OPINION OF ADVOCATE GENERAL DARMON
delivered on 17 March 1993 *

Mr President,
Members of the Court,

1. The present action for failure to fulfil obligations seeks a declaration from the Court that the Italian legislation prohibiting the importation of consignments of fish from other Member States and from the Kingdom of Norway on the ground that they contain nematode larvae, and consequently subjecting them to systematic inspections at the frontier, is incompatible with Community law. I would observe at the outset that whilst Italy has amended its legislation during the proceedings, the Commission has not withdrawn its application.

2. It should be recalled, in this connection, that

'the object of an action under Article 169 is established by the Commission's reasoned opinion, and even when the default has been remedied subsequently to the time-limit prescribed by paragraph 2 of the same article, pursuit of the action still has an object.' [1]

3. That being established, I shall now briefly summarize the facts that gave rise to the present proceedings, whilst I would refer to the Report for the Hearing for a fuller account and for the precise content of the Italian legislation. [2]

4. In July 1987, following a German television broadcast reporting on the alleged dangers to public health of consuming fish containing nematode larvae, Germany prohibited the importation of fish containing such larvae and Italy followed suit. The Italian Minister of Health sent the health authorities three telegrams, requesting them to inspect consignments of imported fish systematically and turn back any in which nematodes were found to be present. [3] Germany, which had adopted similar measures, relaxed its rules, with the result that the Commission subsequently decided that they were compatible with Community law.

5. The Commission's attention was drawn to the matter by complaints, particularly from wholesalers who objected to the Italian measures inasmuch as they had the effect of restricting imports.

6. It is essential to distinguish, in the legislation at issue, between measures designed to prohibit the importation of fish containing

* Original language: French.

1 — Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 9.

2 — Part I: Legal framework, facts and pre-litigation procedure.

3 — According to a telegram dated 15 December 1987, it was however decided that certain species of fish should be inspected by means of spot checks, provided they were accompanied by a health document certifying that the fish in question were frozen.

nematode larvae and measures instituting the inspection of imported consignments.

7. It should be noted, first, that the Italian legislation prohibits the sale of foodstuffs that are deprived of their nutritive elements or infested with parasites. [4] Provision is made for the imposition of criminal sanctions on 'any person who holds with the intention of marketing or distributes for human consumption foodstuffs which, without being disguised or modified, constitute a danger to public health'. [5] The Minister of Health's telegrams to the frontier health authorities were based on that legislation.

8. In the light of those facts and of the Italian legislation, we must now determine the case-law within which the measures at issue fall to be considered.

9. In the first place, there can be no doubt that measures of this kind come within the scope of Article 30 of the Treaty and constitute measures having equivalent effect to quantitative restrictions in so far as they are trading rules which are

'... capable of hindering, directly or indirectly, actually or potentially, intra-Community trade ...',

according to the well-known principle established by the Court in *Dassonville*. [6]

10. Such restrictions may, however, escape the prohibition contained in Article 30 by virtue of the derogations set out in Article 36. Thus,

'... it is for the Member States, in the absence of harmonization at Community level, to decide on the level of protection which they wish to accord to the protection of human health, whilst taking account of the requirements of the free movement of goods within the Community'. [7]

11. Now, we are concerned in this case with a sector that had not been harmonized when the facts at issue occurred and, according to the case-law of the Court, recourse to Article 36 is not precluded until after the matter in question has been harmonized. [8]

12. As the Court held in *United Foods*, [9]

'... at present there are in the Community no common or harmonized rules relating to health controls on fish. The purpose of Council Regulation No 113/76 [10] of 19 January 1976 (OJ 1976 L 20, p. 29), which has been referred to during the proceedings, is to lay down common marketing rules in respect

4 — Law No 283 of 30 April 1962.

5 — Article 444 of the Italian Criminal Code.

6 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5.

7 — Case 205/89 *Commission* v *Greece* [1991] ECR I-1361, paragraph 8.

8 — Case 35/76 *Simmenthal* v *Italian Minister for Finance* [1976] ECR 1871, Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, Case 251/78 *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten* [1979] ECR 3369, paragraph 14, and Case 29/84 *Commission* v *Germany* [1985] ECR 3097, paragraph 25.

9 — Case 132/80 *United Foods and Van den Abeele* v *Belgian State* [1981] ECR 995.

10 — The reference is in fact to Regulation No 103/76.

of certain fresh or chilled fish. This regulation is not concerned with the subject of health control. [11]

... it is for the Member States to provide for health control ... and to apply it at the various marketing stages of the fish. Since restrictions on trade justified on grounds of the protection of public health are expressly allowed under Article 36 of the Treaty and the Community has not yet adopted common or harmonized rules in this matter, the application to fish imported from other Member States of the health control provided for under the national legislation of a Member State in respect of sea-fish landed in its ports cannot be regarded as constituting, as far as the principle on which it is based is concerned, a measure prohibited under the Treaty.' [12]

13. The Council has since, on 22 July 1991, adopted a directive [13] laying down health rules in the fishery sector, but that measure postdates the reasoned opinion.

14. It therefore has to be determined whether, in the light of Articles 30 to 36 and the case-law of the Court, the Italian legislation can be held to be compatible with Community law as it was applicable when the reasoned opinion was delivered.

15. The prohibition on marketing fish containing nematode larvae is justified, according to the Italian Republic, on one of the grounds listed in Article 36, though it should be noted that the measure is applicable without distinction to both imported and domestic products. In such cases, the Court has consistently held that measures of this kind, which have restrictive effects, may escape the prohibition by virtue either of Article 36 or of imperative requirements contained in Article 30. However, as only the protection of public health is relied on, it would not only be superfluous but pointless to review the legality of the legislation by reason of the existence of imperative requirements.

16. It appears from the judgment in *Aragonesa de Publicidad Exterior and Publivía* [14] that:

'... The protection of public health is expressly mentioned amongst the grounds of public interest which are set out in Article 36 and enable a restriction on imports to escape the prohibition laid down in Article 30. In those circumstances, since Article 36 also applies where the contested measure restricts only imports, whereas according to the Court's case-law the question of imperative requirements for the purposes of the interpretation of Article 30 cannot arise unless the measure in question applies without distinction to both national and imported products, it is not necessary to consider whether the protection of public health might also be in the nature of an imperative requirement for the purposes of the application of Article 30.' [15]

11 — Paragraph 24.

12 — Paragraph 25.

13 — Council Directive 91/493 of 22 July 1991 (OJ 1991 L 268, p. 15).

14 — Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151.

15 — Paragraph 13.

17. It should however be mentioned for the sake of absolute completeness that the right of Member States to rely on the grounds listed in Article 36, in the absence of harmonization, is not without limits. [16]

18. It appears in particular from the judgment in *Commission* v *Greece* [17] that that provision

'... lays down an exception — falling to be construed strictly — to the rule that goods should be able to move freely within the Community, which constitutes one of the fundamental principles of the common market'. [18]

19. That strict interpretation has two consequences.

20. In the first place, as the Court held in *De Peijper*, [19] the restrictive effect on imports is

'... only compatible with the Treaty to the extent to which they (the rules in question) are necessary for the effective protection of health and life of humans. [20]

National rules or practices do not fall within the exception specified in Article 36 if the health and life of humans can as effectively be protected by measures which do not restrict intra-Community trade so much.' [21]

21. In the second place, as this is a derogation from the principle of the free movement of goods,

'it is for the national authorities to demonstrate in each case that their rules are necessary to give effective protection to the interests referred to in Article 36 of the Treaty and, in particular, to show that the marketing of the product in question creates a serious risk to public health'. [22]

22. It should however be noted, in this connection, that even a potential risk to consumers may be enough to justify the adoption of a measure that restricts intra-Community trade, as the Court held in *Melkunie*: [23]

'... national legislation seeking to ensure that at the time of consumption the milk product in question does not contain micro-organisms in a quantity which may constitute a risk merely to the health of some, particularly sensitive consumers, must be considered compatible with the requirements of Article 36'. [24]

16 — Case 251/78 *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten* [1979] ECR 3369, paragraph 21.

17 — Case C-205/89 *Commission* v *Greece* [1991] ECR I-1361.

18 — Paragraph 9.

19 — Case 104/75 *De Peijper* [1976] ECR 613. See also judgments in Case 54/85 *Ministère Public* v *Mirepoix* [1986] ECR 1067, paragraph 13, and Case C-42/90 *Bellon* [1990] ECR I-4863, paragraph 11.

20 — Paragraph 16.

21 — Paragraph 17.

22 — Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 40. See also the judgment in Case 304/84 *Ministère Public* v *Müller* [1986] ECR 1511, paragraph 25.

23 — Case 97/83 *Melkunie* [1984] ECR 2367.

24 — Paragraph 18, in fine.

23. Thus, a study of the case-law of the Court enables the contours of Article 36 to be defined and its scope and the limits secured by the Treaty objective of free movement to be assessed without, however, jeopardizing the protection of public health, as appears in particular from the judgment in *Commission* v *France*. [25]

24. I should like to pass now to the measures for the protection of public health adopted by the Italian Government and to consider whether they are in keeping with the principle of the free movement of goods.

25. We must consider, in this connection, whether in the present case any measures less restrictive of intra-Community trade might enable the desired aim to be achieved without jeopardizing that principle. In this connection, it is not without interest to mention at this juncture that the health inspection of fish is now governed by Circular No 10 [26] of 11 March 1992, which relaxed the previous strict rules on inspection. [27]

26. Although the Italian Republic has indeed amended its trading rules, it still contends that it has never failed to fulfil its obligations under the Treaty or under secondary legislation. It is therefore necessary, at this point, to examine the possible effect on public health of the consumption of fish containing nematode larvae, alive or dead.

27. It should be recalled that the Commission has stated, and the Italian Republic has not contradicted it, that the presence of nematodes in fish is a phenomenon associated with the marine food cycle and has nothing to do with possible pollution of the seas. [28]

28. According to the Commission, it is only the consumption of fish containing live nematodes that constitutes a danger to public health, by causing a disease called 'anisakiasis', which, moreover, is difficult to diagnose. However, these parasites are to be found alive only in fish that is consumed raw or lightly salted, smoked or marinated. [29] Live larvae are killed when the fish is cooked and the Commission claims that there is no risk factor whatever attached to the ingestion of dead larvae. It also suggests that there are various methods of treatment that enable the virulence of live larvae to be deactivated at the production stage. I would refer in this connection to the Report for the Hearing. [30]

29. The Commission's claims are corroborated by medical studies on the toxicity of nematodes, published in specialist journals. The Italian Republic has not contested those studies in detail but merely states that even with dead nematodes there is, if not a risk, at least a loss of the organoleptic qualities of the fish consumed. No sound support for this assertion is to be found in any of the documents in the case. On the contrary, the opinion of the Italian Health Council, to which the Italian Government refers in its

25 — Case 188/84 *Commission* v *France* [1986] ECR 419, particularly paragraph 17.

26 — *Gazzetta Ufficiale della Repubblica Italiana* No 62 of 4 March 1992.

27 — Those rules are described in the third part of the Report for the Hearing — Part III — Pleas and arguments of the parties, section 4, from which it emerges *inter alia* that dead larvae do not constitute a danger to human health.

28 — Application, p. 29 et seq.

29 — Ibid., p. 30, point 2.

30 — Report for the Hearing, Part III — Pleas and arguments of the parties, section 1.(a).

reply of 13 March 1989 to the Commission's request for observations, states that it is necessary to have a certificate to the effect that the fish 'is free from parasites or has undergone the necessary treatment to inactivate the parasite', [31] which presupposes that it is permissible for dead larvae to be present in fish without this affecting public health.

30. It should be borne in mind, in this connection, that it is for the national authorities to show the risk to public health entailed by the consumption of fish containing nematode larvae. [32]

31. Thus, in the first place, with respect to the marketing of fish containing dead larvae, Italy has not justified its prohibition on the ground of a requirement relating to the protection of public health either in its written submissions or at the hearing, and it is impossible to support its position, which consists of reversing the burden of proof and complaining that the Commission has failed to establish that such larvae are harmless. As I have already mentioned, the Court has consistently held that it is for the Member State seeking to rely on one of the exceptions listed in Article 36 to prove the risk involved. In the absence of such proof, the Italian Republic was not entitled to prohibit the marketing and importation of fish containing dead larvae, as it undoubtedly did, as witness its reply of 13 March 1989 to the Commission's letter, which reads as follows:

'... The presence of dead parasites is not a valid criterion for authorizing the marketing of a product which has, if only partially, lost its biological value'. [33]

32. I should however point out that, even if they do not present any danger to public health, dead larvae must be taken into consideration when fish are being classified by freshness category.

33. Article 6(2) of Council Regulation No 103/76 [34] provides that:

'When the products are being classified by freshness category the presence of parasites shall also be taken into consideration, allowance being made for the type of product, the fishing ground in which it was caught and its presentation'.

34. That rule applies, however, only to certain species of fish, including whiting, hake and herring, listed in Article 3 of the regulation.

35. Council Regulation No 33/89 of 5 January 1989 [35] reiterates that provision, but adds that it is to apply 'without prejudice to the applicable health rules'. [36]

31 — Letter of 13 March 1989, p. 6.

32 — Judgments in *Van Bennekom*, cited in footnote 2, and *Denkavit Futtermittel*, cited in footnote 16, paragraphs 40 and 24 respectively.

33 — P. 7, point 10.

34 — Council Regulation (EEC) No 103/76 of 19 January 1976 (OJ 1976 L 20, p. 29).

35 — Amending Regulation (EEC) No 103/76 laying down common marketing standards for certain fresh or chilled fish (OJ 1989 L 5, p. 18).

36 — Article 6(5).

36. It follows from that provision, as amended, that in the absence of any risk to public health the presence of dead larvae in fishery products only justifies classifying them in a lower freshness category, not turning them back. In contrast, it must be interpreted as meaning that health rules prohibiting the marketing of fish containing certain toxic parasites, if justified under Article 36, would entitle a Member State to refuse to market such fish.

37. In the second place, with respect to live larvae, the Commission does not dispute the danger to health and there can therefore be no possible obligation to market fish that may present a risk to public health. There are, as the Commission has indicated, measures that can be used to treat fish, but once treated the fish in question may no longer be described as fresh but must be classified as frozen, marinated, salted or smoked, according to the treatment it has undergone. The marketing of fish that has undergone such treatment, which guarantees the absence of live larvae, cannot be prohibited without seriously jeopardizing the principle of the free movement of goods.

38. With respect to fresh fish that has not undergone any appropriate treatment, I consider that the Italian Republic is justified in not allowing it to be marketed unless it is free from live nematode larvae. Whilst cooking does kill such larvae, there is still a potential risk to anyone who may consume such a product raw.

39. Moreover, the measures less restrictive of trade suggested by the Commission do not appear to offer a satisfactory solution.

40. There is every reason to think that marking fish to show the presence of live nematodes would affect consumers' confidence in the quality of the product.

41. Also, although I consider it impermissible to allow a product that is even potentially dangerous to be placed on the market, I do not see how, in practice, such information could be guaranteed, since the fish would be purchased direct from a fishmonger who would have to inform his customers that it contained live larvae. The Commission's suggestion in this respect seems to me to be highly unrealistic and it will be recalled that, on the occasion when the Court authorized labelling as a means of achieving the aim sought by the relevant legislation without jeopardizing the free movement of goods, there was no risk to the health of consumers. [37]

42. The Commission's application therefore appears to be without foundation with respect to fresh fish containing live larvae which has not undergone appropriate prior treatment.

43. I should now like to consider whether the Italian legislation is compatible with Council Regulation No 1691/73 'concluding an Agreement between the European Economic Community and the Kingdom of

37 — Case 176/84 *Commission* v *Greece* [1987] ECR 1193.

Norway and adopting provisions for its implementation', [38] the Agreement being annexed to the regulation.

44. It should be noted *in limine* that that agreement:

'... applies to products originating in the Community or Norway:

(i) which fall within Chapters 25 to 99 of the Brussels Nomenclature, excluding the products listed in the Annex ...'. [39]

45. Fishery products appear at first sight to be excluded from the scope *ratione materiae* of the Agreement, as they fall within Annex II to Chapter 3 of the Brussels Nomenclature.

46. However, Article 15 [40] of the Agreement provides that:

'1. The Contracting Parties declare their readiness to foster, so far as their agricultural policies allow, the harmonious development of trade in agricultural products to which the Agreement does not apply.

2. The Contracting Parties shall apply their agricultural rules in veterinary, health and plant health matters in a non-discriminatory fashion and shall not introduce any new measures that have the effect of unduly obstructing trade ...'.

47. That article thus imposes a standstill obligation, prohibiting the adoption of measures that restrict trade unless they are justified on one of the grounds set out in Articles 30 to 36. Now, as I have indicated, the prohibition on importing fresh fish containing live nematode larvae constitutes a justified impediment to intra-Community trade. The Italian Republic has therefore infringed Regulation No 1691/73 and the Agreement between the Community and the Kingdom of Norway contained in its annex, more specifically Article 15 thereof, only by refusing to allow the importation of consignments of fish that has undergone treatment or contains dead larvae.

48. This brings me to the Commission's claim that Council Directive 83/643 [41] on the facilitation of inspections has been infringed. I would observe forthwith that that directive has been amended twice, first on 15 December 1986 [42] and then on 20 June 1991, [43] neither amendment being relevant for the purposes of the present dispute.

38 — OJ 1973 L 171, p. 1.

39 — Article 2.

40 — OJ 1973 L 171, p. 4.

41 — Directive 83/643 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (OJ 1983 L 359, p. 8).

42 — Council Directive 87/53 of 15 December 1986 amending Directive 83/643/EEC on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (OJ 1987 L 24, p. 33).

43 — Council Directive 91/342 of 20 June 1991 amending Directive 83/643/EEC on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (OJ 1991 L 187, p. 47).

49. It should be recalled, first, that Article 1 of Directive 83/643 states that it is to apply 'without prejudice to individual provisions in force in the framework of general or specific Community rules'.

50. Thus, in so far as there were no Community rules on the subject at the material time, the exception contained in Article 36 may be invoked.

51. Article 2 of the directive provides as follows:

'Member States shall take the necessary measures to ensure that in the course of any carriage operation the various inspections and formalities are carried out with the minimum of delay necessary and ...

— with the inspections being carried out by means of spot checks, except in duly justified circumstances'.

52. The directive, as amended, does not, however, appear to alter the Court's earlier case-law and, in this respect, I concur with a view expressed in the legal literature. [44] Article 2 merely enshrines the principles identified by the Court, notably in its judgments in *United Foods* [45] and *Denkavit Futtermittel* v *Minister für Ernährung*. [46] Thus, in *Denkavit Futtermittel* the Court pointed out that:

'... the Court in its decided cases continues to interpret the concept of measures having an effect equivalent to quantitative restrictions in Article 30 of the Treaty as applying to systematic ... health inspections carried out at the intra-Community frontiers'. [47]

53. Such inspections cannot therefore be considered to be incompatible with Community law if there is no harmonization directive governing the product in question, if the restrictions are justified in the light of Article 36 and if they are proportionate to the aim pursued. I would observe that, in the judgment in *United Foods*, the Court recognized the principle of applying a health control to imported fish provided that the fish had not undergone an equivalent control in the State of origin and the control applied without distinction to imported fish and fish caught in the waters of the importing State.

54. In contrast, those findings do not authorize the systematic inspection of every consignment imported, if there are measures that would be less restrictive and would satisfactorily safeguard the imperative requirement of protecting public health.

55. As Advocate General VerLoren van Themaat wrote, in his Opinion in *Delhaize*: [48]

44 — MATTERA, *Le marché unique européen*, Jupiter, second edition, p. 322.

45 — Case 132/80, cited in footnote 9.

46 — Case 251/78, cited in footnote 8.

47 — Ibid., paragraph 10.

48 — Joined Cases 2/82 to 4/82 *Delhaize Frères* v *Belgian State* [1983] ECR 2973.

'... according to the case-law of the Court, even if no harmonization directives concerning public health inspections are in force within the Community, Article 36 of the EEC Treaty by no means unconditionally allows systematic national inspections to be carried out in the importing country. Apart from the principle of proportionality and the duty in such circumstances to take account of equivalent inspections carried out in the exporting country, the prohibition of arbitrary discrimination and of disguised restrictions on trade is also relevant.' [49]

56. In particular, it can be inferred from the Court's judgment in *Commission* v *United Kingdom* [50] that a Member State may, in certain circumstances, require any importer to produce a health certificate, even if such a measure is capable of hindering intra-Community trade, as the Court ruled in the *Denkavit Futtermittel* case: [51]

'The concept of a measure having an effect equivalent to a quantitative restriction also applies to the obligation to produce a certificate to the effect that the imported feedingstuffs have undergone specified treatment in the exporting country. The fact that there are often provisions in Community directives which are designed to harmonize and bring to an end as far as possible national veterinary and public health inspections at the frontier does not result in the requirement under national law in the importing Member State to produce a certificate from the authorities of the exporting State no longer being treated as a measure having equivalent effect ...'. [52]

57. Thus, while the requirement to produce such a certificate from the State of dispatch is indeed in the nature of a measure having equivalent effect to a quantitative restriction and consequently falls within the scope of Article 30, it may nevertheless be justified under Article 36 where there is a risk to public health.

58. It is true that the Court ruled in *Commission* v Greece [53] that such a requirement was contrary to the principle that goods should be able to move freely, but that was because the marketing of the product had not given rise to any health problems. [54]

59. It is unquestionable that the obligation to produce a health certificate is a measure that restricts trade and such a certificate may therefore be required only for products that represent a risk to public health. [55] The Italian Republic was therefore entitled to require importers to produce a document certifying that the fish had undergone treatment designed to deactivate the virulence of the larvae or, in the case of fish that had not been treated, that it was free from live larvae.

49 — Ibid., at 2991. See also the Opinions of Advocate General Capotorti in *United Foods*, cited in footnote 8, at 1030 (particularly at 1031), and Advocate General Lenz in Case 35/84 *Commission* v *Italy* [1986] ECR 545.

50 — Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203.

51 — Case 251/78, cited in footnote 8.

52 — Paragraph 11.

53 — Case C-205/89 Commission v Greece [1991] ECR I-1374.

54 — Paragraph 12.

55 — Case C-304/88 *Commission* v *Belgium* [1990] ECR I-2801, paragraph 14.

60. I would refer in this connection to the Court's judgment in *Commission* v *United Kingdom*, [56] on the importation of milk, where the Member State in question required imported UHT milk to undergo a second treatment in its territory on the ground that the treatment carried out in the other Member States did not guarantee observance of its national standards or, consequently, the perfect quality of the milk.

61. The Court did not consider that the United Kingdom measures were proportionate to the requirement of protecting public health and it ruled as follows:

'Under those circumstances, the United Kingdom, in its concern to protect the health of humans, could ensure safeguards equivalent to those which it has prescribed for its domestic production of UHT milk, without having recourse to the measures adopted, which amount to a total prohibition on imports. [57]

To that end, the United Kingdom would be entitled to lay down the objective conditions which it considers ought to be observed as regards the quality of the milk before treatment ... The United Kingdom could also stipulate that imported UHT milk must satisfy the requirements thus laid down, whilst however taking care not to go beyond that which is strictly necessary for the protection of the health of the consumer. It would be able to ensure that such requirements are satisfied by requesting importers to produce certificates issued for the purpose by the competent authorities of the exporting Member States. [58]

That necessary cooperation does not, however, preclude the United Kingdom authorities from carrying out controls by means of samples to ensure observance of the standards which it has laid down, or from preventing the entry of consignments found not to conform with those standards.' [59]

62. In this connection, the Commission expressly stated in its application that certain consignments of fish that had been 'thoroughly inspected before dispatch and were accompanied by health certificates that conformed with the Italian requirements' [60] had been required to undergo a further inspection at the frontier, and the Italian Government representative did not challenge that statement during the oral procedure.

63. I would recall that:

'Since ... the fish has already undergone in the country of dispatch a health inspection carried out in accordance with the rules which the actual legislation of the country of destination prescribes, control on importation must in all cases be limited to measures designed to counter the risks arising from transportation or from any handling following the inspection carried out on dispatch.' [61]

64. It follows from the foregoing general remarks that the Italian Republic was justified in carrying out health inspections in cases where the imports were not accompanied by an appropriate certificate. But by stipulating that all imported consignments, not omitting those accompanied by an

56 — Case 124/81, cited in footnote 50.
57 — Paragraph 28.
58 — Paragraph 29.
59 — Paragraph 31.
60 — Page 4 of the French translation of the application.
61 — *United Foods*, cited in footnote 9, paragraph 29.

appropriate certificate, were to be subject to such inspections, it failed to fulfil its obligations. It is true that it authorized inspection by means of samples, but only in the case of frozen fish accompanied by a certificate. Despite the fact that no problem arises in the case of frozen fish, since freezing is sufficient to deactivate any nematodes, the Italian Republic ordered the systematic inspection of consignments of fresh fish, including consignments accompanied by a certificate.

65. The case-law of the Court prohibits such inspections and Italy was therefore only entitled to order spot checks on such consignments.

66. Although it is clear from the percentages given by the Italian Republic, which the Commission itself submitted in support of its application, that the inspections were not *in fact* systematic, what is important in this case is not the actual implementation of the requirements set out in the telegrams but solely the obligation which they imposed on the frontier health authorities to inspect all consignments systematically, including consignments complying with the Italian requirements.

67. In addition to Directive 83/643, the Commission also claims that the Italian Republic has failed to fulfil its obligations under the Agreement between the Community and the Kingdom of Norway, in particular Article 15, which, it is recalled, prohibits the introduction 'of any new measures that have the effect of unduly obstructing trade'.

68. The telegrams addressed to the health authorities undoubtedly constitute new measures. Even assuming, as the Italian Republic maintains, that controls were merely stepped up, this nevertheless constitutes a failure to fulfil its obligations. If an intensification had to be equated to existing measures, the effectiveness of the Agreement would unquestionably be jeopardized.

69. Moreover, this was the view taken by the Court in *Moorman*, [62] which was concerned with Directive 83/643 itself:

'In accordance with its aim of making the crossing of a Community frontier less difficult and doing away with the systematic carrying out of costly verifications, the terms of the directive must be interpreted in such a manner as to ensure that they in fact contribute to that purpose'. [63]

70. The Agreement between the Community and the Kingdom of Norway is likewise intended to facilitate trade, with the result that, unless they are justified, frontier inspection measures must be regarded as hindering such trade.

71. By ordering the health authorities to carry out systematic inspections at that stage, without distinguishing between consignments that were accompanied by appropriate health certificates and those that were not, the Italian Republic has also infringed the Agreement, for the reasons which I have already described.

62 — Case 190/87 *Oberkreisdirektor des Kreises Borken and Another* v *Moorman* [1988] ECR 4689.

63 — Paragraph 27.

72. I therefore propose that the Court should declare that, by prohibiting the importation of consignments of fish containing dead nematode larvae and ordering systematic inspections to be carried out at the frontier on such consignments, including consignments of fish accompanied by an appropriate health certificate, the Italian Republic has failed to fulfil its obligations under Articles 30 and 36 of the Treaty, Council Directive 83/643 and the Agreement between the Community and the Kingdom of Norway annexed to Regulation No 1691/73.

73. I propose that the remainder of the application should be dismissed and that the Italian Republic be ordered to pay three-quarters and the Commission one-quarter of the costs.