of the failure to comply with the DSB’s decision of 25 September 1997 within the period allowed does not require the substance of the Community measure at issue to be examined and cannot therefore affect the way in which the Community decides to put an end to the unlawfulness, any solution remaining possible provided that it is consistent with the WTO agreements and accepted by the opposing party.

74. Nor did the Court of First Instance take appropriate account of the arguments of FIAMM and Fedon that, unlike an application for annulment or a reference for a preliminary ruling on the validity of a measure, an action for compensation cannot result in the Community measure concerned being eliminated or rendered inapplicable or, therefore, in the responsible bodies of the parties to the WTO agreements being denied the possibility of entering into negotiated arrangements. That line of argument is particularly apposite because in the present instance the application for compensation is being examined after the conclusion of the dispute.

75. The same considerations provide grounds for rejecting the argument, recalled in paragraph 111 of the FIAMM judgment and paragraph 104 of the Fedon judgment, regarding the fact that the WTO agreements are founded on reciprocal and mutually advantageous arrangements.

76. The Council submits that the Court of First Instance in fact examined in parallel the possibility of relying on WTO rules and on the DSB’s decision of 25 September 1997, as is apparent inter alia from paragraph 129 of the FIAMM judgment and paragraph 122 of the Fedon judgment.

77. The judgments under appeal are, moreover, consistent with the case-law stating that the WTO agreements are not in principle among the rules in the light of which the Court of Justice is to review the legality of measures adopted by the Community institutions, and the Court of First Instance correctly held that neither of the two permitted exceptions to that principle is applicable here.

78. Since the WTO agreements are not intended to confer rights on individuals, the Community likewise cannot incur liability by reason of any infringement of those agreements if the scope for manoeuvre enjoyed by WTO members with a view to complying or not complying with a decision of the DSB is not to be prejudiced.

79. The Council further contends that the distinction drawn by the appellants between the legal effects attached to a DSB decision and those resulting from the substantive rules which that decision has found to have been infringed is artificial. Such a decision can be taken into consideration in an action for compensation only in so far as those substantive rules have previously been found to have direct effect.

80. In the Commission’s submission, at first instance FIAMM and Fedon did not in any way put forward the possibility of relying directly on a DSB decision as a specific and independent theory enabling the unlawfulness of action of the Community to be established or centre their arguments on this point. They essentially set out standard arguments in order to establish that the failure to amend the Community legislation so as to comply with the WTO agreements after the DSB’s decision of 25 September 1997 involved a breach of higher-ranking rules of law.

81. It was only as a subsidiary point that FIAMM and Fedon simply contended, without expanding upon and otherwise substantiating this assertion, that, should the WTO agreements not be directly applicable, the DSB’s decision of 25 September 1997 should have direct effect.
82. The Court of First Instance, which is not indeed required to rule on each of the arguments put forward by the applicants, accordingly took account of the arguments of FIAMM and Fedon in an appropriate manner, mainly concentrating, in paragraphs 108 to 150 of the FIAMM judgment and paragraphs 101 to 143 of the Fedon judgment, on an examination of the conduct of the Community institutions, but not without referring to the effects of the DSB’s decision of 25 September 1997 in paragraphs 108 and 144 of the FIAMM judgment and paragraphs 101 and 137 of the Fedon judgment. In view of the, even implicit, grounds of the judgments under appeal, FIAMM and Fedon are, furthermore, able to understand the reasons for which the Court of First Instance held that the institutions’ conduct had not been established to be unlawful, even after a decision of the DSB.

83. If the Court of Justice were nevertheless to hold that the grounds of the judgments under appeal are insufficient, it could uphold their operative parts while supplementing their grounds.

84. The question whether the WTO agreements may be relied upon by individuals who have suffered damage in order to contest the validity of Community legislation, in a situation where a DSB decision has found that legislation to be incompatible with the WTO agreements and the reasonable period of time granted for complying with the DSB decision has expired, was decided by the Court in the negative in Case C-377/02 Van Parys [2005] ECR I-1465.

85. Any distinction between review of the legality of Community action with a view to a finding of invalidity and such review with a view to the award of compensation is, in this regard, irrelevant. Furthermore, to compensate the industry affected by measures providing for suspension which are consistent with the WTO agreements would prejudice the rebalancing of concessions to which those measures contribute and would therefore prejudice reciprocity.

86. The Kingdom of Spain also takes the view that the judgments under appeal satisfy the obligation to state reasons. The Court of First Instance referred, in paragraph 100 of the FIAMM judgment and paragraph 93 of the Fedon judgment, to the proposition advanced by FIAMM and Fedon regarding the direct effect of a DSB decision and, in paragraphs 116 to 150 of the FIAMM judgment and paragraphs 109 to 143 of the Fedon judgment, it refuted that proposition in examining the question whether the existence of such a decision enables the Community courts to review the legality of the conduct of the Community institutions in the light of WTO rules.

87. Furthermore, the Court of First Instance did not err in law in concluding that it was impossible to carry out such a review in the case in point. In particular, the risk for the Community of laying itself open to actions for damages would be liable to weaken its position and to lead it not to contemplate the possibility of exhausting all the ways in which disputes may be settled, including in particular the possible adoption of retaliatory measures by the opposing party and the subsequent search for a solution.

88. Nor is there any justification in law for drawing a distinction according to whether the review of the legality of the Community’s action takes place with a view to the annulment of a measure or with a view to the award of compensation, since the criteria for such review are invariable and in particular cannot depend on whether or not there is damage or on the time at which the damage is alleged.

Findings of the Court

89. First of all, as the Advocate General has observed in point 20 of his Opinion, although, according to its heading, the first plea is intended to raise a lack of reasoning in the judgments under appeal, examination of the content of the appeals reveals that the latter also contain substantive complaints regarding the approach adopted by those judgments; those complaints were, moreover, the focus of most of the debate between the parties both during the written procedure and at the hearing. It is therefore appropriate, for the purposes of ruling on the first
plea, to distinguish its two parts, concerning, first, a lack of reasoning in the judgments under appeal and, second, an error of law committed by the Court of First Instance in relation to the conditions under which the Community can incur liability for the unlawful conduct of its institutions.

First part of the plea

90. The question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a question of law which is amenable, as such, to judicial review on appeal (see, inter alia, the judgment of 11 January 2007 in Case C-404/04 P Technische Glaswerke Ilmenau v Commission, paragraph 90).

91. It should however be recalled, first, that, as the Court of Justice has repeatedly held, the requirement that the Court of First Instance give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise (see, inter alia, Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 121; Case C-197/99 P Belgium v Commission [2003] ECR I-8461, paragraph 81; and Technische Glaswerke Ilmenau v Commission, paragraph 90).

92. Examination of the applications lodged by FIAMM and Fedon before the Court of First Instance reveals, first of all, that the assertion relating to the possible direct effect of the DSB’s decision of 25 September 1997 does not appear at all in the section of those applications intended to establish that an infringement of the WTO agreements by the Community exists or can be relied upon. The assertion can be found in a section of the applications seeking to demonstrate that the higher-ranking rules of law which are thus alleged to have been infringed, and which include, in particular, the principle pacta sunt servanda and the WTO agreements, are ‘intended to protect individuals’, so that there would be compliance in that regard with one of the conditions which the case-law requires to be met in order for liability of the Community for unlawful conduct of its institutions to be put in issue.

93. Also, that assertion was expressed, from the angle described above, only very much as a subsidiary point, since FIAMM and Fedon simply submitted that, if direct effect and the resulting status of a rule protecting individuals were not to be accepted in the case of the WTO agreements, they should be as regards decisions of the DSB.

94. Finally, that assertion, which, as regards FIAMM, takes up two paragraphs of an application of 177 paragraphs and, as regards Fedon, is contained in a footnote, is not, either in the applications or in the replies subsequently lodged by FIAMM and Fedon, expanded upon or accompanied by a specific line of argument intended to support it.

95. It follows from the foregoing that, contrary to what FIAMM and Fedon contend in the very specific arguments which they devote to this question in the context of their appeals under the cover of a request that the reasoning of the judgments under appeal be reviewed, they did not in their applications to the Court of First Instance in any way state with the clarity and precision which would have been required that the direct effect which may attach to decisions of the DSB would justify the establishment of failure to comply with them as a new, third, exception to the principle that the WTO agreements cannot be relied upon for the purposes of reviewing the legality of secondary Community legislation. As is apparent from Fedon’s application and FIAMM’s reply, they, on the contrary, expressly invoked one of the two traditionally accepted exceptions to that principle, submitting that in this instance the Community indicated that it intended to implement a specific obligation assumed within the framework of the GATT.

96. Second, it should also be recalled that the obligation to state reasons does not require the Court of First Instance to provide an account which follows exhaustively and one by one all the
arguments put forward by the parties to the case and that the reasoning may therefore be implicit on condition that it enables the persons concerned to know why the Court of First Instance has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, in particular, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 372, and the judgment of 25 October 2007 in Case C-167/06 P Komninou and Others v Commission, paragraph 22).

97. It is apparent, first of all, from paragraph 108 of the FIAMM judgment and paragraph 101 of the Fedon judgment that in the case in point the Court of First Instance sought to decide whether the WTO agreements, including the DSU and its provisions devoted to the implementation of decisions of the DSB, confer on persons the right to rely on those agreements when contesting the validity of Community legislation ‘if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules’.

98. Next, likewise referring to ‘the WTO agreements’ as so defined, the Court of First Instance explained, in paragraphs 110 to 112 of the FIAMM judgment and paragraphs 103 to 105 of the Fedon judgment, that, in accordance with settled case-law and for the reasons recalled by the Court of First Instance, those agreements are not in principle among the rules in the light of which the Community courts review the legality of action by the Community institutions.

99. Finally, it is to be noted that the judgments under appeal do contain considerable explanation of the legal effects that may attach to a decision of the DSB, in particular where the period of time allowed for implementation of the decision has expired.

100. While it is true that that explanation appears in passages of the judgments under appeal in which the Court of First Instance examined whether one of the two exceptions traditionally accepted by the case-law to the principle that the WTO agreements cannot be relied upon by individuals was applicable in the case in point, the fact remains that the findings made by the Court of First Instance at that juncture responded in an implicit, but nevertheless certain, manner to the specific arguments which are alleged in the appeals not to have been dealt with by the Court.

101. Thus, it is apparent in particular from paragraphs 129 to 131 of the FIAMM judgment and paragraphs 122 to 124 of the Fedon judgment that the Court of First Instance held, after an examination of the relevant provisions of the DSU, that the expiry of the period of time allowed for the Community to bring its banana import regime into conformity with the DSB’s decision of 25 September 1997 had not resulted in exhaustion of the methods for settling disputes made available by the DSU. The Court also stated in this connection that review of the legality of the conduct of the defendant institutions could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute consistent with WTO rules and, in some cases, of thus depriving the legislative or executive organs of a contracting party of the possibility afforded in particular in Article 22 of the DSU of entering into a negotiated arrangement even on a temporary basis.

102. Furthermore, in paragraph 132 of the FIAMM judgment and paragraph 125 of the Fedon judgment, the Court of First Instance concluded its analysis in this regard, holding that the applicants were therefore wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO member to comply, within a specified period, with the recommendations and rulings of the WTO bodies and in contending that DSB rulings are enforceable unless the contracting parties unanimously oppose this.
103. In so deciding, the Court of First Instance ruled, implicitly at the very least, on the applicants’ assertion that direct effect should be accorded to such recommendations or such rulings once the period of time allowed for their implementation has expired.

104. It follows from all of the foregoing that the grounds of the judgments under appeal deal adequately with the arguments set out by the applicants at first instance and that they in particular enable the Court of Justice to exercise its power of judicial review, so that the first part of the plea must be declared unfounded.

Second part of the plea

105. The following should be stated in relation to the second part of the first plea, alleging an error of law regarding the circumstances in which liability for unlawful conduct of the Community can found an action.

106. The Court has consistently interpreted the second paragraph of Article 288 EC as meaning that the non-contractual liability of the Community and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see, inter alia, Case 26/81 Oleifici Mediterranei v EEC [1982] ECR 3057, paragraph 16, and Case C-146/91 KYDEP v Council and Commission [1994] ECR I-4199, paragraph 19).

107. Here, the applicants essentially contended in support of their claim for compensation before the Court of First Instance that the Community institutions acted unlawfully, and therefore wrongfully, in failing to bring the Community legislation into conformity with the WTO agreements within the reasonable period of time that the Community was allowed for that purpose after a decision of the DSB had found that legislation to be incompatible with the WTO agreements.

108. It is to be observed in that regard that the effects within the Community of provisions of an agreement concluded by the Community with non-member States may not be determined without taking account of the international origin of the provisions in question. In conformity with the principles of public international law, Community institutions which have power to negotiate and conclude such an agreement are free to agree with the non-member States concerned what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. If that question has not been expressly dealt with in the agreement, it is the courts having jurisdiction in the matter and in particular the Court of Justice within the framework of its jurisdiction under the EC Treaty that have the task of deciding it, in the same manner as any other question of interpretation relating to the application of the agreement in question in the Community (see, in particular, Case 104/81 Kupferberg [1982] ECR 3641, paragraph 17, and Portugal v Council, paragraph 34), on the basis in particular of the agreement’s spirit, general scheme or terms (see, to this effect, Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 110).

109. Therefore, specifically, it falls to the Court to determine, on the basis in particular of the abovementioned criteria, whether the provisions of an international agreement confer on persons subject to Community law the right to rely on that agreement in legal proceedings in order to contest the validity of a Community measure (see, with regard to the GATT 1947, Joined Cases 21/72 to 24/72 International Fruit Company and Others [1972] ECR 1219, paragraph 19).

110. As is apparent from its case-law, the Court considers that it can examine the validity of secondary Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty’s provisions
appear, as regards their content, to be unconditional and sufficiently precise (see, in particular, Case C-308/06 Intertanko and Others [2008] ECR I-0000, paragraph 45 and the case-law cited).

111. As regards, more specifically, the WTO agreements, it is settled case-law that, given their nature and structure, those agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (see, in particular, Portugal v Council , paragraph 47; Biret International v Council , paragraph 52; and Van Parys , paragraph 39).

112. It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see Biret International v Council , paragraph 53, and Van Parys , paragraph 40 and the case-law cited).

113. The Court has already held that the common organisation of the market in bananas, as introduced by Regulation No 404/93 and subsequently amended, is not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of the GATT and does not refer expressly to specific provisions of the GATT either (order in OGT Fruchthandelsgesellschaft , paragraph 28).

114. As regards, in particular, Regulation No 1637/98 and the regulations adopted to implement it, the Court stated in Van Parys , paragraph 52, that they do not expressly refer to specific provisions of the WTO agreements.

115. The Court also held in that judgment that, by undertaking after the adoption of the DSB’s decision of 25 September 1997 to comply with the WTO rules and, in particular, with Articles I(1) and XIII of the GATT 1994, the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the principle that WTO rules cannot be relied upon before the Community courts and enabling the Community courts to review the legality of Regulation No 1637/98 and the regulations adopted to implement it in the light of those rules (see, to this effect, Van Parys , paragraphs 41 and 52).

116. It should be remembered that the decisive factor here is that the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measures is admittedly the solution recommended by WTO law, but other solutions are also authorised ( Omega Air and Others , paragraph 89).

117. The Court thus held in Van Parys , paragraph 51, that the expiry of the period granted by the DSB for implementation of its decision of 25 September 1997 does not imply that the Community had exhausted the possibilities under the DSU of finding a solution to the dispute between it and the other parties. In those circumstances, to require the Community courts, merely on the basis that that period has expired, to review the legality of the Community measures concerned in the light of the WTO rules could have the effect of undermining the Community’s position in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules.

118. Referring in particular to the memorandum of understanding concluded with the United States of America on 11 April 2001, the Court observed more specifically that such an outcome, by which the Community sought to reconcile its obligations under the WTO agreements with those in respect of the ACP States, and with the requirements inherent in the implementation of the common agricultural policy, could have been compromised if the Community courts had been entitled to review the legality of the Community measures in question in the light of the WTO rules upon the expiry of the reasonable period of time granted by the DSB (see, to this effect, Van Parys , paragraphs 49 and 50).
119. The Court also pointed out that to accept that the Community courts have the direct responsibility for ensuring that Community law complies with the WTO rules would effectively deprive the Community’s legislative or executive organs of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners. It is not in dispute that some of the contracting parties, including the Community’s most important trading partners, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if accepted, would risk introducing an imbalance in the application of the WTO rules (Van Parys, paragraph 53).

120. As is apparent from the Court’s case-law, there is also no reason to draw a distinction in these various respects according to whether the legality of the Community action is to be reviewed in annulment proceedings or for the purpose of deciding an action for compensation (see to this effect, with regard to the period preceding the expiry of the reasonable period of time allowed for implementing a decision of the DSB, Biret International v Council, paragraph 62).

121. First, as the Court has pointed out, the prospect of actions for damages is liable to hinder exercise of the powers of the legislative authority whenever it has occasion to adopt, in the public interest, legislative measures which may adversely affect the interests of individuals (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 Bayerische HNL Vermehrungsbetriebe and Others v Council and Commission [1978] ECR 1209, paragraph 5, and Joined Cases C-46/93 and C-48/93 Brasserie du pêcheur and Factortame [1996] ECR I-1029, paragraph 45).

122. Second, any determination by the Community courts that a Community measure is unlawful, even when not made in the exercise of their jurisdiction under Article 230 EC to annul measures, is inherently liable to have repercussions on the conduct required of the institution that adopted the measure in question.

123. Thus, in particular, it is settled case-law that when the Court rules, in proceedings under Article 234 EC, that a measure adopted by a Community authority is invalid, its decision has the legal effect of requiring the competent Community institutions to take the necessary measures to remedy that illegality, as the obligation laid down in Article 233 EC in the case of a judgment annulling a measure applies in such a situation by analogy (see, in particular, the order of 8 November 2007 in Case C-421/06 Fratelli Martini and Cargill, paragraph 52 and the case-law cited).

124. There is nothing to suggest that the position should be different in the case of a judgment delivered in an action for compensation in which it is found that a measure adopted by the Community or a failure by it to act is unlawful. As the Advocate General has observed in point 49 of his Opinion, any determination by the Community courts that a measure is unlawful, even when made in an action for compensation, has the force of res judicata and accordingly compels the institution concerned to take the necessary measures to remedy that illegality.

125. The distinction which the appellants seek to draw between the ‘direct effect’ of the WTO rules imposing substantive obligations and the ‘direct effect’ of a decision of the DSB, asserting that it should be open to individuals to have the legality of the conduct of the Community institutions reviewed by the Community courts in the light of the DSB decision itself if such a review is not possible in the light of the WTO rules which that decision has found to have been infringed, calls for the following comments.

126. Even though the Court has not yet been required to rule expressly on such a distinction, it nevertheless necessarily follows from its case-law mentioned above that there is no basis for the distinction.
127. In holding that the WTO rules which have been found by a decision of the DSB to have been infringed cannot, notwithstanding the expiry of the period of time laid down for implementing that decision, be relied upon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed by the Community courts in the light of those rules, the Court has necessarily excluded such a review in the light of the DSB decision itself.

128. A DSB decision, which has no object other than to rule on whether a WTO member’s conduct is consistent with the obligations entered into by it within the context of the WTO, cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations and by reference to which such a review is carried out, at least when it is a question of determining whether or not an infringement of those rules or that decision can be relied upon before the Community courts for the purpose of reviewing the legality of the conduct of the Community institutions.

129. A recommendation or a ruling of the DSB finding that the substantive rules contained in the WTO agreements have not been complied with is, whatever the precise legal effect attaching to such a recommendation or ruling, no more capable than those rules of conferring upon individuals a right to rely thereon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed.

130. First, as is apparent from paragraphs 113 to 124 of the present judgment, the considerations linked to the nature of the WTO agreements and to the reciprocity and flexibility characterising them continue to obtain after such a ruling or recommendation has been adopted and after the reasonable period of time allowed for its implementation has expired. The Community institutions continue in particular to have an element of discretion and scope for negotiation vis-à-vis their trading partners with a view to the adoption of measures intended to respond to the ruling or recommendation, and such leeway must be preserved.

131. Second, as is apparent from Article 3(2) of the DSU, recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the agreements concerned. It follows in particular that a decision of the DSB finding an infringement of such an obligation cannot have the effect of requiring a party to the WTO agreements to accord individuals a right which they do not hold by virtue of those agreements in the absence of such a decision.

132. It should, in particular, be recalled in this regard that the Court has already held in relation to the provisions of the GATT 1994, which have been found by the DSB to have been infringed in the present case, that those provisions are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law (see, to this effect, the order in OGT Fruchthandelsgesellschaft, paragraphs 25 and 26).

133. It follows from all of the foregoing considerations that the Court of First Instance rightly decided that, notwithstanding the expiry of the period of time allowed for implementing a decision of the DSB, the Community courts could not, in the circumstances of the case in point, review the legality of the conduct of the Community institutions in the light of WTO rules.

134. Since, therefore, neither part of the first plea in the appeals is well founded, this plea must be dismissed.

The second plea in the main appeals, the cross-appeals and the claims seeking the substitution of grounds

Arguments of the parties
135. By a second plea, FIAMM and Fedon submit that, in holding when it examined their claims expressed in terms of no-fault Community liability that the damage suffered by them was not unusual in nature, the Court of First Instance adopted illogical reasoning and infringed certain principles that are well established in the case-law.

136. According to FIAMM and Fedon, in the judgments under appeal the Court of First Instance in particular misapplied the dual requirement that damage must be, first, foreseeable and, second, inherent in operating in the sector concerned if it is to be classifiable as usual.

137. Damage caused by customs penalties imposed by a non-member State in the industrial-battery or spectacle-case sector following a dispute in the banana sector is not inherent in the first two of those sectors, as is attested in particular by Article 22(3)(a) of the DSU. Such damage is all the less foreseeable because of its novel punitive nature and because it is unprecedented in GATT and WTO history and in relations between the Community and the United States of America.

138. The Court of First Instance’s reasoning that, as Article 22(3) of the DSU authorises the adoption of retaliatory measures, the damage incurred is not unusual is contradictory. To take the view that damage is usual because it is the consequence of an act permitted by the applicable law is tantamount to denying that damage caused by a lawful act can give rise to liability, but this possibility is accepted by the judgments under appeal.

139. The Council contends that the Court of First Instance was right in holding that the alleged damage falls within the normal risks which an exporter must assume given the current arrangements for world trade.

140. However, it contests some of the grounds of the judgments under appeal and asks the Court either to substitute various grounds in those respects or, ruling on the cross-appeals brought by it in this regard, to set aside those judgments in part.

141. First, since barely half of the Member States’ legal systems provide for the possibility - which moreover is subject to very strict conditions - of obtaining compensation for damage resulting from certain lawful acts of public authorities, the Council contests the statement, appearing in paragraph 160 of the FIAMM judgment and paragraph 153 of the Fedon judgment, according to which a general principle common to the Member States exists that enables the liability of the Community to be put in issue even in the absence of unlawful conduct on the part of its institutions.

142. Even assuming that such a principle can be established, the Court of First Instance was in any event wrong in its view that it is capable of applying in a situation such as that here since, in particular:
- liability for legislative omission would limit both the freedom of choice inherent in the Commission’s right of initiative and the legislature’s discretion, calling into question the separation of powers and institutional balance intended by the Treaty;
- the lack of proportionality between Community liability for an unlawful legislative measure, which is subject to very strict conditions as regards the unlawfulness of the conduct, and liability for a lawful legislative omission, which would require only special and unusual damage and therefore be more easily brought into play, betrays an inconsistency;
- the position thus adopted by the Court of First Instance conflicts with the reasoning followed by it in concluding that it is not possible to rely on WTO rules in an action for compensation founded on unlawful Community conduct, in particular with the need not to deprive the Community organs of the scope for manoeuvre enjoyed by the organs of the Community’s trading partners.
143. Second, the judgments under appeal wrongly concluded that there was damage that was certain, since FIAMM and Fedon had not proved the existence, extent or the precise amount of such damage.

144. Third, with regard to the causal link, the Court of First Instance failed to observe the requirement that the damage must be a sufficiently direct consequence of the conduct of the institution concerned. There is no automatic link between the DSB’s decision of 25 September 1997 and the introduction of the increased customs duty at issue, since the United States authorities, in the exercise of their discretion, decided in principle to impose the duty and determined the products upon which it would be charged and its rate when, in particular, they could have accepted the compensation offered by the Community.

145. The Commission too submits that the Court of First Instance rightly concluded in the judgments under appeal that there was no unusual damage. In order for damage to be usual, it is in particular not necessary for the risk of it occurring to be inherent in the sector in which the business operates. Involvement in international trade is, whatever the product market concerned, accompanied by the risk that an importing country will adopt decisions affecting trade for the most diverse reasons.

146. While thus concluding that the second plea in the appeals should be dismissed, the Commission submits however, like the Council, that the Court of First Instance made various errors of law as regards the question of Community liability in the absence of unlawful conduct on the part of its institutions. Since the operative parts of the judgments under appeal are nevertheless justified, it asks the Court of Justice to substitute various grounds in this regard.

147. First, so far as concerns the affirmation as to the very existence of the principle of such liability, the Court of First Instance could not, according to the Commission, make so significant an innovation on the basis of merely the vague reasoning contained in paragraph 159 of the FIAMM judgment and paragraph 152 of the Fedon judgment.

148. This principle has never been accepted by the case-law, which has systematically left the question to one side, merely setting out a purely hypothetical reference framework in this regard without in any way laying down the conditions under which and fields and situations in which such liability could where appropriate be incurred.

149. Furthermore, by setting out in paragraph 160 of the FIAMM judgment and paragraph 153 of the Fedon judgment the conditions to which liability is subject, the Court of First Instance implicitly but necessarily held that this principle applies in the type of situation covered by the present case, without establishing, however, whether such a conclusion is justified in the light of principles common to the legal systems of the Member States.

150. In particular, the Court of First Instance did not focus its examination on instances of liability of the public authorities resulting from legislative activity, referring on the contrary, in paragraph 159 of the FIAMM judgment and paragraph 152 of the Fedon judgment, in the most general manner to the possibility of obtaining compensation from the perpetrator of damage in the absence of fault on his part.

151. However, examination of the 25 legal orders of the Member States indicates that, in contrast to cases such as expropriation in the public interest or compensation paid by the State for damage caused by dangerous activity on its part or on account of a specific relationship between it and the victim, which are irrelevant here, any obligation to pay compensation as a result of a lawful State act reflecting a broad discretion, on account for example of considerations of solidarity or fairness, is unknown to the law of a large number of Member States. While liability of such a type can be found, in exceptional circumstances, in the legal orders of certain other Member States, it is, as a general rule, limited solely to administrative
acts, with the notable exception of French law which alone clearly accepts this type of liability in the case of legislative activity, provided that the damage is unusual, special, serious and direct, that the legislature is not pursuing the common good and that the legislature has not ruled out compensation as a matter of principle.

152. Furthermore, the principle specific to French law cannot be transferred to the Community legal order. While the basis of that principle is the fact that, in France, judicial review by the Conseil d’État (Council of State) of the constitutionality of laws is precluded, Community law provides for review of the legality of measures of the legislature by reference to the Treaty and fundamental principles and for the possibility of the liability of the Community to be put in issue if those higher-ranking norms are infringed.

153. Second, the Commission submits that, in concluding in the judgments under appeal that there was real and certain damage, the Court of First Instance in particular distorted the Commission’s arguments, failed to verify specifically that the damage was real and certain and infringed the principles for determining who has the burden of proof.

154. Third, the Commission contends, for reasons analogous to those set out by the Council, that the Court of First Instance erred in the legal characterisation of the facts in concluding that the condition relating to the causal link was met in the case in point.

155. The Kingdom of Spain also contends that the second plea in the appeals should be dismissed. As practice shows, there is nothing unforeseeable or exceptional in the imposition of retaliatory measures within the framework of the WTO, including in sectors other than those concerned by a dispute.

156. By the cross-appeal which it has brought in Case C-120/06 P and in its statement in intervention in Case C-121/06 P, the Kingdom of Spain further requests that the judgments under appeal be set aside in so far as the Court of First Instance held that Community law includes, by way of a general principle common to the Member States, a system of liability for lawful acts. Moreover, in conferring upon that principle a scope as wide as that resulting from the conditions set out in paragraph 160 of the FIAMM judgment and paragraph 153 of the Fedon judgment, the Court of First Instance failed to have regard to the finding which it itself made in paragraph 159 of the FIAMM judgment and paragraph 152 of the Fedon judgment.

157. Acceptance of the possibility of Community liability for a legislative omission although no rule obliging the Community to act can be invoked by the person harmed disregards the principle of reciprocity which the Court of First Instance relied on in rejecting the possibility of liability for unlawful conduct.

158. In its observations on the statement in intervention of the Kingdom of Spain, Fedon contends that the Court of First Instance was right in holding that a principle of liability for lawful conduct of the Community institutions has been laid down and delimited by settled case-law, as the Court of Justice noted in Dorsch Consult v Council and Commission.

159. Since the second paragraph of Article 288 EC is intended to safeguard the fundamental principle of a State based on the rule of law that protects individuals and, in particular, their rights to property and pursuit of an economic activity, it must, having regard to the liberal orientation of the Community legal system, be interpreted in such a way as to favour the most liberal principles characterising the legal systems of the Member States. In addition, in a Union composed of 25 Member States this provision must be interpreted flexibly if it is not to be rendered inapplicable. In the case in point, the legal systems of the new Member States should nevertheless not be taken into account, since the relevant enlargement occurred after the material time.
160. Fedon further submits that the objection put forward by the Kingdom of Spain relating in particular to the fact that the conduct complained of consists of an omission is inadmissible as it was not raised at first instance. In any event, the Community can incur liability for both omissions and acts of the institutions.

Findings of the Court

161. In the first plea of their respective cross-appeals, the Council has contended that the FIAMM and Fedon judgments should be set aside, and the Kingdom of Spain that the FIAMM judgment should be set aside, on the ground that the Court of First Instance erred in law in establishing a principle of Community liability in the absence of unlawful conduct attributable to its institutions or, in any event, in holding that such a principle is applicable in the case of conduct such as that at issue in the case in point. Without bringing a cross-appeal, the Commission asks the Court to retain the operative parts of the judgments under appeal but to substitute grounds to the same effect.

162. Since the grounds of challenge as so formulated dispute the very existence or very applicability of the liability regime which the judgments under appeal applied, they should be considered first.

163. Indeed, if the error of law pleaded were proved, there would no longer be any need to rule on the second plea in the main appeals, concerning the unusual nature of the damage incurred, or on the other two pleas in the cross-appeals, respectively concerning the lack of certainty of the damage and the lack of a causal link, as the liability regime to which those three conditions are supposed to relate would not exist or not be applicable. The first plea in the cross-appeals and the claims seeking the substitution of grounds, according to which a regime of no-fault liability, as established by the judgments under appeal, does not exist

164. It should be pointed out first of all that, in accordance with the settled case-law noted in paragraph 106 of the present judgment, the second paragraph of Article 288 EC means that the non-contractual liability of the Community and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of.

165. The Court has also repeatedly pointed out that that liability cannot be regarded as having been incurred without satisfaction of all the conditions to which the duty to make good any damage, as defined in the second paragraph of Article 288 EC, is thus subject (Oleifici Mediterranei v EEC, paragraph 17).

166. The Court has accordingly held that, where the Community courts find that there is no act or omission by an institution of an unlawful nature, so that the first condition for non-contractual Community liability under the second paragraph of Article 288 EC is not satisfied, they may dismiss the application in its entirety without it being necessary for them to examine the other preconditions for such liability, namely the fact of damage and the existence of a causal link between the conduct of the institutions and the damage complained of (see, in particular, KYDEP v Council and Commission, paragraphs 80 and 81).

167. The Court’s case-law enshrining, in accordance with the second paragraph of Article 288 EC, both the existence of the regime governing the non-contractual liability of the Community for the unlawful conduct of its institutions and the conditions for the regime’s application is thus firmly established. By contrast, that is not so in the case of a regime governing non-contractual Community liability in the absence of such unlawful conduct.
168. Contrary to what the Court of First Instance stated in the judgments under appeal, it cannot, first of all, be deduced from the case-law prior to those judgments that the Court of Justice has established the principle of such a regime.

169. As the Court of Justice noted in particular in Dorsch Consult v Council and Commission, paragraph 18, a judgment to which the Court of First Instance refers in paragraph 160 of the FIAMM judgment and paragraph 153 of the Fedon judgment, the Court has on the contrary hitherto limited itself, as set out in settled case-law, to specifying some of the conditions under which such liability could be incurred in the event of the principle of Community liability for a lawful act being recognised in Community law (see also, in similar terms, Case 59/83 Biovilac v EEC [1984] ECR 4057, paragraph 28). It was solely on that basis that the Court noted in Dorsch Consult v Council and Commission, paragraph 19, that if the principle of such liability came to be recognised, at the very least three conditions, comprising the fact of damage, the existence of a causal link between it and the act concerned and the unusual and special nature of the damage, would all have to be satisfied in order for liability to be incurred.

170. Secondly, as regards the liability regime recognised in Community law, the Court, while noting that it is to the general principles common to the laws of the Member States that the second paragraph of Article 288 EC refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties, has held that the principle of the non-contractual liability of the Community expressly laid down in that article is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused (Brasserie du pêcheur and Factortame, paragraphs 28 and 29).

171. As regards, more specifically, liability for legislative activity, the Court moreover pointed out at a very early stage that, although the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures vary considerably from one Member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy (Bayerische HNL Vermehrungsbetriebe and Others v Council and Commission, paragraph 5).

172. The Court has therefore held in particular that, in view of the second paragraph of Article 288 EC, the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (see, inter alia, Joined Cases 9/71 and 11/71 Compagnie d'approvisionnement, de transport et de crédit and Grands Moulins de Paris v Commission [1972] ECR 391, paragraph 13; Bayerische HNL Vermehrungsbetriebe and Others v Council and Commission, paragraph 4; Case 50/86 Les Grands Moulins de Paris v EEC [1987] ECR 4833, paragraph 8; and Case C-119/88 AERPO and Others v Commission [1990] ECR I-2189, paragraph 18).

173. It has further pointed out, in this connection, that the rule of law the breach of which must be found has to be intended to confer rights on individuals (see to this effect, inter alia, Case C-352/98 P Bergaderm and Goupil v Commission [2000] ECR I-5291, paragraphs 41 and 42, and Case C-282/05 P Holcim (Deutschland) v Commission [2007] ECR I-2941, paragraph 47).

174. The Court has, moreover, stated that the strict approach taken towards the liability of the Community in the exercise of its legislative activities is attributable to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot
Incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (see, in particular, Brasserie du pêcheur and Factortame, paragraph 45).

175. Finally, it is clear that, while comparative examination of the Member States' legal systems enabled the Court to make at a very early stage the finding recalled in paragraph 170 of the present judgment concerning convergence of those legal systems in the establishment of a principle of liability in the case of unlawful action or an unlawful omission of the authority, including of a legislative nature, that is in no way the position as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature.

176. In the light of all the foregoing considerations, it must be concluded that, as Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts.

177. In the case in point, the conduct which the appellants allege to have caused them damage comes within the context of establishment of a common organisation of the market and clearly falls within the sphere of legislative activity of the Community legislature.

178. It is immaterial in this regard whether that conduct is to be regarded as a positive act, namely the adoption of Regulations No 1637/98 and No 2362/98 following the DSB’s decision of 25 September 1997, or as an omission, namely the failure to adopt measures calculated to ensure the correct implementation of that decision. Failure on the part of the Community institutions to act can also fall within the legislative function of the Community, including in the context of actions for damages (see, to this effect, Les Grands Moulins de Paris v EEC, paragraph 9).

179. It follows from all of the foregoing that, in affirming in the judgments under appeal the existence of a regime providing for non-contractual liability of the Community on account of the lawful pursuit by it of its activities falling within the legislative sphere, the Court of First Instance erred in law.

180. However, two further points should be made.

181. First, the finding in paragraph 179 of the present judgment is made without prejudice to the broad discretion which the Community legislature enjoys where appropriate for the purpose of assessing whether the adoption of a given legislative measure justifies, when account is taken of certain harmful effects that are to result from its adoption, the provision of certain forms of compensation (see to this effect, with regard to agricultural policy, Joined Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, paragraph 85).

182. Second, it is to be remembered that it is settled case-law that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.

183. With regard, more specifically, to the right to property and the freedom to pursue a trade or profession, the Court has long recognised that they are general principles of Community law, while pointing out however that they do not constitute absolute prerogatives, but must be viewed in relation to their social function. It has thus held that, while the exercise of the right to property and to pursue a trade or profession freely may be restricted, particularly in the context of a common organisation of the market, that is on condition that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference
which infringes upon the very substance of the rights guaranteed (see, inter alia, Case 265/87 Schröder H5 Kraftfutter [1989] ECR 2237, paragraph 15; Germany v Council, paragraph 78; and Case C-295/03 P Alessandrini and Others v Commission [2005] ECR I-5673, paragraph 86).

184. It follows that a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community.

185. Having regard to the features of the present cases, it should also be noted that it follows from the Court's case-law that an economic operator cannot claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risks of changing circumstances (see to this effect, in particular, Germany v Council, paragraph 79, and Alessandri and Others v Commission, paragraph 88). The Court has also stated that the guarantees accorded by the right to property or by the general principle safeguarding the freedom to pursue a trade or profession cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity (Case 4/73 Nold v Commission [1974] ECR 491, paragraph 14).

186. An economic operator whose business consists in particular in exporting goods to the markets of non-member States must therefore be aware that the commercial position which he has at a given time may be affected and altered by various circumstances and that those circumstances include the possibility, which is moreover expressly envisaged and governed by Article 22 of the DSU, that one of the non-member States will adopt measures suspending concessions in reaction to the stance taken by its trading partners within the framework of the WTO and will for this purpose select in its discretion, as follows from Article 22(3)(a) and (f) of the DSU, the goods to be subject to those measures.

187. Although it follows from paragraphs 176 and 179 of the present judgment that the Court of First Instance erred in law, it is settled case-law that, if the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed (see, in particular, Case C-320/92 P Finsider v Commission [1994] ECR I-5697, paragraph 37; Case C-150/98 P ESC v E [1999] ECR I-8877, paragraph 17; and Case C-210/98 P Salzgitter v Commission [2000] ECR I-5843, paragraph 58).

188. That is the case here. The Court has held that Community law as it currently stands does not provide for a regime enabling the liability of the Community for its legislative conduct to found an action in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts. The claims for compensation by the applicants sought in particular to put in issue the liability of the Community for such conduct. Accordingly, the Court of First Instance could only dismiss those claims, whatever the arguments put forward by the applicants to support them (see, by analogy, Salzgitter v Commission, paragraph 59). The Court of First Instance would thus have been obliged to dismiss the applicants’ claims on that basis if it had not made the error of law that led it to dismiss them on other grounds (see, by analogy, Finsider v Commission, paragraph 38, and ESC v E, paragraph 18).

189. It follows that, although the first plea relied upon in support of the cross-appeals is well founded, it is of no consequence and must therefore be dismissed (see, by analogy, Salzgitter v Commission, paragraph 60).

The second plea in the main appeals and the second and third pleas in the cross-appeals
190. In the light of the finding made in paragraph 176, and the matters set out in paragraph 163, of the present judgment, there is no need to examine the second plea in the main appeals, concerning the unusual nature of the damage allegedly suffered by FIAMM and Fedon, or the second and third pleas in the cross-appeals, respectively concerning the lack of certainty of that damage and the lack of a causal link between that damage and the conduct of the Community institutions.

The claims for compensation on account of the duration of the proceedings at first instance

Arguments of the parties

191. In the alternative, FIAMM and Fedon seek fair compensation having regard to the excessive duration of the proceedings at first instance.

192. Relying on Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraphs 26 to 49, FIAMM submits in this regard (i) that the case is of considerable financial importance to it, (ii) that the questions of fact here are very clear, (iii) that the conduct of none of the parties contributed to prolonging the procedure and (iv) that the Court of First Instance did not have to deal with exceptional circumstances.

193. The Commission contends that the forms of order sought by FIAMM and Fedon are inadmissible in this respect.

194. In the case of Fedon's appeal, the inadmissibility is dictated firstly by Article 112(1)(c) of the Rules of Procedure of the Court of Justice, since Fedon has not stated any reasons at all to substantiate the claim.

195. Also, in the case of both appeals, the forms of order sought are necessarily inadmissible ratione materiae. First, as is apparent from Articles 57 and 58 of the Statute of the Court of Justice, an appeal cannot concern new facts that have not already been set out at first instance. Second, the length of the proceedings before the Court of First Instance cannot be characterised as a breach of procedure, in the absence of any effect on the outcome of the cases.

196. Finally, the forms of order sought are also inadmissible ratione personae, since the Community is represented in the present proceedings by the Council and the Commission and not by the Court of Justice, of which the Court of First Instance - to which the conduct giving rise to the liability alleged is attributed here - forms an integral part.

197. Furthermore, compensation on grounds of fairness like the compensation granted in Baustahlgewebe v Commission cannot be envisaged here as FIAMM and Fedon are not obliged to pay into the Community budget a sum that is capable of being reduced.

198. Finally, the length of the proceedings before the Court of First Instance is in any event explained by the complexity of the cases, by the procedural hazards linked to the joinder of a multiplicity of cases brought in five different languages and involving three institutions and an intervener, by the reassignment of those cases to a larger chamber and by the fact that Van Parys, a case raising similar questions of principle, was pending before the Court of Justice.

199. According to the Kingdom of Spain, the claims of FIAMM and Fedon are inadmissible as they were not relied upon at first instance and therefore could not be dealt with in the judgments under appeal.

Findings of the Court
200. The appellants’ claims seeking reasonable satisfaction on account of the fact that the proceedings before the Court of First Instance exceeded a reasonable duration cannot be upheld here.

201. As regards Fedon’s claim, suffice it to state that, while the claim is set out in the form of order sought, it is not mentioned at all in the main body of the appeal.

202. As provided in Article 112(1)(c) of the Rules of Procedure, an appeal is to contain the pleas in law and legal arguments relied on. Since such pleas and arguments, which are to be distinguished from the form of order sought by the action, referred to in Article 112(1)(d), were here entirely absent from Fedon’s appeal, it follows that the claim for reasonable compensation made by it, for which no reasoning at all is given, must be dismissed as manifestly inadmissible.

203. As regards FIAMM’s claim, it must be pointed out that, where there is no indication that the length of the proceedings affected their outcome in any way, a plea that the proceedings before the Court of First Instance did not satisfy the requirements concerning completion within a reasonable time cannot as a general rule lead to the setting aside of the judgment delivered by the Court of First Instance (see, to this effect, Baustahlgewebe v Commission, paragraph 49).

204. In the present case, FIAMM has indeed not asserted that the allegedly excessive duration of the proceedings affected their outcome, or requested that the FIAMM judgment be set aside on this basis.

205. As is apparent from Article 113(1) of the Rules of Procedure, any appeal is to seek to set aside, in whole or in part, the judgment of the Court of First Instance and, as the case may be, to seek the same form of order, in whole or in part, as that sought at first instance.

206. In this regard, it is to be observed that in Baustahlgewebe v Commission, upon which FIAMM relies, the appeal before the Court of Justice was brought against a judgment in which the Court of First Instance had imposed a fine on the appellant for infringement of the competition rules, in exercise of the unlimited jurisdiction which it enjoys for that purpose and which the Court of Justice itself may exercise when it sets aside such a judgment of the Court of First Instance and rules on the action.

207. In paragraph 33 of that judgment, the Court of Justice noted the appellant’s right to fair legal process within a reasonable period and in particular to a decision on the merits of the allegations of infringement of competition law made against it by the Commission and of the fines imposed on it in that regard.

208. After holding that such a period had, in the case in point, been exceeded by the Court of First Instance, the Court of Justice decided, for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, that in the circumstances the requisite reasonable satisfaction could be granted by setting aside and varying, solely in relation to determination of the amount of the fine, the judgment of the Court of First Instance (Baustahlgewebe v Commission, paragraphs 47, 48 and 141).

209. By contrast, the present appeal challenges a judgment of the Court of First Instance dismissing an action for compensation brought on the basis of the second paragraph of Article 288 EC.

210. It follows that the setting aside of such a judgment cannot lead to the grant of reasonable satisfaction for the excessive duration of the proceedings before the Court of First Instance by variation of the judgment under appeal, since in such proceedings the Court of First Instance is not in any event, any more than the Court of Justice on appeal, called upon to order the
applicants to pay a sum from which that reasonable satisfaction could, where appropriate, be subtracted.

211. Accordingly, FIAMM’s claim seeking reasonable satisfaction for the allegedly excessive duration of the proceedings before the Court of First Instance must also be dismissed as inadmissible.

212. It should, moreover, be pointed out that, even though in this instance the proceedings before the Court of First Instance did last a considerable time, the reasonableness of a period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, inter alia, Baustahlgewebe v Commission, paragraph 29, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschappij and Others v Commission [2002] ECR I-8375, paragraph 210).

213. It should be stated with regard to the conduct of the competent authority and the degree of complexity of the case that the considerable length of the proceedings before the Court of First Instance is in this instance capable of being largely explained by a combination of objective circumstances relating to the number of parallel cases successively brought before that Court and to the importance of the legal questions raised by them.

214. Those circumstances provide the explanation as to why a series of procedural hazards arose which had a decisive contribution in delaying the conclusion of the cases concerned and which cannot here be considered unusual, such as the joinder, in the light of the connection between them, of six cases brought in a number of different languages, or their reassignment, first to a chamber in extended composition, then to a new Judge-Rapporteur following the departure of the Judge-Rapporteur initially designated and, finally, to the Grand Chamber of the Court of First Instance, this final reassignment being itself accompanied by the reopening of the oral procedure.

Costs

215. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. The first subparagraph of Article 69(4) of the Rules of Procedure provides that Member States which intervene in the proceedings are to bear their own costs.

216. Since the Council and the Commission have applied for costs and FIAMM and Fedon have been unsuccessful, FIAMM and Fedon must be ordered to pay the costs.

217. The Kingdom of Spain will bear its own costs.

Operative part

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the main appeals;
2. Dismisses the cross-appeals;
3. Orders Fabbrica italiana accumulatori motocarri Montecchio SpA, Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, Giorgio Fedon & Figli SpA and Fedon America, Inc. to bear the costs incurred by the Council of the European Union and the Commission of the European Communities;
4. Orders the Kingdom of Spain to bear its own costs.