Lecourt Monaco Pescatore

Donner Trabucchi Mertens de Wilmars Kutscher

Delivered in open court in Luxembourg on 12 December 1972.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 25 OCTOBER 1972[1]

Mr President,
Members of the Court,

I — *Introduction*

1. *The problem*

One of the essential aims of the Treaty establishing the European Economic Community is the creation of a unified economic area, free of internal barriers, in which there must be first the gradual establishment of a customs union and then an economic union.

In consequence of this the common market must, in its relations with third countries, act like a unit, Member States no longer being entitled to conduct independently of one another their commercial relations with the outside world. Appearing in this regard like a 'block', the European Community must not, however, practise autarky. On the contrary, the orientation of its commercial policy is defined, both by the preamble to and Article 110 of the Treaty, as being aimed at the progressive abolition of restrictions on international trade and the lowering of customs barriers. It is therefore a question of a liberal policy in regard to third countries, fully consistent with the general world aspiration for an organization of international trade founded on non-discrimination and rejection of the system of 'preferences'.

Moreover, on the creation of the European Economic Community, Member States were bound in law, either bilaterally with certain countries, or multilaterally, and in particular under the General Agreement on Tariffs and Trade (GATT).

In what way have these obligations been affected by the Treaty of Rome and by secondary Community law? How can conflicts, if they arise, be resolved? Can nationals of the common market usefully rely, as a ground for contesting certain measures adopted by the Community authorities, on the alleged infringement of certain GATT provisions?

Can this Court, entrusted under Article 164 of the Treaty of Rome with ensuring that the law is observed in the interpretation and implementation of the Treaty and also called on by Article 177 and in co-operation with the national courts of Member States to ensure the uniform interpretation of Community rules, give a ruling on the compatibility of those rules with the external undertakings of the Community or of Member States and, more generally, with 'an international law other than Community law'? That is, in

1. Translated from the French

principle, the question referred to you, in accordance with Article 177, by the College van Beroep voor het Bedrijfsleven—the Netherlands Appeal Court in economic matters—which asks you, in addition, to rule whether certain regulations of the Commission dealing with the importation of agricultural products subject to a common organization of the market may be regarded as valid under the provisions of Article XI of GATT.

But, before beginning to examine this problem, I must recall briefly—for you have already had occasion to deal with other aspects of these cases—the circumstances in which you have today had this matter referred to you.

2. *Circumstances of reference to the Court*

On the basis of Regulation No 23 of 4 April on the progressive establishment of a common organization of the market in fruit and vegetables, the Council of the European Communities, by Regulation No 2513 of 9 December 1969, coordinated and unified the import systems in respect of those products as applied by each Member State in regard to third countries. This regulation prohibits, in principle, any quantitative restriction or measure having equivalent effect on imports into the common market of certain of those products, including eating apples.

But Article 2 of that regulation contains a protective clause by virtue of which, if the internal Community market in one of those products suffers, or is threatened, by reason of imports or exports, with serious disturbance capable of jeopardizing the objectives of the common agricultural policy as defined by Article 39 of the Treaty, appropriate measures may be taken in regard to trade with third countries until the situation has returned to normal.

In such an event, it is for the Commission, on the request of a Member State or of its own motion, to take the necessary measures, which are to be implemented immediately.

This protective measure was brought into operation in the spring of 1970, for the market in eating apples by Regulation No 459/70 of the Commission of 11 March 1970. In the preamble to that regulation, the Commission points out that the increase in domestic production had created in Belgium, France, Italy and Luxembourg a 'situation of crisis' characterized, within the meaning of the Community rules (Article 6 of Council Regulation No 159/66 of 25 October 1966), by a lowering of quotations over quite a long period in one or several typical markets below a specific threshold; that there was a threat to the German and Netherlands markets; secondly, the freeing of imports from third countries as introduced by Regulation No 2513/69 of the Council involved, according to the Commission, the risk of an increase in imports from third countries which had already been 'considerable' in the preceding period.

From those findings the Commission concluded that the common market was threatened with serious disturbances capable of jeopardizing the objectives of Article 39 of the Treaty. It therefore became necessary, in order to limit imports to a level which the Community could absorb without the market situation worsening, to adopt temporary measures for suspending imports through a system of licences.

In consequence, Regulation No 459/70, which enacted the protective measures applicable to the importation of eating apples, provided that with effect from 1 April and until 30 June 1970 all imports into the Community of apples other than cider apples ... are subject to the presentation of an import certificate. Having received each week information from Member States as to the quantities in respect of which application has been made for certificates, the Commission 'shall appraise the situation and decide on the issuing of certificates'.

In a second Regulation, No 565/70 of 25 March, the Commission laid down the method of administering import certificates, providing that 'applications ... submitted up to 20 March 1970 shall be accepted for the quantity indicated in the application and up to a maximum of 80% of a reference quantity' equal to that which the applicant imported into the Community during the corresponding month of 1969.

It was therefore a question of fixing a general ceiling for imports at the level reached in the preceding year during the critical period.

The date of 20 March 1970, the date of application of this scheme to importers, was then put back several times by the Commission, in particular in pursuance of Regulation No 686/70.

In May, four fruit-importing firms in Rotterdam, namely International Fruit Company, Kooy Rotterdam, Velleman en Tas and Jan van den Brink's Im- en Exporthandel, requested the Produktschap voor Groenten en Fruit, the competent Netherlands authority, entrusted with the task of, among other things, implementing the rules relating to the import of fruit and vegetables, to issue them with certificates enabling them to transport eating apples from third countries. On the Produktschap informing them that these applications 'had to be rejected' or that it 'had been decided to reject them', these companies first brought an action before this Court for the annulment of the measures taken by the Commission of the European Community regarded as forming the basis of the refusal set up against them; secondly, they appealed to the competent national court, the Netherlands Appeal Court in economic matters, for the annulment of the decisions of rejection notified to them by the Produktschap.

By judgment of 13 May 1971 the Court declared the direct actions brought by these undertakings (Joined Cases 41 to 44/70, [1971] ECR 411) admissible but rejected them as unfounded.

As for the Netherlands court, before which the applicants complained that the state had, contrary to Regulation No 459/70 of the Commission, transferred the exercise of the powers which it held thereunder to the Produktschap voor Groenten en Fruit and claimed that certain provisions of domestic law applied by the Produktschap were contrary to Community rules, it referred to you, for the first time, on the basis of Article 177 of the Treaty, preliminary questions on the interpretation of the regulations in question.

By judgment of 15 December 1971 (Joined Cases 51 to 54/71, [1971] ECR 1107) the Court gave its preliminary ruling.

Coming back to the examination of the dispute in the main action, the court deciding on the substance of the case, having followed the interpretation given by the Court on the questions referred, found itself unable to conclude its consideration of those actions.

In fact, the plaintiff firms made before it a submission based on the incompatibility of Regulations Nos 459, 565 and 685/70 of the Commission, establishing the system for the importation of eating apples and determining the mode of administration of import certificates, with the provisions of Article XI of the General Agreement on Tariffs and Trade.

That article, entitled 'General Elimination of Quantitative Restrictions', provides in paragraph 1: 'No prohibition or restriction other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party'. Paragraph 2 of that article sets out a certain number of exceptions to that prohibition of principle on quantitative restrictions.

The economic appeal court, considering with good reason, I think, that it did not have the power to judge the validity of Community regulations as compared with a provision of an international agreement by reason of the powers conferred in this regard on the Community in its relations with third countries, decided, on 5 May 1972, to have recourse for a second time to the procedure set up by Article 177 and to refer to the Court the following questions:

(1) Does the validity of measures taken by the institutions of the Community, which is one of the matters dealt with in Article 177 of the EEC Treaty, also cover the validity of thosemeasures under an international law other than Community law?

(2) If the answer is in the affirmative, are Regulations Nos 459/70, 565/70 and 686/70 invalid as being contrary to Article XI of the General Agreement on Tariffs and Trade?

II — *Position of the problem*

The first of those questions was deliberately drafted by the Netherlands economic court in as wide terms as possible by asking the Court to state its position on the following alternatives:

— Can the validity of measures emanating from Community bodies be judged solely with reference to the provisions of the Treaty of Rome or also with reference to the rules of secondary Community law, higher in the hierarchy of laws than those the validity of which is in question?

or

— Where appropriate, must such judgment as to validity be operated by the European Court of Justice with reference to rules unrelated to Community law, both primary and secondary, to rules which come under, to repeat the expression used, an 'international law other than the law of the Community'?

If one were to ignore the procedural context of the question, its abstract terms would call for real deliberation and for a proper reply it would be necessary to consider many hypotheses without doubt very different one from the other. But its legal context is clearly delimited; it is a question of interpreting Article 177 of the Treaty. This sole fact makes me consider that the Court's jurisdiction cannot be questioned.

It is true that the task which is entrusted to the Court by Article 164 of the Treaty establishing the European Economic Community of ensuring that 'in the interpretation and application of this Treaty the law is observed' cannot be limited to reviewing solely whether the measures adopted by the Community institutions conform strictly to the rules of the Treaty duly interpreted by the Court.

First, because such an interpretation demands, frequently, *per se*, that the Court should consider general or 'classical' rules of international law, as it has stated in regard to the interpretation of Article 88 of the Community Coal and Steel Treaty. Next, because both the Treaty itself, through certain of its provisions, and secondary Community law, often refer, expressly or by implication, to provisions of Treaty law made with third countries and in particular, as we shall see, to GATT, or even, sometimes, by incorporating the contents of such agreements.

Finally, because the Court will also frequently find itself, at the invitation of the authors of the Treaty or of its own motion, obliged to apply the 'general principles of law', not only general principles common to the national laws of Member States, but also principles of public international law.

On the other hand, the European Economic Community, being a body having international personality, holds the power to conclude treaties with third countries or with international organizations (Article 228), whether it is a question of commercial agreements (Article 113), cooperation agreements or association agreements (Article 238). It also has relations with various European organizations and with the United Nations Organization (Articles 229, 230 and 231).

Not only, therefore, is the Court's jurisdiction limited solely to Community law, not only must it, on many occasions, have recourse, in its task of interpretation, to rules of general international law or international agreements, but it is undeniable that since the Community is itself subject to international law and is obliged by law to observe the agreements which bind it, the question whether measures adopted by its institution are compatible with such agreements falls within the Court's jurisdiction at least when it is seised in the circumstances prescribed by the Treaty.

There is no doubt that just as the Court has constantly asserted the precedence of Community law over the national laws of Member States it cannot but recognize the

superiority of the Community's international agreements over the measures adopted by its institutions.

It is inconceivable to apply two different systems of reasoning according to whether it is a question of relations between the legal systems within the Community or relations governed by Community law and external international law.

Byt a distinction must be made which is necessitated, moreover, by the implementation of Article 177.

In one respect, the conflict of rules may arise in the Community's relations with one or several third countries in regard to the infringement of an agreement binding the Community as a contracting party. In such a case, I cannot see how the dispute can be a matter for the Court. In fact, such conflicts are resolved by the procedure governing general international law which is most often by negotiation, circulation or arbitration.

In another respect, although, by virtue of the Treaty, the Community institutions, Member States and national and legal persons to whom individual decisions are addressed have, in the conditions of admissibility determined by Articles 169 and 170 (action for failure to act against a State), 173 (review of legality of acts of the Council and of the Commission), 175 (actions for failure to act by institutions), 178 and 215 (actions for damages), the right to bring their complaints before this Court, that is not the case in respect of third states or international organizations. There is consequently no point in speculating on this first aspect which is outside the limits of the Court's jurisdiction.

Under a second aspect, however, the problem of the compatibility of Community law with the rules of international law, arising in a preliminary question, is in very different terms.

What, in fact, is the position?

The national court of a Member State before which a dispute is brought raising as an issue either the interpretation of the Treaty itself or the validity or interpretation of measures taken, under the Treaty, by the institutions, decides to stay the proceedings, It has, according to the distinction drawn by Article 177, the option of doing so or the obligation of doing so when it is a supreme court against whose decisions there is no judicial remedy under national law.

It refers to the Court one or several preliminary questions. They are questions the solution of which is necessary to decide the dispute in the main action.

In the classical system of preliminary questions it is also necessary that the court dealing with the substance of the case should lack the jurisdiction *ratione materiae* to decide this question. Under the Treaty of Rome the reason for preliminary references is to ensure uniformity of interpretation of Community law by the European Court of Justice, so that its rules are applied in accordance with the same criteria in all the Member States, the court dealing with the substance of the case having to conform to the interpretation of this Court.

Such a system is of enormous importance in the situation where, as in the present cases, it is a question of the validity of Community regulations which, according to the words of the second paragraph of Article 189, are 'binding' in their entirety and directly applicable in all Member States.

Since before these regulations may be held invalid under provisions of the law of an international agreement, which is outside the legal system of the Community, the applicants must, in the context of Article 177, in invoking such provisions, be able to rely on rights deriving from them. In other words those provisions must have a *direct effect* within the Community.

The unity and, it can be said, the very existence of Community law require that the Court is alone empowered to say, with the force of law, whether an agreement binding the Community or all the Member States is or is not directly applicable within the territory of the Community and, if it is, whether or not a measure emanating from a Community institution conforms to that external agreement.

The principle of direct effect is one of those established by the case-law of the Court through judgments of 5 February 1963, Case 26/62, *Van Gend and Loos*, of 15 July 1964, Case 6/64, *Costa v ENEL*, and

of 16 June 1966, Case 57/65, *Lütticke*, as is the legislative practice of the Community. It is applied in the relationship between Community law and national law and must also be applied in the relations between Community law and national law and must also be applied in the relations between international law and Community law. In order to resolve whether an international measure has such a direct effect, it is not enough to consider this act as a whole; it is necessary to examine the particular provisions the infringement of which is relied upon, because it is a peculiarity of international treaties that they may contain both provisions which are directly applicable and others which are not.

Furthermore, recognition of direct effect is not a matter of an alternative. All the provisions of a treaty bind States or other legal persons representing people, as contracting parties, and must, by reason of this fact, be observed by them, subject to the means of ensuring this observance. If therefore the binding nature of all the provisions of an international treaty is undeniable, the question arises whether certain of the provisions of a treaty may have a direct effect in the legal system either of the State or, *mutatis mutandis*, of the Community.

That is therefore a problem of interpretation the solution of which is dependant on the coincidence of various judicial and technical processes:

— analysis of the provisions,

— examination of the context and general scheme of the treaty,

— aim of the provision in question, having regard to overall objective of the measure,

— finally, circumstances in which the contracting parties have decided to apply the treaty.

It is to this examination that I must now turn in connection with Article XI of the General Agreement on Tariffs and Trade, once I have set out the ways in which this general agreement affects the European Economic Community.

Let us bear in mind, for the moment, that in relation to the question of principle put by the economic appeal court of the Netherlands the word 'validity', within the meaning of Article 177 of the Treaty of Rome extends not only to the validity of measures adopted by the Community institutions with reference to the Treaty and secondary Community legislation but also to the validity of those measures with reference to an international law other than Community law, subject to the two condition that the provision of international law invoked binds the Community and that it has a direct effect in its legal system.

III — *Does the General Agreement on Tariffs and Trade bind the Community? Are the provisions of Article XI of that Agreement directly applicable within the Community?*

The aim of the General Agreement on Tariffs and Trade is, according to its preamble, 'the substantial reduction of tariffs and other barriers to trade and ... the elimination of discriminatory treatment in international trade' which includes the disappearance of all quantitative restrictions as prescribed, expressly, by Article XI.

Concluded originally by eight States, including Belgium, France, Luxembourg and the Netherlands, this Treaty was, on 30 October 1947, the subject of a protocol under the terms of which the contracting parties agreed to apply, on a provisional basis, as from 1 January 1948:

— parts I and II of the General Agreement

— and part II of that agreement, which includes Article XI, but 'in so far as is compatible with current legislation'

Italy joined GATT with effect from 30 May 1950 in pursuance of the Protocol of Annecy of 10 October 1949. As for the Federal Republic of Germany it joined with effect from 1 October 1951 in pursuance of the Protocol of Torquay of 21 April of the same year.

Thus, before the entry into force of the Treaty of Rome, the six Member States of the European Economic Community were from the start bound by GATT, in pursuance either of the protocol of provisional application or of protocols of accession.

It is therefore necessary to inquire into what has become of the undertakings entered into by them under the General Agreement after the creation of the Community.

The question is governed by the first paragraph of Article 234 of the Treaty of Rome, which is as follows:

The question is governed by the first paragraph of Article 234 of the Treaty of Rome, which is as follows:

'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.' And it is on the basis of this provision that the plaintiff firms in the main actions have sought to justify the allegation that the Commission regulations are invalid. This provision very clearly recognizes the principle that agreements made with third countries must be kept. But, having stated this principle, it was necessary to take account of the fact that the only reason for the particularly close links agreed to within the framework of the European Community is that they enable the attainment of objectives of common policy and cooperation which are inconceivable in a broader system. For this purpose, it was necessary for Member States to obtain recognition from third countries with which they had entered into multilateral agreements, that they had, without being discriminatory towards them, to accord among themselves advantages which it was not possible to grant the third countries.

That is why the second paragraph of Article 234 provides that to the extent that prior agreements are not compatible with the Treaty of Rome Member States shall take all appropriate steps to eliminate the incompatibilities established, understanding thereby to negotiate and to resort, where appropriate, to the normal procedure governing conflicts of international law; such States must give each other, if the need arises, mutual assistance to arrive at this end, by adopting where necessary a common attitude.

The above provision has remained inapplicable with regard to GATT, for not only have the Community and the States not considered the agreement as being incompatible with the Treaty of Rome—in which case it would have been necessary to take the steps provided for by the second paragraph of Article 234, but, on the contrary, the Community has considered itself as being bound by the General Agreement. First, a certain number of provisions of the Treaty of Rome and more especially of secondary Community legislation are exactly in keeping with the provisions of GATT and, although it is true that express references to multilateral agreements in the Treaty are rare, references by implication and more especially provisions taken from them are not lacking—see for example Articles 18, 29, 110 and 111 of the Treaty.

In the same way, the Community authorities, which are mindful of the compatibility of their action with the rules of GATT in regard to third countries, frequently base their decisions directly on the provisions of the General Agreement. Let me give as specific examples Regulations of the Council Nos 46/64 of 30 April 1964 and 65/65 of 13 May 1965 in the fruit and vegetable sector and the very regulations of the Commission which are at issue in the present cases. Similar references are to be found in Community law relating to other market organizations; that is the case in respect of Regulation No 14/64 of the Council on beef and veal, Regulation No 136/66 on fats and oils and Regulation No 160/66 on processed products.

However, it so happens that the rights which Member States are recognized to possess and the obligations assumed by them in the context of GATT are essentially, at least since the end of the transitional period, dependent on Community powers, whether it is a question of the Common Customs Tariff or decisions

directed at regulating trade with Third States in the sectors subject to a common market organization.

The Community is therefore, in reality, bound by the provisions of the General Agreement although it is not a contracting party in the formal sense of the expression and that can be seen in the fact that since 1960 it has taken part in the first multilateral negotiations held under GATT, one of the objects of which consisted in substituting Community concessions for tariff concessions of Member States. In accordance with Article XXIV of the General Agreement the protocols signed in Geneva in 1962 and 1963 were adopted both by the Council of the Community and by the Member States.

Likewise, the Community took part in the commercial negotiations, known as the Kennedy Round, of 1964 and 1967, the agreements resulting from them having been concluded by decision of the Council of 28 November 1967.

Finally, it has also taken part in other multilateral discussions, consultations and negotiations which concerned its commercial policy.

If, by acting as a member of the GATT organization and accepted as such by the other contracting parties, the Community is bound by the General Agreement in the same way as it is bound by the agreements which it itself concludes in accordance with Article 228 of the Treaty, the argument which the plaintiff companies advance on the basis of the first paragraph of Article 234 is not relevant; it can be of no relevance in solving the question of validity put to you.

It is, secondly, by examining the wording of GATT, the procedure governing any conflicts between contracting parties and finally the circumstances in which the Agreement has been implemented that it can be ascertained whether Article XI has direct application in the Community legal system.

As far as I am aware, it is virgin territory, at least in so far as concerns the case-law of the Court. The Court decided by judgment delivered on 27 February 1962, in Case 10/61, *Commission* v *Italian Republic*, [1962] ECR 1, that the Treaty of the European Economic Community prevails, in the matters which it governs, over previously concluded agreements concerning relations *between Member States*, including even agreements made within the framework of GATT. But that decision, which relates to an action for failure to act brought against the Italian Republic, is of no use in the solution of the question which is today put to the Court, since it relates, not to the *obligations* arising out of the GATT provisions and imposed upon Community bodies, but to the *rights* which Italy claimed it could invoke from that agreement in the relations between Member States and the Community.

Nor is it possible to rely on the judgment of 15 December 1971 in which, on the request of this same economic appeal court of the Netherlands and with reference to the same disputes in the main action, the Court declared that 'in trade with third countries the application of quantitative restrictions and of measures having equivalent effect forms part of the common commercial policy under Article 113 of the Treaty and the provisions on the common agricultural policy, in particular Article 40(3), which provides for the establishment of common machinery for stabilizing imports or exports'. In that case it was therefore a matter of judging whether the decisions taken in 1970 in respect of the importation of eating apples were in conformity with the Treaty of Rome and it does not suffice to assert that this Treaty, both in terms of quality and chronology, is superior to GATT in settling the problem.

It is therefore necessary to examine whether Article XI of GATT has direct effect in the Community system, with the meaning and consequences which this Court attaches to that expression.

There are serious reasons for thinking that that is not the case. In this connexion, decisive importance can most certainly not be given to certain decisions delivered by national courts. Those in Germany have held in regard to the relationship between Article III of GATT and the *domestic* legal system that Article III, which concerns national action in regard to internal

taxation and regulations, is not directly applicable, adding that the provisions of the General Agreement are not, in their entirety, such as to confer rights on individuals (Bundesfinanzhof, 29 April 1969, VII 81/65/BZB1 1969, p. 1007; Finanzgericht Bremen, 20 June 1969, II 1214/67 ZFZ 1971, p. 51; Finanzgericht Hamburg, 29 October 1969, IV 356/66 H, Entscheidungen des Finanzgerichts 1970, p. 145). A solution which is outwardly different was adopted by the Italian Corte di Cassazione, still with regard to Article III of GATT (Corte di Cassazione, 6 July 1968, No 2293; Corte di Cassazione, 8 June 1972, No 1773). But those judgments, which proceed on the dualist conception of relations between international law and State law, are based only on the fact that the Italian domestic law adopted for the implementation of GATT expressly incorporated the rules of the General Agreement into the national law. In this system, a subsequent law which is contrary to Article III of that Agreement deprives individuals of any possibility of forcing the State to observe it. It is therefore not a question of 'direct effect' within the meaning of the case-law of the Court.

But, leaving aside those national judgments or decisions, I consider first that by the General Agreement the States undertook only to adopt a particular line of conduct in commercial policy, that they did not intend to establish directly applicable rules which the national courts must protect, even when it conflicts with a domestic law; secondly, that the procedures prescribed by GATT for the settlement of conflicts arising through its application also exclude the concept of direct effect; that finally the very circumstances in which the provisions contained in Part II of the Agreement, which include Article XI, are applied, confirm that opinion.

A — Under GATT, general rules are enacted in a form which is often peremptory and precise, whether it is a question of most-favoured-nation treatment (Article I(1)), of national treatment on internal taxation and regulations (Article III), of anti-dumping and countervailing duties (Article VI) or of elimination of quantitative restrictions (Article XI). But those rules are subject to such restrictions as are prescribed by the text itself and subject to so many instances of derogation which may be granted with the agreement of the contracting parties that in the end the Agreement is characterized by a very flexible application, by the existence of a very broad discretion so that the principles may be adapted to the facts. There is nothing unconditional about those rules.

Consequently, by way of exception to the most-favoured-nation clause, paragraph (2) of Article I takes into consideration four categories of preferential systems which existed on the conclusion of the General Agreement, which included, at the time, the British Commonwealth and the French Union. As for derogation from that clause, on the authorization of the contracting parties, obtained after negotiation, such derogation includes 'regional integration'. The European Coal and Steel Community has, moreover, benefited in this way from an express derogation and Article XXV of GATT.

Article XXIV also provides, in relation to customs unions and free trade areas, for a system which is very largely subject to derogation.

Likewise, the prohibition of quantitative restriction is under paragraph (2) of Article XI subject to exceptions based on three ideas:

— the protection of developing economies,

— the safeguarding of equilibrium in the balance of payments,

— finally, the protection of agriculture.

This last clause authorizes the contracting parties to implement, without prior authorization, quantitative restrictions on imports so as to have a stabilizing effect on their national markets, within the context of measures tending to relieve the market in an agricultural product threatened with glut. This power is subject to certain specific conditions: limitation of application in terms of time; need to respect, as between imports and national

production, a certain proportion similar to that which could be expected in the absence of restrictions, in particular through reference to imports attained during a reference period.
But practice has strangely widened the scope of this derogation. Many States asked for and obtained the benefit of such derogation; the GATT organization was even led to make use in this sphere of Article XXV of the Agreement by reason of the importance of the schemes of derogation which certain of its members has resolved to implement. It was in this way that the United States obtained in 1955 a dispensation covering the greater part of its agricultural policy. Article XXV in fact gives the contracting parties the possibility of obtaining relief to certain of their obligations under the Agreement, by reason of so-called exceptional circumstances different from those which the other provisions of the General Agreement prescribe. That is a 'safety valve' which is very wide and of very flexible application, the mechanism of which is released on the request of a State by majority decision of the contracting parties.

B — The procedure governing conflicts which arise between members of the GATT organization is also revealing. According to Article XXIII, if any contracting party should consider that any benefit accruing to it under the Agreement is being nullified or impaired or that the attainment of the objectives of GATT is, itself, being impeded as the result of the application by another contracting party of any measure which conflicts with the provision of the Agreement, it may, at first, only make representations or proposals to which the other party 'shall give sympathetic consideration'. If no satisfactory adjustment is affected within a reasonable time, the matter may be referred to the members of GATT who, after investigation and consultation, may, where they consider the consider the circumstances sufficiently serious, authorize the contracting party or parties affected to suspend their obligations towards the party responsible. Finally, *ultimo ratio*, the latter may advise the Secretary-General of the organization of its intention to withdraw from the General Agreement.

C — Finally, never having been ratified by the national parliaments, except by that of Haiti, the General Agreement is applicable to States pursuant to a protocol of temporary application, which has however been the subject of a 'law of approval' in the Federal Republic and of a 'law of implementation' in Italy. The contracting parties are bound to apply Parts I and III of the Agreement. They cannot make reservations in this regard; on the other hand, they are bound by Part II, including Article XI, only 'in so far as is compatible with the legislation in force'. If a conflict arises, such domestic legislation therefore takes precedence over the clauses of Part II. It is certainly a question only of the legislation existing on the entry into force of the General Agreement, but such a system in no way corresponds to the criteria of direct effect.
All of the above considerations lead to the conclusion that the provisions of the General Agreement, the machinery of which is dependent on the concensus of the contracting parties, do not concern individuals as such.
More particularly, Article XI contains exceptions and derogations which in practice have been shown to leave States and, *mutatis mutandis*, the Community a discretion such as excludes individuals from being able to derive from the prinprinciple established by that article subjective rights capable of being profitably invoked before a court.
Consequently, I do not think that the 'validity' of the Community regulations, within the meaning of Article 177 of the Treaty of Rome, can be cast in doubt by Article XI of the General Agreement. The problem of the compatibility of those regulations with the provisions of Article XI could have been raised only in regard to the relations between the GATT organization, on the one hand, and the European Economic Community and the Member States, on the other, and in accordance with the arrangements for negotiation and regulation prescribed by the General Agreement.

Furthermore, is it not right to think that if Article XI of GATT was directly applicable in the Community legal system, the Netherlands Government could have requested this Court, in pursuance of Article 173 of the Treaty of Rome, to annul the regulations at issue, on the ground that is considered those Community regulations to be contrary to the General Agreement and, consequently, to the treaty obligations of the Community and of the Netherlands?

It is my opinion that the Court should give the following ruling:

1) Within the meaning of Article 177 of the Treaty of the European Economic Community, the validity of measures adopted by the Community institutions can be judged with reference to a rule of international law other than Community law, subject to the two conditions that such rule binds the Community and that it is directly applicable in its legal system;

2) Since the provisions of Article XI of the General Agreement on Tariffs and Trade are not directly applicable in the Community legal system, the validity of Regulations Nos 459/70, 565/70 and 686/70 of the Commission cannot be called into question by those provisions.