OPINION OF ADVOCATE GENERAL LÉGER

delivered on 13 June 2002 [1]

1. This reference for a preliminary ruling seeks to ascertain the manner in which the customs value of certain fruit and vegetables imported into the Community from non-Member States is to be calculated. The fruit and vegetables in question are those listed in the annex to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables. [2]

2. The fruit and vegetables covered by this legislation are subject to the imposition of a composite customs duty. It is a duty made up of two components, namely *ad valorem* duty expressed as a percentage of the value of the goods and a specific duty fixed in ecus per 100 kg net weight. *Ad valorem* duty is calculated on the basis of the customs value of the product, whereas the specific duty is calculated on the entry price of the product into the Community.

3. The parties differ as regards the manner in which the customs value of those fruit and vegetables is to be calculated. The United Kingdom and the Commission of the European Communities consider that the customs value must be determined on the basis of the entry price of the products in accordance with Article 5 of Regulation No 3223/94. Conversely, Capespan International plc (hereinafter 'Capespan') maintains that the customs value must be determined in accordance with the rules provided for in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Common Customs Code [3] and Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92. [4]

I — Facts and questions referred to the Court

4. Capespan is an importer of fruit established in the United Kingdom. During the period between 18 March 1997 and 24 August 1998, [5] it imported consignments of fruit (in particular apples) from South Africa. That fruit was sold in the

1 — Original language: French.

2 — OJ 1994 L 337, p. 66.

3 — OJ 1992 L 302, p. 1 (hereinafter 'the Customs Code' or 'the Code').

4 — OJ 1993 L 253, p. 1 (hereinafter 'the implementing regulation').

5 — Otherwise designated herein as 'the period at issue'.

Community at a provisional price which was adjusted at the end of the season.

5. For the purpose of determining the customs value of the imported fruit, Capespan believed that it was entitled to base itself on Article 29 of the Customs Code. That article provides that the customs value of goods is equivalent to their 'transaction value', that is to say the price actually paid or to be paid for the products. None the less, since the definitive price of the fruit was not known at the time of importation, Capespan provided a provisional indication of value under Article 254 of the implementing regulation.

6. The United Kingdom customs authorities — the Commissioners of Customs & Excise — challenged the validity of the method used by Capespan.

7. First, they considered that the customs value of the fruit at issue could not be calculated on the basis of Article 29 of the Customs Code. In their view, where the fruit comes under Regulation No 3223/94, the customs value must be determined on the basis of the entry price of the products into the Community. Secondly, the customs authorities considered that Capespan was not entitled to declare a provisional customs value under Article 254 of the implementing regulation. Consequently, they claimed payment from that company of the amount of GBP 2 884 279 for the imports effected by it during the period at issue.

8. Capespan lodged an appeal against that decision before the VAT and Duties Tribunal, London (United Kingdom). That tribunal took the view that resolution of the dispute was dependent on the interpretation of the Community provisions relied on by the parties. It therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(i) For products listed in the annex to Commission Regulation (EC) No 3223/94 ('Regulation No 3223/94'), as replaced by Commission Regulation (EC) No 1890/96 and entered into the European Community from 18 March 1997 but before 18 July 1998, being the date upon which Commission Regulation (EC) No 1498/98 ('Regulation No 1498/98') amending Article 5 of Regulation No 3223/94 is expressed to have entered into force, is the customs value of such products to be determined in accordance with

(a) the rules set out in Chapter 3 of Title II (namely Articles 28 to 36) to Council Regulation (EEC) No 2913/92 ('the Code') and the rules set out in Title V (namely Articles 141 to 181a) to Commission Regulation (EC) No 2454/93 ('the implementing regulation'); or

(b) Article 5 of Regulation No 3223/94?

(ii) If the customs value is not to be determined in accordance with either of the above, what is the correct basis for the determination of the customs value of such products?

(iii) Is Regulation No 1498/98, amending with effect from 18 July 1998 Article 5 of Regulation No 3223/94 on detailed rules for the application of the import arrangements for fruit and vegetables published in the Official Journal of the European Communities (OJ 1998 L 198, p. 4), valid?

(iv) If Regulation No 1498/98 is not valid, how is the customs value of products of the type identified in question (i), which are entered into the European Community from 18 July 1998, to be determined?

(v) Whether or not Regulation No 1498/98 is valid, does Regulation No 3223/94 preclude the giving of a provisional indication of customs value in accordance with Article 254 of the implementing regulation?'

II — Community legal framework

9. The provisions relevant to an examination of the above questions are contained in the customs legislation and in the agricultural legislation. For the sake of clarity I will present these provisions by placing them in their general context.

A — *Customs legislation*

10. The customs legislation essentially comprises the Customs Code and the implementing regulation.

11. The Customs Code provides that import duties are based on the common customs tariff. [6] It states that that tariff comprises the combined nomenclature of goods and the rates and other items of charge applicable as regards customs duties and agricultural levies. [7]

6 — Article 20(1).
7 — Article 20(3)(a) and (c).

12. On 23 July 1987 the Council adopted Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. [8] Annex I to that regulation contains the combined nomenclature and the table of duties under the common customs tariff. That annex is amended each year and the relevant version in the present case is:

— for 1997 Commission Regulation (EC) No 1734/96 of 9 September 1996 amending Annex I to Regulation No 2658/87; [9]

— for 1998 Commission Regulation (EC) No 2086/97 of 4 November 1997 amending Annex I to Regulation No 2658/87. [10]

13. In respect of fruit and vegetables coming under Regulation No 3223/94 Annex I to Regulation No 2658/87 contains the combined nomenclature and the table of duties relating to 'products to which an entry price applies.' [11] It states that the detailed rules governing application of the entry price are laid down in Regulation No 3223/94. [12]

14. Fruit and vegetables governed by this table are subject to imposition of a composite customs duty. [13] It is a duty made up of two components, namely *ad valorem* duty expressed as a percentage of the value of the goods [14] and a specific duty fixed in ecus per 100 kg net weight. *Ad valorem* duty is calculated on the basis of the value of the product whereas the specific duty is calculated on the entry price. Moreover, the specific duty is inversely proportional to the entry price: the lower the entry price, the higher the specific duty. [15]

15. Thus, the entry price enables the tariff classification of the fruit and vegetables to

8 — OJ 1987 L 256, p. 1. It should be noted that that regulation was adopted before the entry into force of the Customs Code. At that time the provisions of customs law were to be found dispersed amongst a number of Community regulations and directives. The Customs Code gathered them into a single text (first recital).

9 — OJ 1997 L 238, p. 1.

10 — OJ 1998 L 312, p. 1. Unless otherwise stated, in the remainder of this Opinion I will use the term 'Regulation No 2658/87' to designate Regulation No 2658/87, as amended by Regulations Nos 1734/96 and 2086/97.

11 — Annex 2 to Annex I to Regulation No 2658/87.

12 — I will revert below in greater detail to the concept of 'entry price' provided for in the provisions of Regulation No 3223/94 (see paragraphs 34 et seq.).

13 — Columns 3 and 4 thereof.

14 — Regulation No 2658/87 provides that the duties expressed as percentage rates in Columns 3 and 4 are *ad valorem* customs duties (see Section I of Part I of Annex I B(4) to Regulation No 2658/87).

15 — In their written observations the United Kingdom and Capespan very usefully provided specific examples of calculations under the rules set out above (see written observations of the United Kingdom, paragraph 2.7 and written observations of Capespan, paragraph 3.15). Thus, in order to ascertain the duties applicable to apples of the variety Granny Smith imported between 1 and 30 July 1997 with an entry price of between ECU 46.8 and ECU 47.7 per 100 kg net weight reference must be made to heading 0808 10 73 (fifth indent) of the table at Annex 2 to Annex I to Regulation No 2658/87, as amended by Regulation No 1734/96 (OJ 1996 L 238, p. 862). *Ad valorem* duty amounts to 5.4% of the value of the product and specific duty is fixed at ECU 1.9 per 100 kg net weight. Conversely, if the entry price of the same product is lower than ECU 44.8 specific duty will amount to ECU 26.8 per 100 kg net weight whereas *ad valorem* duty will remain at 5.4% of the value of the product.

be determined as well as the applicable duties (*ad valorem* duty and specific duty). There is consensus between the parties to the present proceedings on that matter. On the other hand, the parties differ as to the manner in which the customs value of the products should be calculated. The United Kingdom and the Commission consider that the entry price should also be used to determine the customs value of the fruit and vegetables. Conversely, Capespan maintains that that value must be determined on the basis of Articles 29 to 36 of the Customs Code.

16. Articles 29 to 36 of the Code contain the rules for determining 'the customs value for the purposes of applying the [Common] Customs Tariff of the European Communities and... measures laid down by Community provisions governing specific fields relating to trade in goods'. [16]

17. Those articles set out six methods of calculation. Those methods are successive such that if the customs value cannot be calculated on the basis of one method it is necessary to have recourse to the next one. [17] Under those provisions the customs value is:

(a) the 'transaction value', that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community (Article 29(1) of the Code); [18]

(b) the transaction value of identical goods sold for export to the Community and exported at the same time as the goods being valued (Article 30(2)(a) of the Code);

(c) the transaction value of similar goods sold for export to the Community and exported at the same time as the goods being valued (Article 30(2)(b) of the Code);

(d) the value based on the unit price at which the imported goods for identical or similar imported goods are sold within the Community in the greatest aggregate quantity (Article 30(2)(c) of the Code);

16 — Article 28.

17 — Articles 30 and 31.

18 — Article 32(1) of the Code sets out the items to be added to the price actually paid or payable: commissions and brokerage, the cost of containers and of packing, the value of certain goods and services for use in connection with the production and sale for export of the goods; royalties and licence fees, the cost of transport and insurance of the goods, and loading and handling charges associated with the transport of the imported goods to the place of introduction into the customs territory of the Community.

(e) the computed value, consisting of the sum of the cost of fabrication of the goods, an amount for profit and general expenses and the cost of transport and insurance of the imported goods to the place of introduction into the customs territory of the Community (Article 30(2)(d) of the Code);

(f) value determined on the basis of data available (Article 31 of the Code).

18. Article 36(2) of the Customs Code provides for an exception to those rules in the case of perishable goods usually delivered on consignment. Sale on consignment is a transaction whereby goods are stored with a view to a subsequent sale. [19] In that case the importer may request that the customs value be calculated in accordance with the simplified rules laid down in Articles 173 to 177 of the implementing regulation.

19. Under those rules the customs value of the fruit and vegetables [20] may be calculated on the basis of a reference 'unit value'. Under that system, which is fairly complex, the value of the goods is established on the basis of prices quoted on certain international markets. [21] It provides that, every 15 days, the Commission is to establish for each classification heading a unit value per 100 kg net expressed in the currencies of the Member States. [22] The unit value is established on the basis of:

— the average unit price calculated on the basis of prices for consignments of goods in specified marketing centres. [23] That unitary price is calculated on the basis of the gross proceeds of sales made between importers and wholesalers, subject to deduction in respect of a marketing margin of 15%, costs of transport and insurance of the goods within the Community, a standard amount of ECU 5 representing all the other costs which are not to be included in the customs value; [24]

— the quantities entered into free circulation over the period of a calendar year with payment of import duties. [25]

19 — Berr, C.J., 'Union douanière, Bases de la taxation' [Customs Union, Bases of taxation], *Juris-classeur*, Paris 1999 (Vol. 504, No 58).

20 — That is to say the fruit and vegetables contained in Annex 26 to the implementing regulation. Apples are included in that list (see heading 2.130 of that annex).

21 — Berr, C.J., cited above (Vol. 504, No 67).

22 — Article 173(1) of the implementing regulation.

23 — The list of marketing centres is contained in Annex 27 to the implementing regulation. Thus, in respect of apples, the Commission may use the prices charged in the marketing centres of Hamburg (Germany), Dublin (Ireland), Rungis (France), Antwerp (Belgium), etc. (see heading 2.130 of that annex).

24 — Article 173(3) of the implementing regulation.

25 — Article 173(2)(b) of the implementing regulation

20. The unit value corresponds to the weighted average of the average unit prices determined in accordance with the quantities of goods entered into free circulation. [26] Use of that system is at the option of the importer. [27] If the importer has recourse to it the customs value of his goods will be the amount of the unit value in force during the period in question. [28] The unit values are applied for periods of 14 days. [29]

21. The Customs Code also lays down simplified rules for the formalities of the customs declaration. In principle, the importer is required to submit declarations on an official form. [30] The declaration must also contain all the particulars necessary for implementation of the provisions governing the customs procedure. [31]

22. However, under Article 76 of the Code the importer may in certain cases omit certain particulars from the declaration. Thus, where the goods are liable to *ad valorem* duties, an importer who is not able to declare a definitive customs value may, under Article 254 of the implementing regulation, provide a provisional indication of that value. [32] In that case, the customs authorities enter immediately in the accounts the amount of duties determined on the basis of the provisional value and demand, if necessary, the lodging of a security adequate to cover the difference between that amount and the amount to which the goods may ultimately be liable. [33]

B — *The agricultural legislation*

23. The common organisation of the markets in fruit and vegetables is one of the common organisations provided for in Article 40 of the EC Treaty (now, after amendment, Article 34 EC).

24. Initially it was provided for in several Community regulations which were consolidated in Council Regulation (EEC) No 1035/72 of 18 May 1972 establishing a common organisation of the market in fruit and vegetables. [34] That regulation contains several provisions organising the system of trade with non-Member States. [35]

25. In fact, attainment of a common market in fruit and vegetables required the establishment of a single system for trade

26 — Article 175(1) of the implementing regulation.

27 — Article 177 of the implementing regulation.

28 — Second subparagraph of Article 173(1) of the implementing regulation.

29 — *Idem.*

30 — Article 62(1) of the Code.

31 — *Idem.*

32 — Second indent of Article 254 of the implementing regulation.

33 — Article 257(3) of the implementing regulation.

34 — OJ, English Special Edition 1972 (II), p. 437 (hereinafter 'the basic regulation').

35 — Articles 22 to 30.

with non-Member States.[36] The Council proceeded on the basis that the application of the duties provided for under the common customs tariff should in principle be sufficient in order to ensure stability of the Community market.[37] However, it considered it to be necessary to lay down provisions enabling disturbances caused by offers at abnormal prices from non-Member States.[38] Thus, the basic regulation made provision for the fixing of 'reference prices' and the levying of a countervailing charge in addition to the customs duty when the price of imported products is below the reference price.[39]

26. The machinery in that connection is organised in the manner described below.

27. Each year the competent authorities fix a reference price for the fruit and vegetables coming within the scope of the basic regulation.[40] The reference price is equal to the arithmetic mean of producer prices in each Member State plus an amount corresponding to the costs of marketing the products in the Community.[41] The reference price is fixed for a year or for shorter periods.[42]

28. For each product subject to a reference price, an entry price is calculated for each exporting country.[43] The entry price for a given exporting country is the lowest price recorded for at least 30% of the quantities from the exporting country concerned which are marketed on all representative markets.[44] From that price several items must be deducted,[45] namely the customs duties provided for in the Common Customs Tariff, any countervailing charges, other import charges and the cost of transporting the products from Community frontier-crossing points to the representative import markets on which prices are recorded. Unlike the reference price, the entry price is fixed for each market day.[46]

29. The basic regulation provides that, if the entry price of a product imported from

36 — Nineteenth recital in the preamble to the basic regulation.

37 — Stability of the markets is one of the objectives of the common agricultural policy (see Article 39(1) of the EC Treaty (now Article 33(1)(c) EC)).

38 — Twentieth recital in the preamble to the basic regulation.

39 — *Idem*.

40 — Apples are amongst the products governed by the basic regulation (Article 1(2)).

41 — Article 23(2) and (4) of the basic regulation. Producer prices are the average of the prices recorded during the three years prior to the date for fixing the reference price for a home-grown product on the representative market or markets situated in the production areas where prices are lowest, for the products or varieties which represent a considerable proportion of production marketed throughout the whole year (Article 23(2) of the basic regulation).

42 — Article 23(2) of the basic regulation.

43 — Article 24(2) of the basic regulation.

44 — Ibid., paragraph 3.

45 — Ibid.

46 — Article 24(2) of the basic regulation.

a third country remains below the reference price for two consecutive market days, a countervailing charge is to be introduced in respect of the exporting country concerned. [47] This charge is equal to the difference between the reference price and the average entry price, that is to say the average of the last two entry prices available. [48] That charge is added to the customs duties in force. [49]

30. The system described above was intended to protect Community production from imports from non-member countries. It ensured that the prices of imports marketed in the Community were in line with those charged for products cultivated within the Community. [50]

31. That machinery was called in question following the signature on 15 April 1994 of the Final Act embodying the Uruguay round of multilateral trade negotiations (the 'Final Act'), the agreement establishing the World Trade Organisation (the 'WTO'), and Annexes 1 to 4 of the agreement establishing the WTO (the 'WTO agreements'). [51]

32. The Agreement on Agriculture is one of the WTO agreements signed in Marrakesh (Morocco) in 1994. [52] It undertakes a reform of world trade in agricultural products and seeks in particular to widen access to the markets of member countries by products from other member countries. [53] In that connection Article 4(2) of that agreement requires the Member States to convert into customs duties all the measures restricting imports of agricultural products into their territory. [54] Those restrictive measures include variable import levies, [55] such as the countervailing charge provided for in the basic regulation. [56]

33. On 22 December 1994 the Council adopted Regulation (EC) No 3290/94 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements con-

47 — Article 25(1) of the basic regulation.

48 — Ibid.

49 — Article 25(3) of the basic regulation.

50 — Commission's written observations (paragraph 10).

51 — The Final Act and the WTO agreements are available on the WTO website at the following address: http://www.wto.org.

52 — For an analysis of that agreement see, in particular, Gadbin, 'L'agriculture et le GATT', *La Communauté européenne et le GATT*, edited by T. Flory, Ed. Apogée, Rennes, 1995 (pp. 95 to 112).

53 — See preamble to the Agreement on Agriculture (first and fourth recitals).

54 — That conversion operation is commonly referred to as tarification.

55 — See footnote to Article 4(2) of the Agreement on Agriculture.

56 — The Agreement on Agriculture was approved by the Council by Decision 94/800/EC of 22 December 1994 by Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

cluded during the Uruguay Round of multilateral trade negotiations. [57]

34. Pursuant to the Agreement on Agriculture, Regulation No 3290/94 abolished the variable import levies. [58] The Council established the principle that rates of customs duties were to be fixed in the Common Customs Tariff. [59] However, for fruit and vegetables the Council introduced a mechanism supplementary to that involving the collection of fixed customs duties. [60]

35. In place of the countervailing charge provided for in the basic regulation the Council introduced the 'entry price' mechanism. That mechanism enables fruit and vegetables to be made subject to specific customs duties where their entry price on entry into the Community is lower than a 'standard import value'. It is governed by Article 23 of the basic regulation, as amended by Annex XIII to Regulation No 3290/94 (hereinafter the 'amended regulation'), and by Regulation No 3223/94.

36. That 'entry price' mechanism operates in the manner described below.

57 — OJ 1994 L 349, p. 105.

58 — Third recital.

59 — *Idem.*

60 — *Idem.*

37. For each product and for each origin, the Commission fixes a standard import value. [61] That value is calculated on:

— the average representative prices of products imported from third countries [62] and marketed on the import markets of the Member States. [63] Those prices must be established at the importer/wholesaler stage after deduction of certain items, [64] such as a sales margin of 15% and the costs of freight and insurance of the goods within the Community;

— the total quantities of goods relating to the abovementioned prices. [65]

38. The standard import value is equal to the weighted average of the representative prices less a standard amount of ECU 5/100 kg net weight and the *ad valorem* customs duties. [66] It is calculated in respect of each working day. [67]

61 — Article 23(2) of the amended regulation and Article 4 of Regulation No 3223/94.

62 — As a general rule prices are regarded as representative where they relate to more than 50% of goods marketed (see Article 2(4) of Regulation No 3223/94).

63 — The list of import markets is contained in Article 3 of Regulation No 3223/94. Thus, the Commission may take the average prices recorded in the centres in Hamburg, London, Rungis, Antwerp, Brussels, Madrid, etc.

64 — Article 2(2) of Regulation No 3223/94.

65 — Article 2(1)(b) of Regulation No 3223/94.

66 — Article 4(1) of Regulation No 3223/94.

67 — *Idem.*

39. Furthermore, Regulation No 3223/94 contains the rules for determining the entry price for fruit and vegetables. Article 5 sets out three methods of calculation amongst which the importer may choose. Under that provision the entry price is

(a) either the fob price of the products in their country of origin plus the costs of insurance and freight up to the borders of the Community customs territory, where that price and those costs are known at the time the declaration of release of the products for free circulation is made (Article 5(1)(a) of Regulation No 3223/94);

(b) the customs value calculated in accordance with Article 30(2)(c) of the Customs Code, that is to say the unit price corresponding to sales in the Community of the imported products or of identical or similar products (Article 5(1)(b) of Regulation (EEC) No 3223/94); or

(c) the standard import value calculated in accordance with the rules set out above (Article 5(1)(c) of Regulation No 3223/94).

40. Under the customs tariff, if the entry price is lower than the standard import value, the imported products are subject to a specific customs duty. The specific duty is in inverse proportion to the entry price. [68] That means the lower the entry price the higher the specific duty. Conversely, if the entry price is greater than the standard import value, the imported products are not subject to specific duties. In that case only the *ad valorem* duties provided for in the customs tariff are applicable. [69]

41. On 28 October 1996 the Council adopted Regulation (EC) No 2200/96 on the common organisation of the market in fruit and vegetables. [70] That regulation replaced the basic regulation and the amended regulation owing to the changes which had occurred in that sector. [71] However, it did not alter the system of trade with third countries in the sector of fruit and vegetables. [72] The rules provided for in the new basic regulation are therefore identical to those set out at paragraphs 34 to 39 above. [73]

68 — See paragraph 13 above.

69 — See Annex 2 to Annex I to Regulation No 2658/87. Thus, to revert to the example given in footnote 15 above, the apples of the variety Granny Smith imported between 1 and 30 July 1997 at an entry price lower than ECU 48.7 per 100 kg net weight are subject to progressive specific duties. Conversely, if the entry price is greater than ECU 48.7 per 100 kg net weight, no specific duty is provided for. Only *ad valorem* duty of 3.8% is applicable (see heading 0808 10 73 of the table in Annex 2 to Annex 1 to Regulation No 2658/87, as amended by Regulation No 1734/96 (OJ 1996 L 238, p 862).

70 — OJ 1996 L 297, p. 1(hereinafter the 'new basic regulation').

71 — First recital in the preamble to the new basic regulation.

72 — Nineteenth recital in the preamble to the new basic regulation.

73 — Article 32 of the new basic regulation.

42. On the other hand, the Commission amended Regulation No 3223/94 by adopting Regulation (EC) No 1498/98 of 14 July 1998. [74]

43. The Commission proceeded on the basis that it was necessary to ensure consistency between the methods for calculating the entry price and the rules for determining the customs value of products. [75] The Commission pointed out that 'this should also be specified in the text of Regulation (EC) No 3223/94, in particular to facilitate the preparation of the customs declarations'. [76] Accordingly, it added the following provision to Article 5(1) of Regulation No 3223/94: [77]

'Where the entry price is calculated on the basis of the price fob of the products in the country of origin, the customs value shall be calculated on the basis of the relevant sale at that price.

When the entry price is calculated in accordance with one of the procedures provided for in paragraph 1(b) or (c)..., the customs value shall be calculated on the same basis as the entry price.'

74 — OJ 1998 L 198, p. 4. Regulation No 3223/94 has also been amended in other respects which are not directly relevant to the present case.

75 — Second recital in the preamble to Regulation No 1498/98.

76 — *Idem*.

77 — Article 5(1)(b) of Regulation No 3223/94, as amended by Regulation No 1498/98.

44. The validity of that amendment is called in question in the present proceedings. [78]

III — Examination of the questions referred to the Court

45. The reference for a preliminary ruling by the VAT and Duties Tribunal raises three sets of questions concerning:

— the manner in which the customs value of fruit and vegetables coming within the scope of Regulation No 3223/94 is to be calculated; [79]

— the validity of Regulation No 1498/98; [80]

— whether an importer may give a provisional indication of the customs value of fruit and vegetables coming within the scope of Regulation No 3223/94. [81]

78 — See third preliminary question.

79 — First, second and fourth questions.

80 — Third question.

81 — Fifth question.

A — *Calculation of the customs value of fruit and vegetables*

46. In its first question the referring court seeks to ascertain the manner in which the customs value of fruit and vegetables coming within the scope of Regulation No 3223/94 is to be calculated in respect of the period between 18 March 1997 and 17 July 1998 inclusive. More specifically, it is asking whether that value must be determined in accordance with the methods set out in the Customs Code or in accordance with the rules provided for in Article 5 of Regulation No 3223/94.

47. Like the United Kingdom and the Commission, I am of the view that the customs value of the fruit at issue must be determined on the basis of the entry price into the Community of the products in accordance with the provisions of Article 5(1) of Regulation No 3223/94.

48. On this point the United Kingdom and the Commission have put forward three sets of reasons which appear to me to be fully persuasive. Those reasons may be stated as set out below.

49. First, Article 5(1) of Regulation No 3223/94 sets out the different methods for determining the customs value provided for in the Code and implementing regulation whilst adapting them to the specific nature of fruit and vegetables.

50. A feature of the fruit and vegetables sector is the very considerable fluctuation as between supply and demand. It is a sector in which the price of products may vary considerably. Moreover, fruit and vegetables are often imported into the Community under the system of sale on consignment. [82] Under that system traders import products with a view to their subsequent sale. The sales price of the products is therefore rarely known at the time when they are declared for customs purposes on Community territory.

51. The rules established by Article 5 of Regulation No 3223/94 enable these different characteristics to be taken into account. Thus, it may be stated that:

— the method of calculation provided for in Article 5(1)(a) of Regulation No 3223/94 [83] is comparable to that appearing in Article 29(1) of the Customs Code. [84] In both cases the value obtained must reflect the fob price of the product in the country of origin, plus costs of freight and insurance up to the borders of the customs territory of the Community;

82 — See paragraph 18 hereof.
83 — See paragraph 39 hereof.
84 — See paragraph 17 hereof.

— Article 5(1)(b) of Regulation No 3223/94 expressly provides that the entry price corresponds to the customs value calculated under Article 30(2)(c) of the Customs Code, that is to say the unit price relating to sales in the Community of imported goods or identical or similar products;

— the method of calculation provided for in Article 5(1)(c) of Regulation No 3223/94[85] is comparable to the method set out in Articles 173 to 177 of the implementing regulation.[86] In both cases the standard value is the weighted average of the prices recorded for imported products on the import markets of the Member States. Moreover, in both cases the price must be established at the importer/wholesaler stage and must be reduced by several items, namely a sales margin of 15%, the cost of transporting and insuring the goods within the Community, a standard amount of ECU 5 and import duties. The difference between the two methods is that the unit value provided for in the implementing regulation is calculated for periods of 14 days whereas the standard import value provided for in Regulation No 3223/94 is fixed for each working day. Regulation No 3223/94 therefore allows better account to be taken of the price variations which are a characteristic feature of the fruit and vegetables sector;

— Article 5(1) of Regulation No 3223/94 contains no method comparable to those set out in Article 30(2)(a) and (b) of the Customs Code.[87] However, those methods are rarely used for determining the customs value of fruit and vegetables. In fact, they presuppose that the sales price is known before the products concerned or similar products are exported to the Community. However, as has been seen,[88] fruit and vegetables are frequently exported to the Community under the consignment system, that is to say before their sale has been effected;

— Article 5(1) of Regulation No 3223/94 contains no method comparable to that laid down in Article 30(2)(d) of the Customs Code. However, that method is not relevant in the case of fruit and vegetables because it is based on the cost of raw materials and the manufacture of imported products.

52. It is apparent from those various matters that the rules provided for in Article 5 of Regulation No 3223/94 are better adapted for calculating the customs value of fruit and vegetables imported into the Community from third countries.

85 — See paragraphs 37 and 38 hereof.

86 — See paragraphs 19 and 20 hereof.

87 — See paragraph 17 hereof.

88 — See paragraph 50 hereof.

53. Moreover, there are several grounds for taking the view that one of the objectives pursued by Regulation No 3223/94 was precisely to amend the rules of the Customs Code and the implementing regulation for calculating the customs value of fruit and vegetables. Thus:

— in the preamble to Regulation No 3223/94 the Commission states that 'most of the perishable fruit and vegetables listed in the Annex to this Regulation are supplied on consignment and this creates special difficulties for determining their value'.[89] As the United Kingdom pointed out, the expression 'value of the products' refers to the customs value of the fruit and vegetables. The inference may thus be drawn that, when establishing the rules for calculating the entry price, the Commission sought to eliminate some of the difficulties arising as regards determination of the customs value of fruit and vegetables from the fact that the sales price of the products is rarely known at the time when they are imported into the territory of the Community;

— Article 4(2) of Regulation No 3223/94 expressly provides that 'where a standard value is established for the products and for the periods of application given in the Annex in accordance with this Regulation, the unit value within the meaning of Articles 173 to 176 of [the implementing Regulation] shall not apply. It shall be replaced by the standard import value referred to in paragraph 1'. It follows therefrom that Regulation No 3223/94 expressly provides that, during the periods given in the annex thereto, the method for determining customs value provided for by the simplified rules contained in the implementing regulation[90] is replaced by one of the methods for calculating the entry price of fruit and vegetables, namely the standard import value;[91]

— Regulation No 1498/98 confirms that one of the objectives pursued by Regulation No 3223/94 was to calculate the customs value of fruit and vegetables on the basis of the entry price of the products. The amendment made by Regulation No 1498/98 was merely to make that rule explicit 'in the text of Regulation... No 3223/94'.[92] By dint of *a contrario* reasoning that means that Regulation No 3223/94 already contained the principle that the customs value of fruit and vegetables must be determined on the basis of the entry price provided for in Article 5(1) thereof.

54. It follows from these various matters that the object of Regulation No 3223/94 is

89 — Third recital.

90 — See paragraphs 18 to 20 hereof.

91 — See paragraphs 37 and 38 hereof.

92 — Second recital in the preamble to Regulation No 1498/98.

to amend the rules for determining the customs value of fruit and vegetables. Under the provisions thereof the entry price serves not only to determine the tariff classification of the products and the rate of the specific customs duties provided for by the common customs tariff, [93] but also to determine the customs value of the fruit and vegetables imported from third countries during the periods indicated in the annex to that regulation.

55. Secondly, I consider that, contrary to Capespan's assertion, the Commission was legitimately entitled to enact specific rules for calculating the customs value of fruit and vegetables. [94]

56. It should be recalled that, under Article 40(2) of the Treaty and Article 43(3) of the EC Treaty (now, after amendment, Article 37(3) EC), the Council has competence to establish a common organisation of agricultural markets. Moreover, Article 40(2) of the Treaty states that the common organisation of markets may include all measures required to attain the objectives of the common agricultural policy and, in particular, 'common machinery for stabilising imports or exports'.

57. It follows that the Council is competent to establish a system governing trade with third countries in the context of a common organisation of the markets. That is so in the case of the common organisation of the markets in the sector of fruit and vegetables as the basic regulation provided for a regime based on the countervailing charge [95] and the amended regulation establishes a system based on entry prices. [96]

58. The Council expressly authorised the Commission to take the necessary steps to adopt the detailed rules for application of the regime governing trade with third countries. Article 23 of the amended regulation provides:

'1. Save as otherwise provided for in this Regulation, the rates of duty in the Common Customs Tariff shall apply to the products listed in Article 1(2).

2. Should the application of the rates of duty in the Common Customs Tariff depend on the entry price of the imported consignment, the veracity of this price shall be checked using a flat-rate import value calculated by the Commission depending on the origin and product on the basis of the weighted average prices for the products in question on Member States' representative import markets... .

93 — See paragraphs 13 to 15 and 40 hereof.

94 — See also on this point the United Kingdom's written observations (paragraphs 3.3 to 3.6).

95 — See paragraphs 24 to 30 hereof.

96 — See paragraphs 34 to 41 hereof.

3. Where the declared entry price of the consignment in question is higher than the flat-rate import value,... the lodging of a security equal to the import duties determined on the basis of the flat-rate import value shall be required.

4. If the entry price of the consignment in question is not declared at the time of customs clearance, the application of the rates of duty in the Common Customs Tariff depends on the flat-rate import value or the application of the relevant provisions of customs legislation under conditions to be determined in accordance with paragraph 5.

5. Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 33.'

59. Article 33 of the amended regulation provides for a specific procedure under which the Commission is authorised to adopt the necessary implementing measures after obtaining the opinion of the Management Committee for Fruit and Vegetables. [97] Accordingly, the Commission was authorised to adopt Regulation No 3223/94. [98]

60. Moreover, it should be emphasised that, contrary to Capespan's assertions, provisions contained in the agricultural legislation may lawfully establish special rules in relation to the general rules of the Customs Code. [99]

61. In fact, Article 1 of the Code provides that it applies 'without prejudice to special rules laid down in other fields'. The preamble to the Code states that it applies 'without prejudice to specific provisions laid down in other fields [and] such specific rules may exist or be introduced in the context... of legislation relating to agriculture'. [100]

97 — Regulation No 3223/94 was adopted in accordance with the concurring opinion of the Management Committee for Fruit and Vegetables (last recital).

98 — It is true, as Capespan asserts (see its written observations at paragraph 4.24), that Regulation No 3223/94, the implementing regulation, was adopted on 21 December 1994, that is to say the day before adoption of the amended regulation, which constitutes the enabling regulation. None the less, I do not believe that that fact has any implications for resolution of the dispute. In fact, the two regulations became applicable with effect from the same date: the amended regulation and Regulation No 3223/94 are applicable as from the 1995/1996 marketing year (Article 6(2)(b) of Regulation No 3290/94 and second paragraph of Article 7 of Regulation No 3223/94). That means that, at the time when Regulation No 3223/94 became applicable, the amended regulation was also. In any event it must be borne in mind that the fruit at issue was imported by Capespan between 18 March 1997 and 24 August 1998. At that time, the amended regulation had undeniably already entered into force.

99 — See also on this point the written observations of the Commission (paragraph 16) and of the United Kingdom (paragraphs 3.3 to 3.6).

100 — Fourth recital in the preamble to the Customs Code.

62. It follows that, in light of the provisions of the Customs Code, Regulation No 3223/94 may lawfully contain specific rules for calculating the customs value of fruit and vegetables.

63. Lastly, I consider that use of the entry price in order to calculate the customs value of fruit and vegetables is likely substantially to reduce the administrative formalities and the risks of import fraud.

64. In fact, to uphold Capespan's arguments would be tantamount to accepting the idea that the customs duties provided for under the Common Customs Tariff could be determined on the basis of two different values. *Ad valorem* duties would be fixed on the basis of the customs value of the goods determined in accordance with Articles 29 to 36 of the Customs Code. On the other hand, specific duties would be fixed on the basis of the entry price established in accordance with Article 5(1) of Regulation No 3223/94. Moreover, since choice of the method of calculating the entry price is entirely left to the importer, the latter could opt for a method which would not be comparable with the corresponding method under the Customs Code. [101]

65. That being the case, acceptance of Capespan's argument would be likely to complicate the formalities of the customs declaration. In concrete terms, the customs authorities of the Member States would be compelled to carry out a double calculation (or a double verification) whereas as a general rule they collect *ad valorem* duties and specific duties simultaneously. [102]

66. Moreover, importers would be able to organise their operations in such a way as to reduce as far as possible the customs duties provided for under the common customs tariff. Thus, they might seek to reduce the customs value of the goods in order to lessen the rate of *ad valorem* duties. But, at the same time, they would opt for the method which results in a high entry price so as to reduce the rate of specific duties. As the Commission pointed out, [103] it cannot be ruled out that practices by certain traders could deprive the Community of a part of its revenue. [104]

67. Consequently, I propose that the Court should reply to the referring court's first question by ruling that, in respect of the period from 18 March 1997 to 17 July 1998 inclusive, the customs value of the fruit and vegetables coming within the scope of Regulation No 3223/94 must be determined on the basis of the entry price of the products calculated in accordance with the rules provided for in Article 5(1) of that regulation.

101 — See paragraph 51 hereof.

102 — According to information provided by the Commission at the hearing.

103 — Paragraph 20 of its written observations.

104 — The Commission also convincingly points out that such practices could in the long term have harmful consequences for the stability of the market in fruit and vegetables (paragraph 20 of its written observations).

B — *Validity of Regulation No 1498/98*

68. In its third question,[105] the referring court asks whether Regulation No 1498/98 is valid.

69. That question follows on from the various arguments advanced by Capespan in the main proceedings to contest the validity of Regulation No 1498/98. Capespan contends that that regulation cannot legitimately provide that the customs value of fruit and vegetables coming under Regulation No 3223/94 must be determined on the same basis as that of the entry price of products into the Community.

70. In support of its position, Capespan advances three sets of arguments which I will examine in turn.

71. First, Capespan maintains that the Commission exceeded the powers conferred on it by the Council in the amended regulation. Thus, Capespan contends that:

— contrary to the objective of Regulation No 1498/98, the amended regulation contains no provision stating that the customs value of fruit and vegetables must be determined on the basis of the entry price;[106]

— the methods provided for in Article 5(1) of Regulation No 3223/94 for calculating the entry price are not in conformity with Articles 29 to 36 of the Customs Code;[107]

— Regulation No 1498/98 does not contain an adequate statement of reasons in light of the requirements laid down in Article 190 of the EC Treaty (now Article 253 EC).[108]

72. In my view these various arguments are not well founded. As regards the first two arguments I have already established that the Commission was authorised to enact specific rules for calculating the customs value of fruit and vegetables[109] and that the rules for calculating the entry price

105 — In light of the reply which I propose be given to the first question the second question is no longer relevant.

106 — Written observations of Capespan (points 4.47 and 4.51 to 4.55).

107 — Ibid. (point 4.49).

108 — Ibid. (point 4.48).

109 — See paragraphs 55 to 62 hereof.

were comparable to the methods for determining customs value provided for in Articles 29 to 36 of the Code and Articles 173 to 177 of the implementing regulation. [110]

As regards the third argument it is sufficient to point out that the preamble to Regulation No 1498/98 clearly sets out the Commission's intentions. The Commission considered it necessary expressly to incorporate in Regulation No 3223/94 the principle and detailed rules whereby the customs value of fruit and vegetables must be determined on the basis of the entry price of the products. I do not therefore see how the statement of reasons on which Regulation No 1498/98 is based can be said to be inadequate in light of Article 190 of the Treaty.

73. Secondly, Capespan maintains that the Commission acted in breach of the Community's international obligations. [111] Capespan considers that the principle whereby the customs value of fruit and vegetables must be calculated on the basis of the entry price of the products into the Community is contrary to Article VII of the General Agreement on Tariffs and Trade (hereinafter 'GATT') 1994 and the agreement on implementation of Article VII of GATT 1994. The rules for calculating entry prices laid down in Article 5 of Regulation No 3223/94 are said to be fundamentally different from, and therefore inconsistent with, the methods for determining dutiable value laid down in Article VII of GATT 1994 and the agreement on implementation of Article VII of GATT 1994.

74. Irrespective of whether the legality of Regulation No 1498/98 may be examined in light of Article VII of GATT 1994 and of the agreement on implementation of Article VII of GATT 1994, [112] I consider Capespan's argument to be unfounded. In fact, as has already been found, the rules for calculating the entry price of products were broadly comparable to the methods for determining customs value provided for in Articles 29 to 36 of the Customs Code and Articles 173 to 177 of the implementing regulation. [113]

Yet, at no stage of these proceedings has Capespan maintained or demonstrated that those methods for determining customs value were incompatible with Article VII of GATT 1994 and the agreement on implementation of Article VII of GATT 1994. Consequently, it is difficult to discern the reasons why the rules for calculating the entry price, which are in conformity with the provisions of the Customs Code and the implementing regulation, conflict with Article VII of GATT 1994 and the agreement on implementation of Article VII of GATT 1994.

110 — See paragraphs 49 to 52 hereof.

111 — Written observations of Capespan (points 4.11, 4.39 and 4.56 to 4.59).

112 — The parties dealt with this issue during the written and oral procedures (see, in particular, Commission's written observations, paragraph 22 et seq.).

113 — See paragraphs 49 to 52 hereof.

75. Thirdly, Capespan raises an argument based on infringement of essential procedural requirements. [114] It points out that the measures implementing the Customs Code must be adopted in accordance with the procedure provided for in that connection by Article 249 of the Customs Code. However, in the present case, Regulation No 1498/98 was adopted under a different procedure, namely that provided for in Article 46 of the new basic regulation. [115]

76. That argument is irrelevant. Since it is lawful for the agricultural legislation to contain specific provisions on the customs value of products, [116] it is normal for the measures implementing those provisions to be adopted in accordance with the procedure provided for in the enabling regulation. In the fruit and vegetables sector the Commission could not therefore have adopted Regulation No 1498/98 under a procedure other than that provided for in Article 46 of the new basic regulation.

77. In those circumstances I propose that the Court should rule that examination of the referring court's questions has disclosed no factor affecting the validity of Regulation No 1498/98.

114 — Written observations of Capespan (points 4.60 and 4.61).

115 — That article is in the same terms as Article 33 of the amended regulation.

116 — See paragraphs 60 to 62 hereof.

C — *Provisional indication of the customs value of fruit and vegetables*

78. In its final question, [117] the referring court is asking whether Article 5 of Regulation No 3223/94 must be interpreted as meaning that an importer who is not in a position to make a definitive declaration of customs value at the time of clearance of the products into Community customs territory, may give a provisional indication of that value under Article 254 of the implementing regulation.

79. The referring court is thus seeking to verify whether Capespan was legally entitled to give a provisional indication of the customs value of the products which it imported into the Community during the period at issue.

80. Like the United Kingdom, I consider that the reply to this question follows on logically from the considerations in connection with the examination of the first question.

81. It should be recalled that the first method of calculating the entry price is based on the fob price of the products plus

117 — In light of the reply which I propose be given to the third question the fourth question is no longer relevant.

the costs of insurance and freight up to the borders of the Community customs territory. [118] That being the case, there is no interest in allowing a provisional indication of the customs value to be given since the definitive value of the products is known at the time of customs clearance. Moreover, Article 5(1)(a) of Regulation No 3223/94 expressly provides that that method may be used only 'where that price and those costs are known at the time the declaration of release of the products for free circulation is made'.

82. Similarly, the third method of calculating the entry price is based on the standard import value. [119] In that case the definitive value of the products will also be known at the time of customs clearance since the standard import value is calculated for each working day. Nor is it therefore necessary to allow the importer to give a provisional indication of the customs value.

83. In reality, the only situation in which importers may need to make an incomplete declaration within the meaning of Article 254 of the implementing regulation is where they use the second method in Article 5(1)(b) of Regulation No 3223/94 for calculating the entry price. [120] In that case the value of the products may be determined on the basis of the unit price relating to sales of identical or similar imported products. That means that the price of the products which form the subject-matter of the declaration is not necessarily known at the time when they are cleared through customs.

84. Since the Customs Code expressly allows a provisional indication of the customs value to be given in such a case, [121] there would seem to be no reason for prohibiting such indication from being given where the customs value of the fruit and vegetables is determined on the basis of Article 5(1)(b) of Regulation No 3223/94.

85. Accordingly, I propose that the Court should rule that Article 5 of Regulation No 3223/94 must be interpreted as meaning that an importer who is not in a position to make a definitive declaration of customs value at the time when the products are cleared through customs may give a provisional indication of that customs value in accordance with Article 254 of the implementing regulation only when the value of the products is determined in accordance with the rules provided for in Article 5(1)(b) of Regulation No 3223/94.

118 — See paragraph 39 hereof.
119 — See paragraphs 37 to 39 hereof.
120 — See paragraph 39 hereof.
121 — See paragraphs 21 and 22 hereof.

IV — Conclusion

86. In light of the foregoing considerations I therefore propose that the Court should reply as follows to the questions referred to it for a preliminary ruling by the VAT and Duties Tribunal, London:

(1) In respect of the period between 18 March 1997 and 17 July 1998 inclusive the customs value of the fruit and vegetables coming within the scope of Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables must be determined in accordance with the rules provided for in Article 5 of that regulation for calculating the entry price.

(2) Examination of the questions raised has disclosed no factor affecting the validity of Commission Regulation (EC) No 1498/98 of 14 July 1998 amending Regulation No 3223/94.

(3) Article 5 of Regulation No 3223/94 must be interpreted as meaning that an importer who is not in a position to make a definitive declaration of customs value at the time when the products are cleared through customs may give a provisional indication of that customs value in accordance with Article 254 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code only when the value of the products is determined in accordance with the rules provided for in Article 5(1)(b) of Regulation No 3223/94.