OPINION OF ADVOCATE GENERAL LÉGER
delivered on 12 March 2002 [1]

1. This appeal has been brought by a company incorporated under German law, Interporc Im- und Export GmbH, [2] against a judgment of the Court of First Instance of the European Communities of 7 December 1999 partially annulling the Commission's decision of 23 April 1998 [3] refusing the appellant access to documents. [4]

The appellant invites this Court, in its principal claim, to set aside the judgment of the Court of First Instance in so far as it held that the Commission was right to apply the rule that it has a duty not to disclose documents held by it but which emanate from Member States or from the authorities of third countries (in the present case, from the Argentine authorities), even though application of that rule, according to the appellant, infringes a fundamental Community right of access to documents.

2. The case relates to a specific legal framework with the following main features:

I — Legal framework

3. Central to this case are Commission Decision 94/90/EC of 8 February 1994 [5] and the annexed Code of Conduct concerning public access to Council and Commission documents. [6]

4. The Code of Conduct sets out a 'general principle' [7] of access to documents, accompanied by legal provisions the most salient aspects of which need presenting here.

1 — Original language: French.

2 — Hereinafter 'Interporc' or 'the appellant'.

3 — Hereinafter 'the contested decision of 23 April 1998'.

4 — Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521 (hereinafter 'the contested judgment').

5 — Commission Decision on public access to documents (OJ 1994 L 46, p. 58).

6 — Hereinafter 'the Code of Conduct'.

7 — The text of the Code of Conduct itself contains the expression 'general principle'. It shall have the following meaning in this Opinion: 'general principle of access to documents within the meaning of the Code of Conduct'.

General principle of access to documents within the meaning of the Code of Conduct

5. The general principle is defined as follows:

'The public will have the widest possible access to *documents held* [8] by the Commission...'. [9]

Limits of the general principle of access to documents within the meaning of the Code of Conduct

6. The Code of Conduct makes provision for the situation where the request for access relates to a document not written by the Commission. In that connection, the fifth paragraph of the Code of Conduct sets out the authorship rule:

'Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author'.

7. As regards the provisions establishing exceptions in the true sense, they are worded as follows:

'The institutions will refuse access to any document whose disclosure could undermine:

— the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

— the protection of the individual and of privacy,

— the protection of commercial and industrial secrecy,

— the protection of the Community's financial interests,

— the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.

8 — Emphasis added.
9 — First paragraph.

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings'. [10]

8. To ensure implementation of the Code of Conduct, Article 2(2) of Decision 94/90 provides:

'The relevant Director-General or Head of Department, the Director designated for the purpose in the Secretariat-General or an official acting on their behalf shall inform the applicant in writing, within one month, whether the application is granted or whether he intends to refuse access. In the latter case the applicant shall also be notified that he has one month in which to apply to the Secretary-General of the Commission for review of the intention to refuse access, failing which he shall be deemed to have withdrawn his initial application'.

9. Subsequently, the Commission also adopted Communication 94/C 67/03 on improved access to documents, specifying the criteria for implementation of Decision 94/90. [11] The communication states that 'anyone may... ask for access to any unpublished Commission document, including preparatory documents and other explanatory material'. [12] As regards the exceptions laid down by the Code of Conduct, the 1994 communication states that '[t]he Commission make take the view that access to a document should be refused because its disclosure could undermine public and private interests and the good functioning of the institution'. [13] In that regard the 1994 communication states that '[t]here is nothing automatic about the exemptions, and each request for access to a document will be considered on its own merits'. [14]

II — Facts and procedure

10. Imports of beef from third countries into the European Community are subject, as a rule, to customs duty and additional import levies. Under the General Agreement on Tariffs and Trade (GATT), certain quantities of high quality beef ('Hilton Beef') from the Argentine Republic can be imported free of additional import levies. In those circumstances, only the applicable common customs tariff is payable. Entitlement to that exemption is subject to presentation of certificates of authenticity issued by the Argentine authorities.

10 — Twelfth paragraph.

11 — OJ 1994 C 67, p. 5, hereinafter 'the 1994 communication'.

12 — Seventh paragraph.

13 — Tenth paragraph.

14 — Eleventh paragraph.

Having learned that a number of those certificates of authenticity had been falsified, the Commission, in collaboration with the customs authorities of the Member States, pursued inquiries which revealed that national undertakings, including Interporc, had used false certificates.

11. Disputing those accusations, Interporc claimed that it had presented certificates in good faith and that certain deficiencies in the control procedure were attributable to the competent Argentine authorities and to the Commission.

12. By decision of 26 January 1996, the Commission informed the Federal Republic of Germany that it found that the remission of the import duty sought by the appellant was not justified.

13. With the aim of proving its good faith, Interporc sought access from the various competent services of the Commission by letter of 23 February 1996, to certain documents relating to the control procedures for beef imports and to the inquiries which led to the decisions by the German authorities to effect post-clearance recovery of import duty.

14. The Commission refused the appellant's request on two counts.

First, by letter of 22 March 1996, the Director-General of Directorate-General [15] VI of the Commission rejected, inter alia, the request for access to the correspondence with the Argentine authorities. The refusal was based on the exception relating to the protection of the public interest and on the ground that the applicant should address its request direct to the authors of those documents.

Secondly, by letter of 25 March 1996, the Director-General of DG XXI held, in particular, that the request for access to documents emanating from Member States should be addressed direct to the various authors of those documents.

15. In response to that refusal, by letter of 27 March 1996, the appellant submitted to the Secretariat-General of the Commission a confirmatory application within the meaning of the Code of Conduct. In that letter, it challenged the grounds relied on by the Directors-General of DG VI and DG XXI to refuse access to the documents. The Secretary-General of the Commission rejected the confirmatory application by letter of 29 May 1996.

15 — Hereinafter 'DG'.

16. Interporc therefore brought an action, and subsequently another, before the Court of First Instance.

First, the appellant jointly with two other German firms brought an action on 12 April 1996 for annulment of the decision of 26 January 1996. The Court of First Instance annulled that decision. [16]

Then, by application lodged at the Registry of the Court of First Instance on 9 August 1996, the appellant brought a second action, this time for annulment of the Commission's decision of 29 May 1996 confirming its refusal to allow the appellant access to certain of its documents. By judgment of 6 February 1998 the Court of First Instance held that the statement of reasons in the decision of 29 May 1996 was inadequate and annulled that decision. [17]

17. Implementing the judgment in *Interporc I*, the Commission sent the appellant a fresh decision dated 23 April 1998 containing an identical conclusion to that of the annulled decision of 29 May 1996, but stating different reasons.

16 — Case T-50/96 *Primex Produkte Import-Export and Others* v *Commission* [1998] ECR II-3773. There was an appeal to this Court but the case was removed from the register by order of 10 May 2000 (Case C-417/98 P *Commission* v *Primex Produkte Import-Export and Others*, not published in the European Court Reports).

17 — Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231 (hereinafter '*Interporc I*').

18. The decision of 23 April 1998 has given rise to fresh proceedings. The appellant disputes the merits of that decision. In so far as concerns us, the decision states inter alia that:

'The documents you have requested may be placed in the following categories:

1. Documents emanating from the Member States and the Argentine authorities

— the declarations of the Member States of quantities of Hilton Beef imported from Argentina between 1985 and 1992;

— the declarations of the Argentine authorities of quantities of Hilton Beef exported to the Community in the same period;

— the documents of the Argentine authorities relating to the designation of the bodies responsible for issuing certificates of authenticity;

— the documents of the Argentine authorities relating to the opening of the Hilton quota;

— the positions taken by the Member States in similar cases.

2. Documents emanating from the Commission

— the internal records of DG VI drawn up on the basis of the declarations of the Member States and third countries;

— the documents of the Commission relating to the designation of the bodies responsible for issuing certificates of authenticity;

— the documents relating to the agreement on the opening of the "Hilton" quota, the views of DG VI, views of other departments, communications sent to the Argentine authorities;

— the documents relating to the agreement concluded between the Community and Argentina concerning a reduction in the quota following discovery of the falsifications, internal views of DG VI, views of other departments (DG I, DG XXI), notes from the offices of the Commissioners responsible, notes sent to those offices, communications sent to the Commission delegation to Argentina, correspondence sent to the Argentine Ambassador to the European Union;

— the Commission's report into the control procedures as regards the "Hilton" quota;

— the views of DG VI and DG XXI on decisions taken in other similar cases;

— the minutes of the meetings of the group of experts from the Member States held on 2 October and 4 December 1995.

As regards the documents emanating from the Member States and the Argentine authorities, I would advise you to request a copy directly from those Member States and from the authorities concerned. Whilst the Code of Conduct provides that "the public will have the widest possible access to documents held by the Commission and the Council", the fifth paragraph provides

that "where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author". The Commission can therefore in no circumstances be accused of an abuse of rights; it is merely applying its decision of 8 February 1994 governing the implementation of the Code of Conduct'. [18]

19. An action was brought before the Court of First Instance on 9 June 1998 for annulment of that decision. The Court delivered the contested judgment, the subject-matter of this appeal.

20. In its arguments before the Court of First Instance, the appellant drew a distinction between the documents prepared by the Commission and those prepared by Member States or the Argentine authorities.

21. As regards the documents emanating from the Commission, the appellant relied on three pleas based, first, on infringement of the Code of Conduct and of Decision 94/90, second, on Article 176 of the EC Treaty (now Article 233 EC) in conjunction with the *Interporc I* judgment and, third, on Article 190 of the EC Treaty (now Article 253 EC).

22. The Court of First Instance annulled the decision to refuse access on the basis of the first plea, and did not examine the two other pleas. It found that the Commission had misapplied the exception relating to the protection of the public interest.

23. The appeal now before this Court does not therefore concern the refusal of access to documents emanating from the Commission, in relation to which the Court of First Instance upheld the appellant's claim. Interporc is here disputing only the reasoning of the Court of First Instance as regards the Commission's refusal to allow it access to documents emanating from the Member States or the Argentine authorities. The present action is confined to that part of the judgment of the Court of First Instance.

24. Before examining the appeal, I would recapitulate the terms of the contested judgment.

18 — Paragraph 20 of the contested judgment.

III — The contested judgment

25. The Court of First Instance sets out as follows the pleas raised before it by Interporc:

'The applicant relies on three pleas alleging, first, the unlawfulness of the contested decision in so far as it is based on the authorship rule, second, infringement of Decision 94/90 and the Code of Conduct and, third, infringement of Article 190 of the Treaty'. [19]

26. After analysing those three pleas in turn, the Court of First Instance held that it should not annul the contested decision as regards the documents emanating from Member States or the Argentine authorities and stated as follows:

'The plea alleging the unlawfulness of the contested decision in so far as it is based on the authorship rule

...

54 First of all, the various stages of the administrative procedure should be recapitulated. By letter of 23 February 1996 the applicant requested access to certain documents relating to the control procedure for imports of Hilton Beef, including the documents at issue. By letters of 22 and 25 March 1996, the Directors-General of DG VI and XXI rejected the applications for access, citing the exception based on the protection of the public interest (international relations), the authorship rule, the exception based on the protection of the public interest (inspections and investigations) and that based on the protection of the individual and of privacy. By letter of 27 March 1996 to the Secretary-General of the Commission, the applicant's legal representative contested those refusals and submitted a confirmatory application. By letter of 29 May 1996, the Secretary-General rejected the confirmatory application, citing the exception based on the protection of the public interest (court proceedings). By its judgment in *Interporc I*, the Court of First Instance held that the decision of 29 May 1996 was inadequately reasoned and annulled it. In implementation of the judgment in *Interporc I*, the Secretary-General again rejected the confirmatory application citing not only the exception based on the protection of the public interest (court proceedings) but also the authorship rule.

55 It follows from the judgment in *Interporc I*, first, that the Secretary-General was required, under Article 176 of the

19 — Paragraph 50.

Treaty, to take a further decision in implementation of that judgment and, second, that the decision of 29 May 1996 is deemed to have never existed.

56 Accordingly, it cannot be inferred from Article 2(2) of Decision 94/90 and the 1994 communication that the Secretary-General could not rely on grounds other than those on which he took a position in his initial decision. He was therefore entitled to undertake a full review of the applications for access and base the contested decision on the authorship rule.

57 It follows that this plea must be dismissed.

The plea alleging infringement of Decision 94/90 and the Code of Conduct

...

65 On a preliminary point, as to the question whether the authorship rule is to be disapplied, it should be observed that the Court of Justice, in its judgment in Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 37, concerning public access to documents, held as follows:

"So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration."

66 In the light of that judgment, it must be held that, so long as there is no rule of law of a higher order according to which the Commission was not empowered, in Decision 94/90, to exclude from the scope of the Code of Conduct documents of which it was not the author, the authorship rule can be applied. The fact that Decision 94/90 makes reference to declarations of general policy such as Declaration No 17 and the conclusions of several European Councils does not alter that finding, since such declarations do not have the force of a rule of law of a higher order.

67 As regards the interpretation of the authorship rule, it should be borne in mind, first, that Declaration No 17 and the Code of Conduct lay down the general principle that the public should have the greatest possible access to documents held by the Commission and the Council and, second, that Decision 94/90 is a measure conferring on citizens the right of access to documents held by the Commission (*WWF UK* v *Commission*, cited above, paragraph 55).

68 Next, it is important to note that where a general principle is established and exceptions to that principle are laid down, those exceptions must be construed and applied strictly, so as not to frustrate the application of the general principle (*WWF UK* v *Commission*, cited above, paragraph 56, and *Interporc I*, cited above, paragraph 49).

69 It must be held, in that regard, that the authorship rule, however it may be characterised, lays down an exception to the general principle of transparency in Decision 94/90. It follows that this rule must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency (Case T-188/97 *Rothmans International* v *Commission* [1999] ECR II-2463, paragraphs 53 to 55).

70 At the hearing, the Commission acknowledged that the application of the authorship rule might give rise to difficulty where there is some doubt as to the authorship of a document. It is in precisely such cases that it is important to construe and apply the authorship rule strictly.

71 In the light of the foregoing observations, the Court must determine whether the authorship rule is applicable to the five types of documents emanating from the Member States or the Argentine authorities mentioned in the contested decision.

72 The five types of document in question comprise, first, the declarations of the Member States of quantities of Hilton Beef imported from Argentina between 1985 and 1992, second, the declarations of the Argentine authorities of quantities of Hilton Beef exported to the Community in the same period, third, the documents of the Argentine authorities relating to the designation of the bodies responsible for issuing certificates of authenticity, fourth, the documents of the Argentine authorities relating to the opening of the "Hilton" quota and, fifth, the positions taken by the Member States in similar cases.

73 It is clear, on examination of the five types of documents, that their authors are either the Member States or the Argentine authorities.

74 It follows that the Commission has applied the authorship rule correctly in taking the view that it was not required to grant access to those documents. It cannot, therefore, have committed an abuse of rights. Accordingly, the applicant's plea alleging infringement of Decision 94/90 and the Code of Conduct must be dismissed as unfounded.

The plea alleging infringement of Article 190 of the Treaty

...

77 According to consistent case-law, the obligation to state reasons, laid down in Article 190 of the Treaty, means that the reasoning of the Community authority which adopted the contested measure must be shown clearly and unequivocally so as to enable the persons concerned to ascertain the reasons for the measure in order to protect their rights and the Community judicature to exercise its power of review (*WWF UK* v *Commission*, cited above, paragraph 66).

78 In the present case, in the contested decision the Commission referred... to the authorship rule and informed the applicant that it should request a copy of the documents in question from the Member States concerned or the Argentine authorities. Such a statement of reasons shows clearly the reasoning of the Commission. The applicant was thus in a position to know the justification for the contested measure and the Court of First Instance is in a position to exercise its power to review the legality of that decision. Accordingly, the applicant is not justified in maintaining that a more specific statement of reasons was required (see *Rothmans International* v *Commission*, cited above, paragraph 37).

79 It follows that this plea must be dismissed. Accordingly, the contested decision should not be annulled in so far as it relates to the documents emanating from the Member States or the Argentine authorities.'

IV — The appeal

27. By this appeal, Interporc requests the Court to annul that part of the contested judgment which disallows its claims. The appellant also invites the Court to rule on the annulment of the contested decision of 23 April 1998 and to order the Commission to pay the costs.

28. It relies on two pleas in support of its appeal.

29. By its first plea, it submits that the Court of First Instance erred in law in interpreting Article 176 of the Treaty and the Code of Conduct. According to the appellant, the contested decision of 23 April 1998 is void and the Court of First Instance should have declared it to be so.

30. There are three limbs to its second plea. As its principal claim, the appellant asserts that the Court of First Instance should have declared the authorship rule to be invalid as running counter to the free access to documents which is, in its view, a rule of law of a higher order. In the alternative, it criticises the Court of First Instance for, on the one hand, having erred in law in interpreting the authorship rule and applying it to the instant case and, on the other, for failing to declare the inadequacy, under Article 190 of the Treaty, of the statement of reasons for the Commission's decision refusing access.

31. In its defence to the appeal, the Commission maintains, as its principal claim, that the appeal is inadmissible in its entirety, with the effect that detailed examination of each plea is unnecessary. It further contends, in the alternative, that the appeal is, in any event, unfounded. It also asks the Court to order the appellant to pay the costs.

32. Since any examination of the merits of this action is subject to its being admissible, I shall begin consideration of this appeal by examining the Commission's arguments to the effect that it is inadmissible.

Admissibility of the appeal

1. Inadmissibility of the application for annulment of the contested decision of 23 April 1998

33. The Commission claims that the appellant is seeking annulment of the decision at issue in its 'entirety',[20] without expressly excluding from this appeal that part of the decision which has already been annulled by the contested judgment.

34. The appellant does in fact request '... that this Court see fit to *annul entirely*[21] the decision of the Secretary-General of the Commission of 23 April 1998'.[22] That wording may, accordingly, give rise to some confusion.

20 — See response, paragraph 4.
21 — Emphasis added.
22 — See notice of appeal, p. 28.

35. However, a detailed examination of the appeal as a whole dispels any ambiguity. The appellant seeks, explicitly, annulment of paragraphs 55 to 57 and 65 to 79 of the contested judgment.[23] That part of the contested judgment addresses only review of the contested decision of 23 April 1998 to the extent that it refuses the appellant access to the documents emanating from Member States or the Argentine authorities.

36. Furthermore, in its reply,[24] the appellant argues that in asking this Court to 'annul entirely' the contested decision of 23 April 1998, its intention is, quite evidently, to confine its application for annulment to only that part of the decision in question which is detrimental to it and which was not already annulled by the Court of First Instance. The appellant states, clearly, that the present action does not concern the legality of the part of the contested decision of 23 April 1998 which the Court of First Instance did annul.

37. The Commission's argument is therefore not sustainable.

38. I am accordingly of the view that the argument that the application for annulment of the contested decision of 23 April 1998 is inadmissible because it referred to that decision in its entirety, omitting to state that it was not seeking annulment of that part of it already annulled by the contested judgment, is unfounded.

2. Inadmissibility of the application for partial annulment of the contested judgment

Arguments of the parties

39. The Commission contends that the appeal does not satisfy the requirements of admissibility set out by the case-law of this Court.

40. As regards the *first plea*, concerning the unlawfulness of the Commission's examination of the request for access to documents, the appellant confines itself, according to the Commission, to reiterating arguments already put before the Court of First Instance. In the view of the Commission, it does not advance any real demonstration of the law, preferring to make vague, peremptory statements. It fails, the Commission submits, to explain its reasoning sufficiently.

41. In its reply, the appellant contends that the Commission's thesis restricts disproportionately the circumstances in which an

23 — Ibid., p. 6.
24 — Page 2.

appeal may be lodged. The purported repetition of pleas for which the Commission criticises the appellant is necessary, in the view of the latter, to demonstrate that the Court of First Instance erred in law in its assessment of the terms of the application and the legal provisions on which it was based. [25]

42. As regards the *second plea*, the Commission disputes the admissibility of all three of its limbs. It raises against them the same grounds of inadmissibility as were rehearsed in relation to the first plea.

43. In connection with the first limb, the Commission asserts, furthermore, that the appellant is submitting observations for the first time before this Court, when it already could have done so before the Court of First Instance. The appellant states that it is not always possible to obtain the documents sought from third party authors. The parties requesting them, it asserts, encounter difficulties caused, in certain Member States, by the absence of regulations on transparency corresponding to those existing within the Community. The appellant presses its point, advancing the argument that the obstacles are all the greater in relation to requests for access made to third countries. Language issues, geographical distance and lack of knowledge of responsibilities and procedures make it almost impossible, in its view, for an individual to inspect the documents in question. According to the Commission, those observations are made out of time and consequently must be rejected.

44. In its reply, the appellant argues that, in the second plea, it demonstrates that the Court of First Instance erred in law in interpreting the authorship rule, as defined in Decision 94/90, and that the interpretation adopted infringes the general principle of transparency. It argues that, contrary to what the Commission maintains, the second plea is adequately argued and challenges with sufficient precision the reasoning of the Court of First Instance.

Opinion

45. Certain principles governing the admissibility of appeals, in particular as regards the extent of the jurisdiction of this Court, need to be borne in mind.

46. According to consistent case-law of this Court, '[a]rticle 168a of the EC Treaty' (now, after amendment, Article 225 EC), 'and Article 51 of the EC Statute of the Court of Justice state that an appeal is to be

25 — See reply, pp. 3 and 4.

limited to points of law and must be based on the grounds of lack of competence of the Court of First Instance, breach of procedure before it which adversely affects the interests of the appellant or infringement of Community law by the Court of First Instance. Article 112(1)(c) of the Court's Rules of Procedure provides that an appeal must contain the pleas in law and legal arguments relied on.

It follows from those provisions that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see the order in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 37).

That requirement is not satisfied by an appeal confined to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance...; in so far as such an appeal does not contain any arguments specifically contesting the judgment appealed against, it amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which under Article 49 of the EC Statute the Court of Justice does not have jurisdiction to undertake (see, to this effect, in particular the order in *San Marco* v *Commission*, cited above, paragraph 38)'. [26]

47. We therefore need to ascertain whether the present case satisfies the requirements of the case-law of this Court on admissibility, as set out above.

48. In the *first plea,* the appellant specifically challenges paragraphs 55 to 57 of the contested judgment. [27] That plea contains detailed arguments seeking to show that the Court of First Instance infringed Community law by finding that the Commission was able to issue a new decision to refuse access on the basis of the authorship rule. [28]

49. Likewise in the *second plea*, the appellant addresses explicitly, in support of its argument, specific paragraphs of the contested judgment.

26 — Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraphs 18 to 20. See, in that regard, Case C-338/93 P *De Hoe* v *Commission* [1994] ECR I-819, paragraphs 17 to 19; Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, paragraphs 10 to 13; and Case C-31/95 P *Del Plato* v *Commission* [1996] ECR I-1443, paragraphs 17 to 20. See, also, Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraphs 22 to 24, and Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 35.

27 — See paragraph 26 of this Opinion.

28 — See notice of appeal, paragraphs 9 to 12.

In the first limb of the plea it contends, contrary to the view of the Court of First Instance in paragraphs 65 and 66 of the contested judgment, [29] that the authorship rule does infringe a superior right to transparency. [30] In the second limb, it refers to paragraphs 69 and 70 of the contested judgment, [31] in which, it asserts, the Court of First Instance wrongly interpreted and applied the authorship rule. [32] Finally, in the third limb, [33] the appellant disputes the Court of First Instance's application of Article 190 in paragraphs 77 to 79 of the contested judgment. [34]

50. According to the case-law of this Court, therefore, the fact that the pleas and arguments as to the admissibility of an action for annulment have already been raised in the same terms at first instance cannot be a ground for their being inadmissible in an appeal procedure. [35] In the present appeal, the appellant in fact refers precisely to the disputed paragraphs of the contested judgment on the basis of which it develops arguments seeking to show that the Court of First Instance erred in law in its interpretation and application of Community law.

29 — See paragraph 26 of this Opinion.

30 — See notice of appeal, paragraph 13.

31 — See paragraph 26 of this Opinion.

32 — See notice of appeal, paragraph 22.

33 — See notice of appeal, paragraph 26.

34 — See paragraph 26 of this Opinion.

35 — See, in that regard, Case C-459/98 P *Martínez del Peral Cagigal* v *Commission* [2001] ECR I-135, paragraphs 37 and 38, and Case C-41/99 P *Sadam Zuccherifici and Others* v *Council* [2001] ECR I-4239, paragraphs 16 to 19.

51. The objection of inadmissibility raised against the first and second pleas, contending that the appellant is merely reproducing, before this Court, arguments already ventilated before the Court of First Instance, must therefore be rejected.

52. With regard more specifically to the first limb of the second plea, the Commission also criticises the appellant for submitting certain observations to this Court out of time.

53. On that point, citing the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, according to which no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the procedure, this Court has held that:

'To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to review of the findings of law on the pleas

argued before the Court of First Instance'. [36]

54. However, one cannot describe as a new plea a criticism levelled against the response of the Court of First Instance to the original plea. [37]

55. In the present case, the Commission seems to be confusing two quite distinct legal notions, namely a 'plea' or 'submission' and an 'argument'. According to the case-law of this Court, '[a] distinction must be drawn between the introduction of new submissions in the course of the proceedings and the introduction of certain new arguments'. [38] One can define a 'new submission' as a head of claim which alters the subject-matter of the application. An 'argument', conversely, merely develops or sets out in greater detail the subject-matter of the application. [39]

56. So, in paragraph 34 of the notice of appeal in this case the appellant is not raising a new plea, but is relying on a fresh argument in support of the plea already examined by the Court of First Instance, namely the infringement by the Commission of Decision 94/90 and of the Code of Conduct. [40] The observations which the appellant makes in paragraph 34 are indeed therefore an argument and not a new plea. They do not alter the subject-matter of the action. They are present in this appeal in support of a plea already examined by the Court of First Instance in the contested judgment.

57. Accordingly, I believe that the objection of inadmissibility raised against the first limb of the second plea must be rejected.

58. As regards the third limb, the Commission takes the view, in its response to the appeal, that it is inextricably bound up with the admissibility of the preceding limb. Since it maintains that the second limb is inadmissible, it draws the logical conclusion that the third is likewise.

59. I myself am of the view that it is admissible. Indeed, the Commission confines itself to pleading its inadmissibility without advancing any specific legal arguments in support of that position.

36 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59, and *Deere* v *Commission*, cited above (paragraph 62). See also, on that point, the orders in Case C-437/98 P *Infrisa* v *Commission* [1999] ECR I-7145, paragraph 29, and Case C-111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I-727, paragraph 25.

37 — On that aspect of the case-law of the Court of Justice, see Friden, G., 'Quelques réflexions sur la recevabilité d'un pourvoi contre un arrêt du Tribunal de première instance', *Revue des affaires européennes*, 2000, p. 231, especially p. 236, and Honorat, E., 'Plaider un pourvoi devant la Cour de justice', *Évolution récente du droit judiciaire communautaire*, European Institute of Public Administration, Maastricht, 1994, p. 21.

38 — Case 2/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority* [1957 and 1958] ECR 199; Case C-153/96 P *De Rijk* v *Commission* [1997] ECR I-2901, paragraph 19, and Case C-220/99 *Commission* v *France* [2001] ECR I-5831, paragraph 20.

39 — See, on that issue, my Opinion in the *Commission* v *France* case cited above, paragraphs 106 and 107.

40 — See paragraphs 58 to 60 of the contested judgment.

60. The first and second pleas should, consequently, be found to be admissible.

Substance

1. The first plea, alleging infringement of Article 176 of the Treaty

Arguments of the parties

61. The appellant contends that the Court of First Instance failed properly to assess the plea which it raised before that Court and erred in law in interpreting Article 176 of the Treaty and Article 2(2) of Decision 94/90.

62. The appellant's complaint against the Commission is that, in the wake of the annulment by the *Interporc I* judgment of the decision to refuse access of 29 May 1996, it adopted a further decision to refuse the request for access based on a new ground for refusal. The appellant sees in that practice a material risk of rendering the Code of Conduct effectively useless. In the view of Interporc, such a practice amounts to preventing citizens from asserting their right of access to documents. The Commission's behaviour, it contends, undermines the effectiveness of that right, inasmuch as individuals would be obliged to bring legal actions until such time as the Commission had, as it were, exhausted all possible grounds for refusal and was no longer in a position to justify a further decision to refuse access. The appellant maintains that the Commission's conduct is an abuse and that from the time it examined the making of the first request for access to documents it should have analysed all foreseeable grounds for refusal in such a way that it would no longer have been possible, subsequently, to refuse the request for access on new grounds under the Code of Conduct.

63. The appellant considers that the Commission failed to comply with the requirements of Article 176 of the Treaty and Article 2(2) of Decision 94/90. Once the Court of First Instance had annulled the decision to refuse access of 29 May 1996, as containing an inadequate statement of reasons, the Commission should, in its view, have fully re-examined the request for access to documents.

64. The Commission, for its part, considers that it did carry out a full re-examination of the request for access. It believes, also, that the fact that it chose to base its decision to refuse access on a single ground for refusal is easily explained by considerations of procedural economy.

Assessment

65. I would recall the case-law of this Court according to which, where the Court of First Instance sets aside the act of an institution, Article 176 of the Treaty requires the latter to take the measures necessary for compliance with the judgment. Both the Court of Justice and the Court of First Instance have held, in that regard, that 'the institution is required, in order to comply with the judgment and implement it fully, to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary in order to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure'. [41]

66. However, the scope of application of Article 176 of the Treaty is limited.

67. Article 176 does not authorise this Court to issue directions to an institution where the Court has annulled a measure of that institution under Article 173 of the EC Treaty (now, after amendment, Article 230 EC). [42]

68. It merely imposes a duty on the institution which adopted the annulled measure to ensure that any act intended to replace it is not affected by the same irregularities as those identified in the judgment of annulment. [43] It does not, on the other hand, mean that this Court should, at the request of interested parties, determine the content of the measure intended to replace the annulled measure.

69. The appellant in this case maintains that, once the *Interporc I* judgment had annulled the decision of 29 May 1996 to refuse access, the Commission had a duty to adopt a new decision taking into account all the grounds for refusal covered by the Code of Conduct. That view presupposes that, on the one hand, the Commission has no discretion in implementing a judgment of the Court of First Instance annulling a measure and, on the other hand, that this Court must tell the Commission what reasons it should state in any fresh decision to refuse. Such an interpretation is not in line with the case-law of this Court referred to above.

41 — Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27.

42 — Case 15/85 *Consorzio Cooperative D'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 18.

43 — Case C-310/97 P *Commission* v *Assidomän Kraft Products and Others* [1999] ECR I-5363, paragraph 56.

70. Consequently, I propose that the Court should reject the first plea as unfounded.

2. The second plea, alleging that the authorship rule is invalid and that Article 190 of the Treaty has been infringed

71. Analysis of the second plea raises questions concerning, on the one hand, the authorship rule (first and second limbs) and, on the other, compliance with the requirement to give a statement of reasons.

(a) The authorship rule (first and second limbs)

72. The appellant's argument in support of the plea for annulment based on the authorship rule is in two parts.

(i) The first part: invalidity of the authorship rule

Arguments of the parties

73. In the view of the appellant, the authorship rule is incompatible with the duty of transparency, which is a legal principle rooted in the democratic principle. Both the Community principle of transparency and free access to documents are, it contends, general principles, which Article 255 EC,[44] in conjunction with the second paragraph of Article 1 and Article 6(1) of the Treaty on European Union, now confirms as being fundamental to the legal order of the Union and the Community. Strict adherence to those principles is, the appellant argues, an indispensable component in safeguarding the democratic structure and the legitimacy of the exercise of Community sovereignty.

74. In its response to the appeal, the Commission defends a markedly different viewpoint. It contends that there is no general principle of a right of transparency in Community law. Although there is undeniably a close link between transparency and democracy, that fact is not sufficient, it maintains, to make transparency a legal principle. In consequence, to restrict the exercise of the right of access solely to documents written by the Commission, to the exclusion of documents emanating from the Member States or the Argentine authorities, does not infringe any right of transparency.

Assessment

75. In order to respond to the opposing arguments set out by the parties, it is

44 — That article was inserted into the EC Treaty by the Treaty of Amsterdam.

appropriate to set out the most recent case-law of this Court on the right of access to documents held by a Community institution.

76. In *Netherlands* v *Council*, cited above, in which this Court considered the lawfulness of the legal basis for Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, [45] the Court stated that 'the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle'. [46]

77. It went on to say that '[s]o long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the [Community] institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration'. [47]

78. It is therefore not possible, as the appellant contends, to interpret the *Netherlands* v *Council* judgment as authority for the existence of a fundamental right of access to documents. [48]

79. Nor can one infer the existence of such a right from the judgment in *Council* v *Hautala*. [49] In that case, the appeal concerned primarily the right of partial access to Council documents, laid down in Decision 93/731.

The appellant, a Member of the European Parliament, requested disclosure of a report written by the Working Group on Conventional Arms Exports, in order to learn in more detail about the criteria for arms exports from Member States of the European Union. The Council refused her request, on the ground that the report

45 — OJ 1993 L 340, p. 43.

46 — Paragraph 34.

47 — Ibid., paragraph 37.

48 — See in that regard, for example, Chiti, E., 'Further Developments of Access to Community Information: Kingdom of the Netherlands v. Council of the European Union', *European Public Law*, Vol. 2, No 4, 1996, p. 536 et seq.; Lafay, F., 'L'accès aux documents du Conseil de l'Union: contribution à une problématique de la transparence en droit communautaire', *RTD eur.* 33(1), January-March 1997, p. 37 et seq.; Bradley, K. St. C., 'La transparence de l'Union européenne: une évidence ou un trompe-l'oeil?', *Cahier de droit européen*, 3-4, 1999, p. 283 et seq.; Travers, N., 'Access to Documents in Community law: on the road to a European participatory democracy', *The Irish Jurist*, Vol. 35, 2000, p. 164 et seq. For a different interpretation, see, for example, Ragnemalm, H., 'Démocratie et transparence: sur le droit général d'accès des citoyens de l'Union européenne aux documents détenus par les institutions communautaires', *Scritti in onore di G. F. Mancini*, p. 809 et seq.

49 — Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565.

contained sensitive information disclosure of which could damage public security. [50]

The Court held that 'Article 4(1) of Decision 93/731 must be interpreted as meaning that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions'. [51] The Court did not see fit, however, to rule as to 'the existence of a "principle of the right to information"'. [52]

80. Accordingly, I take the view that, as the case-law of this Court currently stands, there is in Community law no fundamental right of access to documents among the general principles of law flowing from the constitutional traditions common to the Member States.

81. The right of access to Commission documents is recognised and guaranteed by the Code of Conduct, implemented by Decision 94/90. It therefore falls to the Court of Justice, in this appeal, to interpret the authorship rule in relation to the general principle of access to documents within the meaning of the Code of Conduct.

82. In that respect, the Code of Conduct enshrines a general principle of access to documents but excludes certain categories of documents from its scope. Thus, where the Commission holds a document of which it is not the author, the Code of Conduct provides that the request should be lodged directly with the person or institution in question.

83. The Code of Conduct therefore expressly provides that the authorship rule is a derogation from the general principle of the right of access.

84. In those circumstances, I take the view that the Court of First Instance did not err in law by finding that the authorship rule could apply, in the absence of any general principle of a right of transparency preventing the Commission from excluding documents of which it is not the author from the ambit of the Code of Conduct.

85. Consequently, the first part of the second plea should be rejected.

50 — The first indent of Article 4(1) of Decision 93/731 provides that '[a]ccess to a Council document shall not be granted where its disclosure could undermine the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations)'.

51 — Paragraph 31.

52 — Idem.

(ii) The second part: misinterpretation in law and misapplication in law of the authorship rule

Arguments of the parties

86. Interporc alleges, in the event that the Court of Justice does not find the authorship rule to be invalid, that the Court of First Instance's interpretation and application of that rule were wrong in law. In the appellant's submission, the Court of First Instance did not construe the authorship rule strictly, in keeping with the general principle of transparency.

87. In its defence to the appeal, the Commission acknowledges that the authorship rule is a limitation on the principle established by Decision 94/90. It contends that the terms of the Code of Conduct are authority for a restrictive interpretation of that rule only in so far as there is a doubt as to the author of the document.

Assessment

88. As explained above, the authorship rule is a clear derogation from the general principle of the right of access to documents within the meaning of the Code of Conduct.

89. In practice, operation of the authorship rule indicates to the party concerned the procedure to follow in filing its request for access to documents. One can easily understand the purpose and the rationale of the derogation. The authorship rule provides assurance to a Member State, third country or any natural or legal person which agrees to entrust documents to the Commission that those documents will not be disclosed against its wishes. By virtue of such relationships of trust, the Commission is able to obtain important information (national statistics, survey reports and the like) enabling it to make reasoned decisions. Similarly, in the context of complaints against anti-competitive practices, undertakings have to be confident that certain written documents which could subsequently be the basis for proceedings will not be disclosed. [53]

90. Application of the authorship rule can, none the less, lead to abuses. The Commission could, for example, rely on that derogation despite the existence of doubt as to the author of the document requested.

91. One should therefore adopt an application and interpretation of the authorship rule in line with the case-law of this Court.

53 — Idot, L., 'La transparence dans les procédures administratives: l'exemple du droit de la concurrence', *La transparence dans l'Union européenne. Mythe ou principe juridique?*, LGDJ, 1998, p. 121 et seq.

92. In that regard, as the Court has been at pains to state recently, the aim pursued by Decision 94/90, besides that of ensuring the smooth operation of the Commission in the interests of good administration, is to provide the public with the widest possible access to documents held by the Commission, so that *any exception to that right of access must be interpreted and applied strictly*. [54]

93. Accordingly, where the Commission holds documents of which it is not the author, it must indicate who the author is. That is, the interested party must be in a position to know who is the author of the document so that it has the opportunity to lodge a request for access with the latter.

94. In the contested decision of 23 April 1998, the Commission informed the appellant that the documents to which it requested access emanated either from Member States or from the Argentine authorities. The Member States provided two types of document. These were, on the one hand, declarations of the quantities of Hilton Beef imported from Argentina between 1985 and 1992 and, on the other, a number of statements of position by the States in question in similar cases. As for the Argentine authorities, they supplied declarations of the quantities of Hilton Beef exported to the Community between 1985 and 1992, documents relating to the designation of the bodies responsible for issuing certificates of authenticity and documents relating to the agreement on the opening of the 'Hilton' quota. The Commission concluded from the foregoing that the appellant should request access to those documents from the Member States or the Argentine authorities.

95. In the present case, therefore, the Commission correctly applied the authorship rule by indicating the authors of the documents requested.

96. I must point out, however, that there has been a recent modification of the right of access to documents held by Community institutions. Article 4(4) of the (new) Regulation (EC) No 1049/2001 of 30 May 2001 [55] states that:

'As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable,

54 — Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 27, and *Council* v *Hautala*, cited above (paragraph 25). I would point out that in that case the solution found related to Decision 93/731.

55 — Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

unless it is clear that the document shall or shall not be disclosed.'

97. In other words, according to the new Community provisions,[56] the authorship rule is no longer an absolute derogation from the right of access to documents, but has become a 'classic' exception subject to the Commission's freedom of interpretation.

98. Under those circumstances, I propose that the Court hold that the Court of First Instance did not err in law in deciding that the Commission had correctly applied the authorship rule when it held that it did not have to grant access to documents of which it was not the author.

99. The second part of the second plea should therefore be dismissed as unfounded.

100. Lastly, the appellant contends that the Commission failed to discharge its duty to give reasons under Article 190 of the Treaty.

56 — Regulation No 1049/2001 has been applicable since 3 December 2001.

(b) Compliance with the duty to give reasons (third limb)

Arguments of the parties

101. The appellant maintains that the Court of First Instance erred in law when it found that the Commission had correctly discharged its duty to give reasons under Article 190 of the Treaty. It claims that the Court of First Instance was not, on the basis of the statement of reasons for the decision to refuse access, in a position to review whether the Commission had also exercised its power to assess, in particular, whether it was effectively possible to assert the right of access to documents in relation to the Member States and the Argentine authorities.

102. The Commission contends that it did comply with the duty to state reasons under Article 190 of the Treaty.

Assessment

103. It should be borne in mind that the duty to state reasons imposed by Article 190 of the Treaty is founded on principles arising from settled case-law.

104. In that respect, the Court has held that the statement of reasons must be appropriate to the nature of the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to be aware of the reasons for the measure taken and the competent court to exercise its power of review. The requirement to give reasons must be assessed with regard to the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. The statement of reasons does not have to set out all the relevant elements of fact or law, to the extent that assessment of whether or not the statement of reasons for a measure satisfies the requirements of Article 190 of the Treaty must relate not only to its wording but also to its context and to all the legal rules governing the matter in question. [57]

105. Since we are dealing, specifically, with a request for public access to Commission documents, the latter has a duty to ascertain, for each document to which access is requested, whether, in the light of the information available to it, disclosure is in fact likely to undermine an interest protected by one of the exceptions laid down by the Code of Conduct. [58]

106. In the present case, in the contested decision of 23 April 1998, the Commission gives a detailed list of the documents it holds of which it is not the author. [59] It informs the appellant that in order to obtain access to the information contained in those documents, it should contact their authors directly. The Commission explicitly bases the refusal to allow access to those documents on the need to comply with the authorship rule, as enshrined in the Code of Conduct. [60]

107. Consequently, the contested decision of 23 April 1998 does in my view contain a sufficient statement of reasons.

108. The Court of First Instance did not, therefore, err in law by finding that the statement of reasons for the contested decision satisfied the requirements of Article 190 of the Treaty. The third part of the second plea, in so far as it alleges there was such an error in law, must therefore be held to be unfounded.

57 — See, for example, Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 29; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; and Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061, paragraph 93.

58 — See the *Netherlands and Van der Wal* v *Commission* case cited above (paragraphs 24 to 28). See also, on that point, Case T-83/96 *Van der Wal* v *Commission* [1998] ECR II-545, paragraph 43; Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 112; Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraph 36 et seq. and Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 63 et seq.

59 — For details, see the Commission's list, at paragraph 18 of this Opinion.

60 — Ibid.

Conclusion

109. In the light of the foregoing considerations, I propose, accordingly, that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs, in accordance with Article 69(2) of the Rules of Procedure.