Although failure to refer in the statement of reasons to a precise provision of the Treaty need not necessarily constitute an infringement of essential procedural requirements when the legal basis for the measure may be determined from other parts of the measure, such explicit reference is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis.

2. In the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.

3. It follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question.

4. It would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself of means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade. In defining the characteristics and the instruments of the common commercial policy in Article 110 *et seq.*, the Treaty took into account possible changes in the concept of international trade relations, such as the progressive strengthening of the link between trade and development.

   Since the Community system of generalized preferences reflects a new concept of international trade relations in which development aims play a major role, measures implementing that system fall within the sphere of the common commercial policy. The Council has the power to adopt them pursuant to Article 113 of the Treaty and is not justified in taking as its basis Article 235.

REPORT FOR THE HEARING
delivered in Case 45/86 *

I — Facts

The origin of the Community system of generalized preferences is to be found in an international setting. It is a unilateral and specific application of the non-binding model of generalized preferences adopted under the auspices of the United Nations Conference on Trade and Development (Unctad), in particular on the basis of Resolution No 21 (II) of 1968.

* Language of the Case: French.

The model drawn up under the auspices of the Unctad reflects a new concept of international trade relations between developed and developing countries which assigns a major role to development objectives. That explains the contradiction between the system of generalized preferences and the basic principles of the General Agreement on Tariffs and Trade (GATT), which made it necessary for a specific derogation to be adopted prior to the introduction of the system of generalized preferences in 1971. Later in 1979 a 'decision of the contracting parties', agreed in connection with the Tokyo Round, established that preferences in favour of developing countries were permanently compatible with the GATT.

The Community system of generalized preferences was established for ten years in 1971 and renewed in 1981. Each year regulations are adopted on its implementation.

The Community system of generalized preferences consists essentially of the suspension, on an autonomous basis without any requirement of reciprocity, of the customs duties set out in the Common Customs Tariff with a view to facilitating the importation of certain products from specific developing countries.

Although the system has often been modified, in particular as regards the products concerned, the beneficiary countries and the volume of the preferences, its basic characteristics have not changed. Customs duties may be suspended totally or partially pursuant to 'quota' arrangements, in which case the limit is rigid, or pursuant to 'ceilings', which are applied more flexibly. The tariff quotas are allocated among the Member States by reference to a flat-rate system, which, in general, involves the apportionment of initial quotas and the right to receive supplementary quotas from a Community reserve. The ceilings are administered at Community level by the Commission, and the general procedure is that customs duties are reintroduced when the ceilings are reached at Community level. In the case of some products 'reference indices' exist; when they are attained customs duties may be reintroduced by the Commission but solely in the event of economic difficulties in the Community. In general, the regulations take account of the degree of development and competitiveness of the beneficiary countries and of the 'sensitivity' of the products concerned.

For 1986 the system of generalized preferences was implemented by three Council regulations which were adopted on 17 December 1985 and published in Official Journal 1985. L 352 on 30 December 1985: Regulation No 3599/85 relating to industrial products in general (*ibid.*, p. 1), Regulation No 3600/85 relating to textile products (*ibid.*, p. 107) and Regulation No 3601/85 relating to agricultural products (*ibid.*, p. 192).

Council Regulation No 3601/85 is based on Article 43 of the EEC Treaty, as the Commission proposed, and is not at issue in these proceedings. However, the Commission seeks to have the other two regulations declared void; they cite as their legal basis the EEC Treaty ('Having regard to the Treaty establishing the European Economic Community') whereas the Commission proposed that that citation should include the additional words 'and in particular Article 113 thereof' (Official Journal C 302 of 25 November 1985, pp. 1 and 97).

Ever since the first year (1971), the Commission has consistently proposed that Article 113 of the EEC Treaty should be taken as the legal basis for the regulations. The Council has never accepted that proposal and, since there was no agreement

as to the precise legal basis, invariably replaced it by the formula quoted above. As it has made clear in reply to a question put by the Court the Council's intention in using that formula was to refer to Articles 113 and 235 of the EEC Treaty.

II — Written procedure and conclusions of the parties

By an application lodged at the Court Registry on 17 February 1986 the *Commission* brought an action against the Council. It claims that the Court should:

(1) Primarily:

Declare void Council Regulations Nos 3599/85 and 3600/85 of 17 December 1985;

Declare that those regulations should continue to apply until regulations are adopted pursuant to the judgment in these proceedings;

Alternatively:

Declare void the proceedings of the Council of 17 December 1985 in which the Council rejected the Commission's proposal that the regulations should be based on Article 113 and substituted the words 'Having regard to the Treaty';

(2) Order the Council to pay the costs.

The *Council* claims that the Court should:

(1) Dismiss the Commission's application as regards both its principal and alternative claims;

(2) Order the Commission to pay the costs.

By a letter received on 22 May 1986 the Commission stated that it would not submit a reply and asked the President of the Court to decide that the case should be given priority pursuant to Article 55 of the Rules of Procedure. That request was refused.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It asked the Council to answer a question in writing and make certain documents available to the Court. That request was complied with within the period prescribed.

III — Submissions and arguments of the parties

1. *Admissibility*

Albeit not formally contesting the admissibility of the application, the Council expresses doubts as to the reality of the dispute. In its view, the Commission is using the application as a means of obtaining the Court's opinion on the scope of Article 113 of the EEC Treaty. It contends that the situation is parallel to that in the case of *Foglia* v *Novello* (judgment of 16 December 1981 in Case 244/80 [1981] ECR 3045) in so far as 'an objective requirement inherent in the resolution of a dispute' is lacking. It further claims that the Commission is pursuing a political objective in so far as it is endeavouring to find a legal basis which provides for a less onerous procedure, that is to say a vote by qualified majority rather than a unanimous vote.

The Council also raises the question of the Commission's interest in bringing the action, since there is little doubt that in the event of the regulations being declared void for a procedural irregularity the substance of the regulations would be re-enacted in full. The Council refers to previous decisions of the Court to the effect that an applicant has no legitimate interest in having

an instrument declared void on account of a procedural irregularity if the only possible result would be the adoption of a new decision which is substantively identical.

2. *The substance*

The Commission raises two submissions with regard to the substance: infringement of an essential procedural requirement and failure to comply with the Treaty. The Commission observes that in fact those two submissions merge into a single complaint: the absence of a precise legal basis, which is in itself contrary to Article 190 of the EEC Treaty and in this case, at the same time, constitutes an infringement of the Treaty because it resulted in recourse being had to a procedure entailing a unanimous vote instead of the procedure applicable under Article 113 of the Treaty, which is the only correct legal basis according to the Commission.

(a) *Breach of an essential procedural requirement*

The Commission relies first on the infringement of Article 190 of the EEC Treaty which provides that:

'Regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.'

That obligation to state reasons is a fundamental requirement of Community law which was introduced, in particular, so as to enable all interested parties to have knowledge of the reasoning adopted by the institution concerned and hence to check whether the substantive rules have been observed, and so as make possible, where necessary, effective judicial review.

The indication of the legal basis of the measure concerned is an essential part of the statement of reasons. The legal basis is not only the first link in the logical chain of the statement of reasons, it is also necessary to indicate it because of the principle of the specific conferring of powers on the Community and its institutions.

As a result, the absence of a precise legal basis is contrary to Article 190 of the EEC Treaty and should, as a general rule, be held to be an infringement of an essential procedural requirement within the meaning of Article 173. The Commission cites in that connection the Court's judgments of 7 July 1981 in Case 158/80 *REWE-Handelsgesellschaft Nord mbH* v *Hauptzollamt Kiel* [1981] ECR 1805, at p. 1833, and of 24 October 1973 in Cases 5/73, 9/73 and 10/73 *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, *Carl Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135, and *REWE-Zentral AG* v *Hauptzollamt Kehl* [1973] ECR 1175. A procedural requirement will be non-essential only in exceptional circumstances, for example where there was a simple omission as a result of oversight and the legal basis is absolutely clear from the context. That is not the case here.

In general, and in this specific case, the formula 'having regard to the Treaty' produces total uncertainty as to which provisions of the Treaty are really intended. That formula can be understood in two ways: either it refers to all the provisions of the Treaty and hence to all the procedures provided for therein, or it refers to the provisions which are eligible to be taken into consideration in the actual case. In this instance, Articles 28, 113 and 235, which entail fundamentally different procedures, could all be contemplated, but the exact legal basis is not clear from the wording of the regulation nor indeed from the discussions within the Council.

The Commission also points to Article 11 of the Rules of Procedure of the Council, which, in its view, has also been infringed: 'Council Regulations shall contain the following: . . . a reference to the provisions under which the Regulation is adopted, preceded by the words "Having regard to".'

The Council agrees with the Commission's general analysis of Article 190 of the EEC Treaty but challenges the conclusions drawn therefrom as regards the legal basis. In its view, the Court's judgments cited by the Commission are not relevant to this case. On the contrary, it appears from the Court's case-law on the infringement of essential procedural requirements that the Court eschews an abstract approach; instead it appraises the seriousness of the alleged procedural irregularity on a case-by-case basis. As regards the particular point of the legal basis, the Court has never declared contested measures void where their citations were incomplete provided that the recitals afforded sufficient information. The Council refers in that regard to the judgment of 5 May 1981 in Case 112/80 *Firma Anton Dürbeck* v *Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095, at p. 1113, and the judgment of 28 October 1981 in Joined Cases 275/80 and 24/81 *Krupp Stahl AG* v *Commission* [1981] ECR 2489, at p. 2512.

While regretting that it was not possible to indicate the legal basis more precisely, the Council considers that the recitals taken as a whole provide sufficient alternative information as to the aims pursued by the Council, which are concerned with both trade and development-aid policy. In the course of the discussions within the Council, the Commission representative maintained the proposal that Article 113 of the EEC Treaty should be cited but intimated that, in the Commission's opinion, to cite as the legal basis both Articles 113 and 235 of the EEC Treaty would be a worse solution, both for political and technical reasons, than a mere reference to the Treaty alone. The Council was clearly influenced by that statement of the Commission's view.

(b) *Infringement of the Treaty*

The *Commission* contends that the Council was in breach of the Treaty because it employed a general legal basis entailing recourse to a procedure involving a decision by unanimous vote whereas Article 113 of the EEC Treaty, under which a vote can be taken by a qualified majority, was the only correct legal basis.

Article 113 (1) provides as follows:

'After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.'

In interpreting that article the Commission develops an 'instrumental' theory. According to that theory the measures referred to in the non-exhaustive list in Article 113 (1) are measures (whether autonomous or adopted pursuant to agreements) of commercial policy alone which, whatever the aim pursued, fall within the competence of the Community. Article 113 contains no further or more restrictive criterion and the measures mentioned overtly and specifically govern trade with non-member countries.

Other measures, closely linked to those expressly mentioned in Article 113, should also fall within the scope of that article, for example ancillary measures or measures

having an effect equivalent to restrictions or taxes on imports or exports.

In the Commission's view, there are a few exceptions to the rule laid down in Article 113. Special régimes are laid down, in particular, by Article 28 (autonomous measures relating to tariffs) and Article 43 (agricultural measures) of the EEC Treaty. In order to define the scope of those articles in relation to that of Article 113, regard should be had to the main objective pursued. That is also true in the case of measures which, while not overtly and specifically governing trade with non-member countries, do nevertheless affect trade with such countries.

In the Commission's view, the regulations at issue in these proceedings must be based solely on Article 113 because they overtly and specifically govern external trade in so far as they relate to 'changes in tariff rates' within the meaning of that article. Article 28 is not applicable since the objective of the regulations was not determined by purely internal reasons. If considerations of development policy alone were allowed to determine the legal basis, then the legal basis would have to be Article 235, as the general residuary provision, in view of the absence of specific provisions relating to development policy.

Such a course of action would be contrary to the wording of Article 113 since it would remove from a provision of specific scope activities expressly covered by that provision.

Moreover, absurd consequences would ensue. In the absence of a Community instrument the Member States could therefore determine the rules governing their trade with developing countries on an individual basis, although Article 113 transfers such trade from the sphere of competence of the Member States to the Community. In the event that the Council wished to render less favourable a measure adopted in favour of developing countries it would have to base such an amendment either on Article 113 (with the result that a measure adopted unanimously could be amended by a qualified majority vote) or on Article 235 (although such an amendment certainly does not raise issues of development policy).

Furthermore, if one always had to establish the ultimate object behind the commercial measures it would no longer be possible to have a consistent administration of the common commercial policy since the policy would be in danger of losing all its substance. Opinion 1/78 of the Court of 4 October 1979 concerning the international agreement on natural rubber ([1979] ECR 2871) bears out in principle the Commission's argument.

Textbooks and international practice, in particular in the context of Unctad and GATT, also regard the systems of generalized preferences for developing countries as measures of commercial policy. The Commission quotes in that context in particular a statement made by the President-in-Office of the Council on 21 and 22 June 1971 (*Bulletin of the European Communities* 8-1971, p. 24).

The Council bases its argument on the concept of the 'ultimate aim' which shows that Article 113 covers any activity of the Community, whether it be autonomous or taken pursuant to an agreement, which has the aim of altering the volume or the pattern of trade.

Interpretation on the basis of the ultimate aim is consistent with the systematic method of interpretation of the Treaty which has been developed by the Court. The Council cites numerous Court decisions relating to the common agricultural policy, transport policy and tax matters. It stresses that the

Commission also deems it necessary to have regard to the objective pursued when it defines — in a manner which the Council considers arbitrary — exceptions to its 'instrumental' theory. The 'instrument' criterion is not workable because it does not resolve the problem of actually defining the concept of trade.

The Council does not agree with the Commission's interpretation of Opinion 1/78 of the Court. The Court did not decide between the different approaches advocated by the two institutions.

Although it concedes the significance of the commercial aim of the regulations in question, the Council considers that the development-policy objective, which is also pursued, is sufficiently important to preclude acceptance of Article 113 of the EEC Treaty as the sole legal basis. In particular as a result of the amendments to the system which took place after 1980 and were even more strongly differentiated depending on the degree of development of the beneficiary countries, the aspect of development aid has gained even more importance.

The Council rejects the conclusions drawn by the Commission from the application of Article 235. In the absence of a Community decision on the system of generalized preferences, the common rules on imports and the Common Customs Tariff would apply. Any amendment to the system, even an unfavourable one, would be dealt with in a regulation of the same nature as the initial regulations as long as the scheme was preferential in comparison with the general scheme for non-member countries.

The declaration made by the President of the Council in 1971 describing the system of generalized preferences as a commercial decision is explicable by the fact that at that time the Community had not yet recognized the autonomous nature of development-aid policy as a Community policy based on Article 235 of the EEC Treaty.

As regards the Commission's alternative claim that the Council's proceedings in which the Council substituted the words 'Having regard to the Treaty' for the formula proposed by the Commission should be declared void, the Council considers that that claim is based on an erroneous analysis of the relations between the institutions. In order to amend a proposal of the Commission the Council does not have to take its decision in two stages but may amend the proposal and adopt the definitive decision at the same time.

G. C. Rodríguez Iglesias
Judge-Rapporteur