Once the Council has definitively fixed the quota, the Commission may, in allocating the remainder, authorize the submission of fresh applications, but it is bound, by virtue of Article 2 (3) of the abovementioned regulation, to give priority to the applications which were left unsatisfied as a result of the suspension and, having been confirmed, remain outstanding. If the amount covered by those applications exceeds the quantity available, the apportionment rule must be applied.

REPORT FOR THE HEARING
delivered in Case 217/87 *

I — Facts and procedure

1. *Legal background to the main proceedings*

For the years 1983 to 1986 Council Regulation No 604/83 [1] subjected imports from non-member countries of products falling within subheading 07.06 A of the Common Customs Tariff, including manioc, to a reduced import levy of a maximum of 6% *ad valorem* within the limits of various annual tariff quotas. For certain non-member countries which are not GATT contracting parties, concerned in the present case, Council Regulation No 604/83 itself fixed a tariff quota of 370 000 tonnes for 1983 and provided that the quantities for the three following years were to be fixed subsequently by the Council acting by qualified majority on a proposal from the Commission.

Article 2 of Commission Regulation No 3656/83 [2] of 23 December 1983 laying down detailed rules for the application of the import arrangements in 1984, 1985 and 1986 for the products at issue in the present case provides that:

'1. Applications for import licences for each of the years 1984, 1985 and 1986 may be lodged with the authorities of the Member States from mid-December provided that their period of validity commences during the following January.

2. Member States shall notify the Commission by telex of the names of the importers, the quantities applied for and their origin, not later than the Thursday of the week following the week in which the application was made.

3. Not later than the Friday of the week following the week of notification referred to in paragraph 2 the Commission shall, where necessary in proportion to the applications, fix the quantities for which licences are to be issued for each country or group of countries mentioned in Article 1 of Regulation (EEC) No 604/83.

4. . . .'

* Language of the Case: Dutch.

1 — OJ 1983, L 72, p. 3.

2 — OJ 1983, L 361, p. 32.

Council Regulation No 758/86 of 10 March 1986[3] on the import system applicable in 1986 to the products at issue in the present case entered into force on 16 March 1986. The Council fixed the quota at 200 000 tonnes, on a proposal by the Commission in November 1985 to that effect, since only 120 000 tonnes of the quota of 300 000 tonnes fixed for 1985 had been taken up.

The Commission had nevertheless stated that it would propose that the Council increase that quota should it prove inadequate. When that proved to be the case the Council, on a proposal from the Commission, increased the quota for 1986 to 300 000 tonnes by Regulation No 1898/86, which entered into force on 20 June 1986.[4]

2. *Background to the main proceedings*

In order to avoid any interruption of imports by reason of the belated fixing of the quota for 1986 by the Council, during the first weeks of 1986 and thus before the quotas were fixed the Commission approved the granting of import licences the applications for which had been forwarded to it by the national authorities. On the basis of an authorization notified by the Commission on 5 February 1986 the defendant in the main proceedings granted the first plaintiff in the main proceedings an import licence for 30 795 tonnes of manioc originating in China.

However, in mid-February 1986, the Commission found that the applications for import licences made to the national authorities together with the licences already granted threatened to exceed the amount of the tariff quota which the Council was probably going to fix. Up to that time the Commission had given its approval for the granting of licences in respect of a total quantity of 130 000 tonnes, and applications from various Member States notified between 11 and 19 February were pending for a total quantity of 87 020.261 tonnes.

By telex message of 20 February 1986 the Commission therefore informed the national authorities concerned, in reply to applications for licences submitted by them and still pending, that no more licences could be granted until the Council had adopted the regulation fixing the tariff quota for 1986.

Among the pending applications for licences were two applications from the plaintiffs, one relating to 15 300 tonnes and the other to 5 000 tonnes of manioc originating in China, which were lodged on 12 and 20 February 1986 respectively by the second plaintiff in the name of the first plaintiff and forwarded to the Commission by the defendant in the main proceedings on 13 and 20 February 1986.

By telex messages of 25 and 26 February 1986 the defendant refused the two requests and released the security which had been lodged. By two applications dated 21 March 1986 the plaintiffs jointly brought an action against the two decisions of refusal before the College van Beroep voor het Bedrijfsleven.

When by Regulation No 758/86 the Council fixed the tariff quota for 1986 at 200 000 tonnes the Commission informed

3 — OJ 1986, L 72, p. 1.

4 — OJ 1986, L 164, p. 1.

the competent national authorities by telex message of 21 March 1986 that to ensure equality among importers in respect of the 70 000 tonnes for which licences had not yet been granted, the Commission would approve licences on a pro rata basis in accordance with Article 2 (3) of Regulation No 3656/83. The Commission extended the period for lodging applications for import licences until 3.00 p. m. (subsequently 4.00 p. m.) on 24 March 1986. The Commission also requested the national authorities to confirm within that period applications previously transmitted. The Commission stated that on 25 March 1986 it would fix the quantities for which licences would be granted in proportion to the applications made and would immediately give notice of those quantities.

On 21 March 1986 the second plaintiff in the main proceedings sent the defendant in the main proceedings a telex message confirming the applications of 12 and 20 February 1986 and on 24 March 1986 another telex message making two fresh applications for 25 000 and 15 000 tonnes respectively. In a telex message of 24 March 1986 the defendant in the main proceedings informed the Commission of those four applications along with other applications.

By a telex message of 25 March 1986 the Commission informed the defendant in the main proceedings that the four applications could be accepted only to the extent of 4.191315% of the requested quantities.

By four telex messages of 26 March 1986 the defendant in the main proceedings thereupon informed the second plaintiff in the main proceedings that the four applications could be satisfied only to the extent of 4.191315% of the quantities requested.

By applications of 7 April 1986 the plaintiffs in the main proceedings jointly challenged the four decisions before the national court, claiming that the notices issued by the Commission of 20 February and 21 March 1986 were void.

3. *Questions for a preliminary ruling*

The College van Beroep voor het Bedrijfsleven considered that the parties' views required it to determine whether the notices issued by the Commission were consistent with Community law; by judgment of 12 June 1987 it therefore stayed the proceedings and requested the Court to give a preliminary ruling on the following questions:

'(1) Is the Commission's notice to the defendant of 20 February 1986 contrary to Community law, in particular Regulation (EEC) No 3656/83, the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty and the principle of legal certainty?

(2) Is the Commission's notice to the defendant of 21 March 1986 contrary to Community law, in particular Regulation (EEC) No 3656/83, the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty and the principle of legal certainty?'

The national court expresses those questions in more detail as follows:

'With regard to the Commission's notice to the defendant of 20 February 1986:

(a) Is this notice contrary to Article 2 of Regulation (EEC) No 3656/83?

In this regard the question arises in particular to what extent the regulation is applicable in the event that the quota for the year to which the relevant applications for import licences are attributable has not yet been fixed. In such a situation it is not clear to the court up to what quantity the Commission may permit import licences to be issued.

The question also arises whether or not the Commission took into account the time-limit laid down in Article 2 (3).

(b) Is this notice contrary to the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty?

How important is it in this respect that import certificates for the year 1986 were issued to the first plaintiff itself before 20 February 1986?

(c) Is this notice contrary to the principle of legal certainty? To what extent does the manner in which, prior to 1986, the Commission dealt with the issue of import licences before the fixing of the quota for the year in question determine what the applicants were entitled to expect of the Commission in 1986, with regard to authorization to issue import certificates prior to the fixing of the total quota for the relevant year?

How significant in this respect is Regulation (EEC) No 1898/86, by which the 1986 quota was increased — and expectations which might have been aroused were fulfilled?

With regard to the Commission's notice to the defendant of 21 March 1986:

(a) Is this notice contrary to Article 2 of Regulation (EEC) No 3656/83?

In this regard the question arises *inter alia* whether the Commission could encourage the submission of new applications for import licences to the competent Member State authorities. The further question arises whether, in dividing the quota in proportion to the applications as provided for in Article 2 (3), the Commission could take into account these new applications to the detriment of persons who had already submitted applications for import licences on 12 and 20 February 1986.

(b) Is this notice contrary to the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty?

(c) Is this notice contrary to the principle of legal certainty?'

4. *Procedure*

The judgment of the College van Beroep voor het Bedrijfsleven containing the questions for a preliminary ruling was received at the Court Registry on 14 July 1987. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged by Krohn and Van Es, the plaintiffs in the main proceedings, represented by L. H. van Lennep, of the Hague Bar, and by the Commission of the European Communities, represented by its Legal Adviser, R. C. Fischer, acting as Agent.

By a decision of 24 February 1988 pursuant to Article 95 (1) and (2) of the Rules of Procedure the Court assigned the case to the Second Chamber.

Upon hearing the Report of the Judge Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it requested supplementary information from the Commission.

II — Summary of the written observations lodged with the Court

The plaintiffs in the main proceedings consider that the Commission's notice to the Hoofdproduktschap of 20 February 1986, referred to in the first question, is contrary to Article 2 (3) of Regulation No 3656/83. The principle laid down in that provision is that applications for licences must be considered in the order they are made and granted in so far as there is a quota available.

If the Council has fixed a quota of 300 000 tonnes from 1 January of a given year, that means that the Commission is obliged to grant applications on a weekly basis until the 300 000 tonnes are exhausted. Assuming that at some point the (last) applications lead to the 300 000 tonnes being exceeded, it is logical that the last applicants will not be granted their applications in full but will have them scaled down. It is also logical that traders who make further applications after the last-mentioned applications should have their applications rejected in their entirety.

Nevertheless, in the present case, namely where the quota has not yet been fixed on 1 January of the particular year, the Commission has the choice between:

(a) waiting until the Council has fixed the quota, or

(b) in anticipation of the quota's being fixed by the Council, awarding applicants the quota which may reasonably be expected.

If, as in the present case, the Commission adopts the second alternative, it may be expected and accepted that at some point the Commission will decide that the quota which may reasonably be expected to be fixed by the Council is practically exhausted and it is no longer reasonable to continue to grant applications so long as the Council has not fixed the corresponding quota.

In such circumstances the Commission has a discretion to inform traders who have made application for import licences, as it did on 20 Februray 1986, that it is provisionally not possible to grant further applications (which means that consideration of the applications may be suspended but they will not be refused) until the Council has definitely fixed the quota.

Once, however, the quota has in fact been fixed, the remaining quota should be used first of all to meet, if necessary on a pro rata basis, the applications which have, so to speak, been 'frozen'. It is only after that has been done that subsequent applications should be considered.

The plaintiffs in the main proceedings consider that the Commission is wrong in taking the view that the 'pro rata' principle in Article 2 (3) of Regulation No 3656/83 means that all parties, no matter when they made their applications, must be entitled to the remaining quota on an equal basis once the quota has finally been fixed. On the contrary, Regulation No 3656/83 is based on the principle that applications must be considered in the order they are made and, in addition, on a weekly basis.

In so far as the notice of 20 February 1986 discontinues preferential treatment for traders who were the first to make applications, it is also contrary to the prohibition of discrimination in Article 40 (3) of the EEC Treaty. It is not discriminatory *per se*. It was only subsequently that the discrimination became apparent, namely on 10 March 1986, after the quota had finally been fixed by the Council and it appeared that from 20 February 1986 the Commission had obviously intended to treat traders who were first to lodge their applications and traders who made applications subsequently on an equal footing although Article 2 (3) of Regulation No 3656/83 treats them differently.

The contested notice, moreover, infringed the principle of legal certainty since the plaintiffs in the main action were taken by surprise by a measure of the Community authorities which in view of the legislation and the policy pursued until then on the basis of that legislation they could not have expected.

The Commission's notice of 21 March 1986 to the Hoofdproduktschap, referred to in the second question, is also contrary to Regulation No 3656/83 because it deprives traders who made application earlier of the preferential treatment to which they are entitled under Article 2 (3) of Regulation No 3656/83.

By extending *de facto* the period for making application the Commission gave importers, who because of late submission of applications could not be taken into account in the distribution of the quota according to Regulation No 3656/83, a further opportunity to compete for an import licence, even though it might be only up to a certain maximum amount. That procedure was detrimental to traders such as Krohn who had made application in good time, namely 12 February 1986. Dissimilar cases were thereby treated equally, contrary to the prohibition of discrimination.

Finally, the plaintiffs in the main proceedings refer to the arguments set out above based on the principle of legal certainty.

The Commission submits that there is no ground for regarding the two notices as invalid.

With regard to its notice of 20 February 1986 the Commission points out that Article 2 of Regulation No 3656/83 is not completely applicable so long as the Council has not fixed the tariff quota for the year in question.

Traders are thus not entitled to claim that for all applications the Commission should fix in accordance with Article 2 (3) of Regulation No 3656/83 the quantities for which licences should be granted. So long as the quota has not been fixed the Commission is under no obligation to share it out. That is corroborated by the fact that before the quota is fixed the Commission is unable fully to apply the provisions of Article 2 (3) since it cannot determine whether, and if so how, allocation in proportion to the applications is to take place.

For the same reason parties whose application was lodged and notified to the Commission before the quota was fixed cannot claim the preferential treatment provided for in Article 2 (3) in relation to applications lodged later.

The Commission is only required to deal with applications lodged and notified by Member States, including applications lodged previously and still pending when the quota is fixed, after the quota is fixed. Pending applications enjoy no priority but are subject to the same treatment as applications lodged immediately after the quota is fixed.

The Commission considers that it is entitled, in cooperation with the competent national authorities, to begin granting import licences where the Council delays fixing the quota and there is thus a risk of interruption to imports and unnecessary damage to trade and consumers. Such a provisional step is of use and reasonable only in so far as the Commission deals with applications for licences in the order in which they are received and approves them without applying the pro rata rule while remaining sufficiently within the limits of the quantities which, according to its forecasts, ought ultimately to be fixed by the Council. In its view it is entitled but under no obligation to act in that way.

The Commission adopted that course of action when in its notice of 20 February 1986 it rejected all the applications still pending instead of granting them a proportional share, which, indeed, it was not able to do.

Such provisional application of the tariff quota was also practised in previous years in the interests of traders and consumers and with their full knowledge, and the plaintiffs themselves benefited from that during the year in question.

In so acting the Commission in no way infringed the prohibition of discrimination. All the parties knew that the quota would be applied on a provisional basis, as the plaintiffs in the main proceedings moreover admit, and they were thus able to lodge their applications as soon as they wished. The situation where, once the limits of the quota are reached, subsequent applications will not be fully met and belated applications will not be granted at all would also have arisen if the quota had been fixed in good time, namely on 1 January 1986. The only difference is that if the Commission acts very carefully in applying the provisional quota it will probably stop granting applications earlier than it would in allocating a definitive quota, so that when the grant of licences is recommenced after the fixing of the quota the Commission will have to apply the pro rata rule to a larger number of applications.

The fact that in 1986 provisional application of the quota had to be interrupted before the Council had fixed the quota is in no way incompatible with the principle of legal certainty. The provisional application of the quota had to stay within the limits of the expected quota (the persons concerned had no doubt on that score), which for 1986 was likely to be much less than that of previous years.

The fact that in June 1986 the quota was increased should not be taken into account in answering the questions put in the present case, although it obviously gave traders who still wished to obtain licences the opportunity of doing so.

With regard to the notice of 21 March 1986 the Commission observes that the persons concerned cannot claim the grant, or partial grant, of the licences requested and application of the priority rule provided for in Article 2 (3) of Regulation No 3656/83 until after the tariff quota has been fixed. It follows that the fixing of the quota on 16 March 1986 gave all concerned the right to make applications or to confirm applications already made and still pending. If those applications exceed the quantity of unused quota, as happened in the present case, they can be met only on the basis of the pro rata rule.

It follows that the notice is not incompatible either with the prohibition of discrimination contained in Article 40 (3) or the principle of legal certainty.

III — Answer to a question put by the Court

The Court requested the *Commission* to reply in writing to the following question:

'Did the Commission, in provisionally applying the tariff quota in years prior to 1986, suspend the grant of import licences when the expected quota had been exhausted and once the quota was fixed by the Council did it authorize the grant also of licences applied for after the suspension on the basis of the pro rata rule?'

The Commission replied that in 1983 and 1985 it also applied the relevant tariff quota provisionally pending the Council's fixing of the quota. It was not, however, necessary to suspend the provisional application or to apply the pro rata rule because in 1983 and 1985 (as indeed in 1984) the total quantities for which licences had been granted (both during and after the provisional application) were appreciably less than the quantities proposed by the Commission and those adopted by the Council.

T. F. O'Higgins
Judge-Rapporteur