preclude traders who are not affiliated to an organization established for the purpose of performing the legal obligations imposed on its members under the law implementing Directive 68/414 on the maintenance of stocks of petroleum products and who wish to export products purchased on the domestic market from being denied the possibility of obtaining a refund of contributions paid by their supplier to that body and passed on in the sale price or from being enabled to obtain such refund under certain conditions, provided that there is no difference in treatment between products intended for export and those placed on the domestic market of the Member State concerned.

REPORT FOR THE HEARING
in Case C-302/88 *

I — Legal framework

The Wet Voorraadvorming Aardolieprodukten (Law on the Stockpiling of Petroleum Products, hereinafter referred to as 'WVA') applies in the Netherlands. This law implements the obligations undertaken within the framework of the International Energy Agency and arising in particular from Council Directive 68/414/EEC of 20 December 1968 (Official Journal, English Special Edition, 1968 (II), p. 586) relating to the maintenance of stocks of certain petroleum products with a view to coping with interruptions to supply.

The WVA defines the 'obligations to maintain stocks'. Persons who 'market' (produce or import, or cause to be produced or imported) certain petroleum products in the Netherlands are required to maintain a fixed stock of these products, as defined in the WVA. The Minister for Economic Affairs may grant exemption to producers from these obligations if a third party declares his readiness to assume them, in which case the Minister for Economic Affairs may declare that these obligations have been totally or partially transferred to that third party. The decision of the Minister may also contain provisions with which the third party to whom the obligations have been transferred will be required to comply.

For this purpose, the Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten (Provisional Central Board for the Stockpiling of Petroleum Products, hereinafter referred to as 'Icova') was set up on 7 September 1978 with the purpose of taking over from its members the obligation to maintain stocks and of discharging that obligation on their behalf. Under the rules governing Icova the Minister for Economic Affairs who, *inter alia*, appoints the members of the Executive Council, may issue instructions which must be followed, may decide on the dissolution of the Board

* Language of the case: Dutch.

and has to approve the draft budget and the annual accounts.

The costs incurred by Icova in the maintenance of stocks are defrayed by a charge, termed a contribution, which is levied on participating undertakings. This contribution is referred to as a 'verplichte voorraadafdracht' (contribution to cover the compulsory maintenance of stocks, hereinafter referred to as a 'VVA'). It is calculated on the quantity of petroleum products (HFL per 100 litres) released into free circulation within the country. Members inform Icova prior to the 15th day of each month of the volume of petroleum products which they have released on to the domestic market during the previous month and are required to make a payment to Icova in respect of these most recent quantities. Member undertakings generally pass on these contributions to their customers, although neither the WVA nor the rules governing Icova impose an obligation in this respect.

Since the petroleum products which undertakings belonging to Icova export on their own account are not taken into consideration for the purpose of determining the extent of the obligation to maintain stocks, such undertakings are not required to declare the quantities which have been exported or placed in a customs warehouse (open warehouse).

When traders in petroleum products established in the Netherlands and not belonging to Icova purchase on the Netherlands market from an undertaking which is a member of Icova, the purchase price normally includes the VVA contribution. If those traders, to the extent to which they 'market' relatively few petroleum products, or indeed none at all, wish to export the petroleum products which they have purchased, they find themselves at a competitive disadvantage in relation to undertakings which are members of Icova and which are not required to pay any VVA contributions in respect of the products which they export.

In September 1981 Icova issued rules which allowed exporters who were not members of Icova to claim, as from 1 January 1981, a refund of VVA contributions from Icova, provided that a number of conditions were satisfied, including the condition that the consignment of petroleum products involved had been purchased from a member of Icova and directly exported in its entirety by the trader concerned. On 25 February 1982 Icova made a number of amendments to the rules governing refunds for the financial year 1982. Henceforth it was possible to obtain a refund in respect of exports of partial consignments. However, the rules required, amongst other things, a quarterly declaration of purchase certified by an independent registered accountant. A further amendment of the rules in 1982 related to exports made in 1981 and permitted exporters to submit the declaration from the registered accountant only once a year.

The WVA was amended with effect from 1 January 1987 with the result that the difference in treatment between undertakings which are members of Icova and those which are not has been removed. The amending legislation set up a Stichting Centraal Orgaan Voorraadvorming Aardolieprodukten (Central Board for the Stockpiling of Petroleum Products, hereinafter referred to as 'COVA') to which was assigned the task of establishing stocks of petroleum products. The stockpiling, for which COVA is responsible, is financed by

a stockpile levy imposed on behalf of the Minister for Finance and collected by the national tax authorities. The stockpile levy is reimbursed in the event of export.

II — Facts and procedure in the main proceedings

Hennen Olie is a trader in petroleum products established in the Netherlands which purchases petroleum products on the Netherlands market from undertakings which are members of Icova. It stores these products in its own tanks and delivers them in consignments to its customers abroad. As it was not a member of Icova, it was unable initially to qualify for the refund of VVA contributions. Between 1 January 1981 and 1 January 1987 it could so qualify, but only provided it satisfied a number of conditions which involved expenses which were far from negligible.

Hennen Olie brought an action for compensation before the Arrondissementsrechtbank (District Court), Rotterdam, in 1983. In 1985 it appealed to the Gerechtshof (Regional Court of Appeal), The Hague, which took the view that the outcome of the proceedings could depend on the interpretation of Community law and in particular of Article 34 of the EEC Treaty, and decided therefore to stay the proceedings until the Court had given a preliminary ruling on the following questions:

'(1) Is a rule of national law, as described above (in the order for reference), incompatible with Article 34 of the EEC Treaty, properly construed?

(2) Does it matter for the purposes of the answer to be given to Question 1 whether the aforementioned difference between traders as regards their competitive position is entirely or partially offset by rules which concern the reimbursement of the aforementioned VVA contributions and which have not been adopted by the Member State concerned itself?'

The order for reference was lodged at the Court Registry on 14 October 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by the plaintiff in the main proceedings, represented by T. R. Ottervanger, of the Brussels Bar; by the defendant in the main proceedings, represented by A. J. Braakman and P. Glazener, of the Rotterdam Bar; by the Netherlands Government, represented by the Acting General Secretary to the Minister for Foreign Affairs, H. J. Heinemann; and by the Commission of the European Communities, represented by R. Barents, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry and assigned the case to the Sixth Chamber. However, it requested the Netherlands Government to answer a number of questions.

III — Written observations submitted to the Court

1. According to *Hennen Olie BV*, the system which was in force in the Netherlands between October 1980 and 1 January 1987 resulted in a restriction on exports in so far as an independent exporter was unable to compete with exporters who were members of Icova and who did not have to pay VVA contributions when exporting. The total lack, initially, of rules regarding refunds, coupled with the subsequent introduction of very complex and burdensome rules, were liable to, and in fact did, constitute a barrier to exports.

The present case concerns measures which apply specifically to exporters and which therefore fall within the scope of the prohibition contained in Article 34 (see the judgments in Case 68/76 *Commission* v *France* [1977] ECR 515 and in Case 237/82 *Jongeneel Kaas* v *Netherlands and Stichting Centraal Orgaan Zuivelcontrole* [1984] ECR 483). Consequently, Hennen Olie suggests that the first question be answered in the affirmative.

2. The *defendant in the main proceedings*, Icova, points out that the present case does not concern national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for the domestic market of the State in question (see, in particular, the judgment in Case 15/83 *Denkavit* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171). On the other hand, in so far as the WVA system resulted in unequal treatment between domestic trade and export trade, such inequality did not operate to the detriment of exports. In fact, in domestic competition the costs connected with stock-piling have always been passed on, while the same costs with regard to exports were either not passed on or else were passed on to the same extent as would have been the case in domestic trade.

To the extent to which the WVA goes further than Directive 68/414, it is not incompatible with Article 34 of the Treaty.

Icova therefore proposes that the first question be answered in the negative.

Turning to the second question, Icova proposes that the reply to that question, on the assumption that an infringement of Article 34 of the Treaty has been found to exist, should be that an infringement of that article may be remedied by rules which allow the refunding of a contribution and which have not been enacted by the Member State itself, to the extent to which those rules have the effect of preventing any consequences incompatible with Article 34 of the Treaty from occurring.

3. The *Netherlands Government* maintains that the obligation imposed by the WVA on those who market petroleum products within the Netherlands is a measure of general application which does not have as its specific object or effect the restriction of patterns of exports and which therefore does not constitute a barrier to exports. It stresses the fact that the obligation to maintain stocks, as introduced by the WVA, is only imposed in connection with the placing of products on the domestic market. On the other hand, petroleum products

which are exported are not taken into consideration for the purpose of determining the extent of the obligation to maintain stocks. However, when an undertaking which is required to maintain stocks sells petroleum products to a purchaser established in the Netherlands, this transaction becomes relevant for determining the extent of the obligation to maintain stocks in so far as the products are thus placed on the domestic market. The costs associated with the compulsory build-up of stocks are therefore incurred irrespective of the use to which the purchaser intends to put the petroleum products delivered to him by the undertaking which is required to maintain stocks.

The Netherlands Government does not believe that Article 34 of the Treaty implies that rules such as those set out in the WVA are incompatible with it. The first question should therefore be answered in the negative; this answer renders any examination of the second question unnecessary.

4. The *Commission* argues that it is clear from the case-law of the Court that charges imposed on products, along with other (parafiscal) levies, come under Articles 12 to 16 and Article 95 of the Treaty (in this regard it refers to the judgment of the Court in Case 27/67 *Fink-Frucht* v *Hauptzollamt München* [1968] ECR 223 and Case 74/76 *Iannelli & Volpi* v *Meroni* [1977] ECR 557). It then goes on to answer the question raised in the present case regarding Article 34 in the alternative. Referring to the judgment in Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409, it states that Article 34 of the Treaty applies when a provision affects exports in a discriminatory manner. The VVA system does not discriminate against exports because sales on the domestic market are always affected by the contribution while exports are so affected only where they are carried out by an undertaking which is not a member of Icova. In this latter case, national production and exports are treated identically. Consequently, the only difference here involved relates rather to the treatment of two patterns of exports: those carried out by an undertaking which is a member of Icova and those carried out by an undertaking which is not. The Commission concludes that if Article 34 applies solely in the case of discrimination against exports, the system in question cannot be regarded as infringing that article.

With respect to the second question, the Commission considers that a body such as Icova may be assimilated to the State of the Netherlands (see the judgments in Case 31/87 *Beentjes* v *Netherlands* [1988] ECR 4635 and in Case 249/81 *Commission* v *Ireland* [1982] ECR 4005). It stresses particularly in this respect the fact that Icova plays a central role as regards compliance with the obligation to maintain stocks which devolves on the Netherlands, as well as the fact that Icova is placed entirely under the control of the Minister for Economic Affairs.

The Commission suggests that the Court should reply in the negative to the questions referred by the national court.

With regard to Article 95, the Commission points out that that provision is applicable to discriminatory duties on exports (see judgment in Case 142/77 *Statens Kontrol med Ædle Metaller* v *Larsen* [1978] ECR 1543). The present case does not involve discrimination against exports. However, the Commission does point out that the VVA system must be described as a barrier

to trade, whether the contribution is not refunded or is only refunded subject to certain conditions. It believes that it is legitimate to take the view that Article 95 of the Treaty also applies to charges which, although not themselves discriminatory, have the clear and specific effect of hindering trade (see the judgments in Case 31/67 *Stier* v *Hauptzollamt Hamburg-Ericus* [1968] ECR 235 and Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409).

IV — Answers to the written questions put by the Court

The Court requested the Netherlands Government to answer the following questions:

(1) Do all importers and producers of petroleum products in the Netherlands who are required to maintain stocks pass on in practice to their customers the costs connected with this requirement and to what extent? Does every operator remain totally free to decide himself whether or not to pass on such costs? What is the significance of the date 1 October 1980?

(2) What method was used from 1 October 1981 to 1 January 1987 to calculate the reimbursement of the contribution for compulsory stockpiling in respect of quantities of petroleum products supplied by members of Icova and exported by traders who were not required to maintain stocks?

(3) Did traders in petroleum products, who were not required to maintain stocks and who purchased petroleum products supplied by importers or producers who were not members of Icova, also qualify, prior to 1 January 1987, for a reimbursement of the costs connected with the aforementioned obligation to maintain stocks and which formed an integral part of the selling price?

The *Netherlands Government* replied that up to 1 January 1987, the date on which the new WVA entered into force, the old WVA, which entered into force on 1 April 1977, required producers and importers of petroleum products to maintain stocks corresponding to 90 and 70 days respectively of their sales to domestic purchasers during the course of the preceding calendar year.

Since 1 April 1977, the producers and importers in question have been required to maintain stocks under the conditions set out in the WVA. The costs relating to compliance with the requirement to maintain stocks form part of the business costs of the undertaking that is under an obligation to stockpile. It is a matter for the producers and importers concerned to decide whether or not to pass on to purchasers the costs connected with the obligation to stockpile. For the undertaking, the position in respect of this item of cost is the same as that in respect of other items such as raw materials, depreciation and social security contributions. The extent to which the proceeds from the products is sufficient to cover all the costs of the undertaking or to which it exceeds these costs depends on the circumstances of the market.

The rules in force in the Netherlands do not lay down any obligation to inform the public authorities of the extent to which the costs connected with the requirement to maintain stocks have actually been passed on.

As from 1 October 1980, undertakings required to maintain stocks have been authorized to entrust to Icova part of the performance of this obligation. Since this date, the costs connected with compulsory stockpiling may therefore also consist of costs (VVA) invoiced by Icova to the member undertaking (the importer or producer required to maintain stocks). Also under this system, the producer or importer required to maintain stocks may, without being compelled to do so, include this item of cost in the price which he invoices to his purchaser.

Icova determines the conditions under which it may refund contributions for compulsory stockpiling. The rules applicable for 1981 were laid down on 10 September 1981. By notice dated 14 October 1982, the rules were improved on two points for the accounting year 1982. These rules were equally applicable to exports made in 1981. Apart from a few amendments, this text was also valid for the accounting year 1983. These provisions remained substantially in force until 1 January 1987.

The producer or importer required to maintain stocks may invoice to the purchaser the costs associated with the obligation to stockpile, but he is not compelled to do so. Feasibility in this respect is dictated by the conditions governing the market. The result of all this is that the undertaking required to maintain stocks may, after carrying out a transaction, grant a reimbursement in respect of the costs of compulsory stockpiling which were included in the selling price, but it is not obliged to do so. This applies both in the case of producers and importers who are members of Icova and in the case of undertakings required to maintain stocks but which are not members of Icova. The obligation to maintain stocks applies to quantities placed on the market in the Netherlands. Thus, the making of a delivery in the Netherlands has consequences in respect of the quantity which must be stockpiled and also entails from this fact costs for the producer or importer who is required to maintain stocks. Only those quantities which are exported by a producer or importer himself do not involve an obligation to stockpile.

T. F. O'Higgins
Judge-Rapporteur