common commercial policy (Article 113). It is thus Articles 28 and 113 of the Treaty which together constitute the appropriate legal basis for the establishment of a tariff nomenclature, which is indispensable for the application of customs duties.

The Council's power to establish a statistical nomenclature for the Community's external trade is given by Article 113 of the Treaty, for statistics of external trade, along with the corresponding nomenclature, constitute an indispensable instrument of commercial policy.

2. The fact that a measure which an institution intends to adopt may affect another measure which is based on Article 235 does not necessarily imply recourse to that provision as a legal basis. Such recourse may be contemplated only if the institution in question cannot base its power on any other provision of the Treaty.

3. Since the Council is always entitled to consult the Parliament, the fact that although it was not mandatory such consultation occurred and may have affected the substance of the measure adopted cannot, unlike disregard of the obligation to consult, be regarded as giving rise to unlawfulness.

REPORT FOR THE HEARING
delivered in Case 165/87 *

I — Facts

The work of the Customs Cooperation Council, an international body to which the most important countries engaged in international trade belong, including all the Member States of the European Communities, led to the conclusion on 15 December 1950 of the Convention on Nomenclature for the Classification of Goods (United Nations Treaty Series, Vol. 347, p. 127).

The 'Brussels Nomenclature' is the basis of the present Common Customs Tariff of the EEC. However, it is not used by some of the important trading partners of the EEC, such as the United States and Canada. At the beginning of the 1970s the Customs Cooperation Council prepared a new Convention which was intended to reflect new technical possibilities and could be used world-wide. In replacement of the 1950 Convention the Customs Cooperation Council adopted on 14 June 1983 the International Convention on the Harmonized Commodity Description and Coding System (hereinafter referred to as 'the Convention').

* Language of the Case: French.

Because of delays in ratification, a Protocol of Amendment was adopted on 24 June 1986 amending the conditions for the entry into force of the Convention. The Convention and the Protocol entered into force on 1 January 1988 (Official Journal 1987, L 277, p. 40).

On 28 March 1984 and 9 February 1987 the Commission had proposed that the Council conclude the Convention and Protocol. The two proposals were based on the EEC Treaty, in particular Article 113, since the Commission took the view that it was solely a matter of common commercial policy.

The Council amended the Commission's proposal pursuant to Article 149 of the Treaty and adopted the contested decision concerning the conclusion of the Convention and Protocol on the basis of 'the Treaty establishing the European Economic Community and in particular Articles 28, 113 and 235 thereof'.

The new harmonized system, which is 'intended to be used for the purposes of freight tariffs and transport statistics of the various modes of transport' (fourth recital in the preamble to the Convention), contains a nomenclature one of whose fundamental characteristics is the transition from four to six figures for the codification of goods. Letters of the alphabet and Roman figures in the Common Customs Tariff are to be eliminated.

It is intended to make the transition from the present system to the new one in as 'neutral' a way as possible from the point of view of the customs duties levied. Negotiations under the GATT are in progress to compensate for any alterations in tariff concessions.

Like that of 1950, the Convention provides for an institutional system. It establishes a 'Harmonized System Committee', composed of all the contracting parties, the function of which is to propose amendments to the Convention, to prepare explanatory notes, classification opinions and other advice and to prepare recommendations to secure uniformity in the interpretation and application of the system. The role of the Customs Cooperation Council is to recommend amendments of the Convention to the contracting parties — to be adopted under a simplified procedure — and to approve the notes, opinions and recommendations prepared by the Committee.

II — Written procedure and conclusions of the parties

By application lodged at the Court Registry on 4 June 1987 the Commission brought an action against the Council. It claims that the Court should:

(i) declare void Council Decision 87/369 of 7 April 1987 concerning the conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto;

(ii) order the Council to pay the costs.

The Council contends that the Court should:

(i) dismiss the action;

(ii) order the Commission to pay the costs.

By letter lodged at the Court Registry on 10 September 1987 the Commission waived its right to submit a reply and requested the President of the Court to give priority to the case pursuant to Article 55 of the Rules of Procedure. That request was rejected.

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.

III — Submissions and arguments of the parties

1. The Commission considers that the contested decision is to be regarded as a measure of commercial policy within the meaning of Article 113 of the Treaty. Any recourse to a legal basis with a more cumbersome decision-making process, such as Article 235 and, before the entry into force of the Single European Act, Article 28, thus constitutes an infringement of the Treaty. In that respect the Commission refers to the judgment of 26 March 1987 in Case 45/86 (*Commission* v *Council* [1987] ECR 1493) — generalized tariff preferences.

The Commission once again puts forward its 'instrumental' theory on the interpretation of Article 113, which was confirmed by the judgment in Case 45/86. According to that theory any measure which overtly and specifically governs trade with non-member countries is to be regarded as constituting a specific commercial instrument which must be based solely on Article 113. However, the Commission observes that in the present case it is unnecessary to decide between its theory and that of the Council (according to which any activity which is intended to alter the volume or pattern of trade falls within Article 113), for the two theories lead to the same result, namely that the contested decision must be based solely on Article 113: it constitutes both a specific instrument governing international trade and a measure whose main objective is commercial policy.

In the Commission's view the Convention is an *instrument of commercial policy* because it plays an ancillary role to the international tariff negotiations and their implementation. Moreover, the institutional framework ensures that individual classification decisions to be taken by the contracting parties observe the new nomenclature and that arbitrary decisions are avoided. In consequence trade should be facilitated and its volume probably increased.

The fact that the Convention may also affect trade statistics does not change its character as an instrument of commercial policy. The Convention itself concerns only external trade statistics. Rules in this area are also ancillary to instruments of commercial policy.

As regards internal statistics, it is only for reasons of convenience and expediency that the Community and its Member States have

recourse to the international nomenclature for trade between Member States. It would be illogical to take the view that it is necessary to base the conclusion of the Convention on Article 235 of the Treaty because it affects the regulation on statistics, which in the absence of a specific legal basis for internal trade is based *inter alia* on Article 235.

The Commission also observes that even for international trade the statistical aspect is only subsidiary in relation to the main objects of the Convention. Moreover, in view of the judgment in Case 45/86 even an agreement relating specifically to the harmonization of trade statistics comes under Article 113 of the Treaty.

In the Commission's view recourse cannot be had to Article 28 of the Treaty on the ground that the Convention affects the Common Customs Tariff, which is based on Articles 28 and 113. The two articles in part overlap. The criterion for distinguishing between the two must be a rule of reason according to the main object pursued: a measure whose objective is commercial policy comes under Article 113 irrespective of any consequences on an internal instrument such as the Common Customs Tariff.

Moreover, Article 113 is more general than Article 28, and so the latter should be given a restrictive interpretation. That leads to the same result: Article 28 concerns only the fixing of customs duties and not an international agreement on customs nomenclature; the latter thus falls within the class of measures not specifically mentioned in Article 113, which is not exhaustive in nature, or even into that of 'tariff agreements'.

Even if the Community can be said to have power under Article 28, on the basis of the judgment of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263 — AETR, because the Convention affects the Common Customs Tariff, such a power is purely residual in relation to that derived from Article 113.

The Commission claims that the Convention mainly pursues an *objective of commercial policy.* That is expressed above all in the preamble, which refers almost in every recital to international trade. The preamble contains the actual objectives of the Convention, as is apparent from the very structure of the nomenclature. The main object is to facilitate international trade in general and GATT negotiations in particular, as is confirmed by the contested decision. The statistical and administrative aspects are quite secondary.

A measure based on Article 113 need not necessarily produce direct effects on trade. The argument to the contrary is unjustified and finds no support in the Council's practice. Council Regulation No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (Official Journal 1980, L 134, p. 1), which is based only on Article 113 although it has no direct effect on the volume or pattern of trade, constitutes a precedent in that respect.

Finally, as regards the consequences should the contested decision be declared void, the Commission considers that the Council should replace it with another based on Article 113. It is clear from the principle contained in Article 46 of the Vienna Convention on the Law of Treaties that in the mean time the international obligations

of the Community would not be affected. In the interests of legal certainty the Commission nevertheless suggests that the Court should give some guidance in that respect pursuant to the second paragraph of Article 174 of the Treaty.

2. The Council is of the opinion that the Convention does not pursue objectives of commercial policy. Nor is it an instrument of commercial policy. It has neither the object nor the effect of altering the volume or pattern of the Community's external trade. It simply establishes a nomenclature to be used by the contracting parties in their customs tariffs and in their external trade statistics. The contested decision is therefore not a measure of common commercial policy within the meaning of Article 113. That article should, however, be the joint legal basis along with Articles 28 and 235 because the Convention affects measures based on those articles: the Common Customs Tariff, based on Articles 28 and 113, and the nomenclature of goods for the external trade statistics of the Community and statistics of trade between Member States (Nimexe), which is based on Article 235. It follows from the judgment in Case 22/70, cited above, that a Community measure which affects another Community measure should have the same legal basis.

G. C. Rodríguez Iglesias
Judge-Rapporteur