OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 25 February 1999 *

1. By its application for annulment under Article 173 of the EC Treaty, lodged at the Court Registry on 3 March 1996, the Portuguese Republic asks the Court to annul Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products [1] (hereinafter 'the decision').

Legal background

International multilateral agreements

2. The first general regulatory framework for the textiles sector was provided by the multilateral arrangement of 20 December 1973 regarding International Trade in Textiles, commonly referred to as 'the Multifibre Arrangement'. [2] This arrangement entered into force on 1 January 1974 and, due to a series of extensions, [3] remained in force until 31 December 1994. The basic objectives of the Multifibre Arrangement were 'to achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalisation of world trade in such products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines of production in both importing and exporting countries' (Article 1(2)). Accordingly, the arrangement provides that 'participating countries may, consistently with the basic objectives and principles of this arrangement, conclude bilateral agreements on mutually acceptable terms in order, on the one hand, to eliminate real risks of market disruption ...

* Original language: Italian.

1 — OJ 1996 L 153, p. 47.

2 — The Community signed the Multifibre Arrangement by Decision of the Council of 21 March 1974 concluding the arrangement regarding international trade in textiles (OJ 1974 L 118, p. 1).

3 — The Protocols extending the Multifibre Arrangement were concluded on 14 December 1977, 22 December 1981, 31 July 1986, 31 July 1991, 9 December 1992, and, finally, on 9 December 1993. The Community signed all the Protocols.

in importing countries and disruption to the textile trade of exporting countries, and on the other hand to ensure the expansion and orderly development of trade in textiles and the equitable treatment of participating countries' (Article 4(2)).

3. Following the Declaration adopted at Punta del Este on 20 September 1986, international negotiations were opened with the aim of integrating the textiles and clothing sector into the GATT, which in turn would mean applying the GATT rules and disciplines to the sector and would therefore constitute a move towards opening up national markets.

On 15 April 1994, the Final Act concluding the multilateral trade agreements of the Uruguay Round was signed in Marrakesh, together with the Agreement establishing the World Trade Organisation and a series of multilateral trade agreements attached to the WTO Agreement, including the Agreement on Textiles and Clothing (hereinafter referred to as 'the ATC'). The Community acceded to the agreement by Council Decision 94/800/EC 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 (1986–94). [4]

4. The ATC contains the rules on the international trade in textiles for a transitional period of 10 years culminating in the definitive integration of the sector into the GATT (Article 1 of the ATC). Under Article 2(1) of the ATC, all quantitative restrictions introduced under bilateral agreements are to be notified, within 60 days following entry into force of the ATC, to the Textiles Monitoring Body established under the ATC. [5] On the date of entry into force of the WTO Agreement, each Member is to integrate into the GATT products which accounted for not less than 16 per cent of the total volume of the Member's 1990 imports (Article 2(6)). The remaining products are to be integrated in three stages: on the first day of the 37th month, the first day of the 85th month and the first day of the 121st month respectively that the WTO Agreement is in effect. By the end of the third phase, 'the textiles and clothing sector shall stand integrated into GATT 1994, all restrictions under this agreement having

4 — OJ 1994 L 336, p. 1.

5 — Under Article 8(1) of the ATC, '[i]n order to supervise the implementation of this agreement, to examine all measures taken under this agreement and their conformity therewith, and to take the actions specifically required of it by this agreement, the Textiles Monitoring Body ("TMB") is hereby established. The TMB shall consist of a Chairman and 10 members. Its membership shall be balanced and broadly representative of the Members and shall provide for rotation of its members at appropriate intervals. The members shall be appointed by Members designated by the Council for Trade in Goods to serve on the TMB, discharging their function on an *ad personam* basis'.

been eliminated'. [Article 2(8), in particular (c)]. Finally, with regard to various systems providing flexibility, Article 2(16) of the ATC provides that '[f]lexibility provisions, i.e. swing, carryover and carry forward, applicable to all restrictions maintained pursuant to this article, shall be the same as those provided for in MFA bilateral agreements for the 12-month period prior to the entry into force of the WTO Agreement'. [6] Furthermore, '[n]o quantitative limits shall be placed or maintained on the combined use of swing, carryover and carry forward'.

International agreements concluded between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India

5. On 15 October and 31 December 1994 the Commission initialled two Memoranda of Understanding with Pakistan and India respectively 'on arrangements in the area of market access for textile products'.

The Memorandum of Understanding with Pakistan provides for a number of commitments on the part of both the Community and Pakistan. In particular, Pakistan is to remove all quantitative restrictions on the textile products given in Annex II to the Memorandum of Understanding. The Commission is to ensure that 'all restrictions currently affecting the importation of products of the handloom and cottage industries of Pakistan are removed *before entry into force of the WTO*' (paragraph 7) and 'to give favourable consideration to requests which the Government of Pakistan might introduce in respect of the management of existing [tariff] quota restrictions' (paragraph 6).

The Memorandum of Understanding with India provides that the Indian Government will bind its tariffs on the textiles and clothing items listed in the Attachment to the Memorandum of Understanding and that 'these rates will be notified to the WTO Secretariat within 60 days of the date

6 — Flexibility is understood to mean the option to grant licences for the import of products in quantities greater than those set out in the import quotas.

of entry into force of the WTO'. It also provides that the Indian Government may 'introduce alternative specific duties for particular products' and that these duties 'will be indicated as a percentage *ad valorem* or an amount in INR per item/square metre/kg, whichever is higher' (paragraph 2). The European Community agreed to 'remove with effect from 1 January 1995 all restrictions currently applicable to India's exports of handloom products and cottage industry products as referred to in Article 5 of the EC-India agreement on trade in textile products' (paragraph 5).[7] The Commission undertook to give favourable consideration to requests 'which the Government of India might introduce for exceptional flexibilities, in addition to the flexibilities applicable under the bilateral textiles agreement' up to the amounts indicated in the Memorandum of Understanding (paragraph 6).

6. On a proposal from the Commission dated 7 December 1995, the Council adopted the contested Decision on the conclusion of these understandings on 26 February 1996. The Decision was approved by a qualified majority; Spain, Greece and Portugal voted against it.

7. The understandings with India and Pakistan were signed respectively on 8 and 27 March 1996.

8. The above Council Decision of 26 February 1996 was published in the Official Journal of the European Communities on 27 June 1996.

Community legislation on import quotas for textile products

9. Council Regulation (EEC) No 3030/93 of 12 October 1993 on common rules for imports of certain textile products from third countries (hereinafter referred to as 'Regulation 3030/93'),[8] lays down quantitative limits on Community imports of textiles from third countries. Under Article 1(1), as amended by Council Regulation 3289/94 of 22 December 1994,[9] the regulation applies to:

'— imports of textile products listed in Annex I, originating in third countries with which the Community has concluded bilat-

7 — Article 5 of the agreement concluded between the Community and the Republic of India, under the Council Decision of 11 December 1986 concerning the provisional application of the agreement between the European Economic Community and the Republic of India on trade in textile products (OJ 1988 L 267, p. 1) provides that, with reference to Article 12(3) of the Geneva Agreement regarding international trade in textiles, concluded by the Community under the Council Decision of 21 March 1974 (OJ 1974 L 118, p. 1), import quotas 'will not apply to handloom fabrics of the cottage industry, hand-made cottage industry products made of such handloom fabrics and traditional folklore handicraft textile products'.

8 — OJ 1993 L 275, p. 1.

9 — Council Regulation (EC) No 3289 of 22 December 1994 amending Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries (OJ 1994 L 349, p. 85).

eral agreements, protocols or other arrangements as listed in Annex II, — imports of textile products which have not been integrated into the World Trade Organisation within the meaning of Article 2(6) of the World Trade Organisation Agreement on Textiles and Clothing (ATC) as listed in Annex X and which originate in third countries, Members of the WTO as listed in Annex XI'.

and (g) breach of the principle of equality between economic operators.

Three of these grounds can be seen as distinct from the arguments put forward in support of claims of a conflict between the decision and WTO rules, and may therefore be considered here. They are: the plea concerning a breach of the principle of publication [(a)], breach of the principle of transparency [(b)] and breach of the principle of non-retroactivity of legal rules [(e)]. I shall deal later with the four other grounds relied on, after considering the compatibility of the rules contained in the bilateral agreements with those in the multilateral WTO Agreement and its annexes.

Substance

Breach of general principles of the Community legal order

10. The Portuguese Government contests the lawfulness of the Council Decision on the ground that it contravenes both the general principles of Community Law and the rules of the WTO. With regard to the first claim, the Portuguese Government invokes a number of grounds for annulment: (a) breach of the principle of publication of Community legislation, (b) breach of the principle of transparency, (c) breach of the principle of cooperation in good faith between the Community and the Member States, (d) breach of the principle of protection of legitimate expectations, (e) breach of the principle of the non-retroactivity of legal rules, (f) breach of the principle of economic and social cohesion

11. In considering the claim of breach of the principle of 'publication of Community legislation', I shall merely point out that under Article 254 EC (ex Article 191), which deals with the publication of Community acts, there is no requirement to publish decisions on the conclusion of international agreements. However, according to established practice, Council acts on the conclusion of international agreements are published in the *Official Journal of the European Communities*. On a point of fact, I should however point out that the contested Decision, which dates from February 1996, was published in June of the same year, thus about four months after its adoption. A delay of this kind, in

my opinion, does not justify annulment of the decision.

12. In support of its second plea, concerning breach of the principle of transparency, the Portuguese Government invokes the Council Resolution of 8 June 1993 on the quality of drafting of Community legislation. [10] As the Council has observed, the resolution has no binding effect [11] and therefore places no obligation on the institutions to follow any particular rules in drafting legislative measures, although it does constitute a political commitment that such legislation should be made clear and comprehensible to those to whom the law applies, and on a more general level, to all interested parties. In point of fact, however, the decision appears to be clear in every aspect, as regards both the wording of its provisions relating to the conclusion of two international agreements and as regards the rules contained in the two Memoranda of Understanding, which provide for a series of reciprocal undertakings by the contracting parties with a view to the gradual liberalisation of the market in textile products. The Portuguese Government's complaint that the decision fails to indicate precisely what provisions of the earlier measures it amends or repeals does not mean that the decision itself is void, nor does such an omission constitute a breach of any rule of law which could justify its annulment. This plea too, in my opinion, is therefore unfounded.

13. Nor is it possible to base a claim that the contested decision is unlawful on a breach of the principle of non-retroactivity of Community legal rules. It is true that the decision, adopted in February 1996 concerns the conclusion of two agreements in which the Community made certain commitments — on the gradual opening up of the internal market — beginning in 1994 in the case of Pakistan, and in 1995 in that of India; I do not, however, consider that making such commitments constitutes a breach of the principle of non-retroactivity invoked by the Portuguese Government.

On this matter, the Council observes that the Memoranda of Understanding were initialled in 1994 and that it is to be expected that they should contain provisions concerning the importation of textiles as from 1995. In any case, according to the Council, as the contested decision sets the date of signing by the contracting parties (8 and 27 March 1996) as the date on which the agreements were to come into force, it does not provide for those agreements to be applied retroactively. As I see it, the Council is confusing entry into force with provisional application. There is no clause in the decision which provides specifically for its entry into force and, having been published in the *Official Journal of the*

10 — OJ 1993 C 166, p. 1.

11 — For resolutions which, on the basis of their content, are of a binding nature see judgments of the Court of Justice, in Case 108/83 *Luxembourg* v *European Parliament* [1984] ECR 1945, paragraph 23, and Joined Cases C-213/88 and C-39/89 *Luxembourg* v *European Parliament* [1991] ECR I-5643, paragraphs 25 to 27.

European Communities, it therefore came into force, according to the general rules, on the twentieth day following publication (Article 254 EC (ex Article 191)). Furthermore, the decision does not expressly provide for retroactive application of its provisions. However, the absence of such a provision does not imply in this instance that the decision is not binding on the Community with regard to the period before the conclusion of the agreements, as these expressly contain a series of commitments by the Community and the other contracting States, to be fulfilled from 1994/95. Therefore, contrary to what the Council claims, it is not necessary to establish the actual date of entry into force of the measure on the basis of the general rules on international agreements, and in particular Article 24 of the Vienna Convention on the Law of Treaties of 22 May 1969 which deals with the entry into force of international agreements, but rather to determine, in the light of general principles of Community Law, whether the provisions of the agreements at issue can be regarded as applicable from 1994/95.

The general principle of non-retroactivity of Community acts has been interpreted, in well-known, settled case-law, as meaning that a measure may, exceptionally, have retroactive effect, but only where its aims justify retroactive application and where such application does not breach the legitimate expectations of those concerned. In this case, it is clear that retroactive application of the agreements is justified by the fact that the Community made an express commitment, to other Contracting States, to provide for the gradual liberalisation of access for textile products from these States from 1994/95 and that therefore any delay in concluding the agreements and initiating the process of opening up the Community market would constitute an amendment to the text of the agreement (unless the system provided by the agreements could in fact affect the trade in goods imported before the entry into force of the agreements). On the matter of a possible breach of the legitimate expectations of those concerned, I do not believe that specific expectations of operators in this sector can be identified as regards binding import quotas, given that the liberalisation of the textiles market was the subject of long negotiations in the course of the Uruguay Round and, furthermore, that at the beginning of 1995, the Commission, precisely for the purpose of applying the Memorandum of Understanding concluded with India at the end of 1994, repealed Regulation No 3030/93 on imports of certain textile products into the Community by Regulation (EC) No 3053/95,[12] in respect of the part in which it provided for the establishment of quantitative limits for cottage industry textile products from India. On the basis of these observations, I therefore consider that this plea also should be held to be unfounded.

12 — Commission Regulation (EC) No 3053/95 of 20 December 1995 amending Annexes I, II, III, V, VI, VII, VIII, IX, and XI of Council Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries (OJ 1995 L 323, p. 1). The regulation was contested by the Portuguese Republic in an application lodged at the Court Registry on 21 March 1996 (Case C-89/96).

Breach of the rules of the WTO Agreements

— Admissibility of pleas concerning breach of the rules of the WTO Agreements

(a) General considerations: case-law on the direct effect of GATT rules

14. In support of its view that it is entitled to rely on World Trade Organisation rules, the Portuguese Government states that, as the contested decision, under which the bilateral agreements with India and Pakistan on the importation of textile products were concluded, constitutes an act enforcing GATT provisions, those provisions, even though they do not have direct effect, may be relied upon in the present case, in accordance with the frequently cited judgment in *Germany* v *Council*. [13] The Council contends that the contested decision is not an act enforcing WTO rules; it argues that the Portuguese Government is, in fact, inferring a conflict between the bilateral agreement concluded between the Community and India, and the multilateral agreement on textiles — the ATC — (attached to the Agreement establishing the World Trade Organisation) on the other, a matter which comes under the exclusive jurisdiction of the Textiles Monitoring Body provided for in the multilateral agreement. The Commission, for its part, merely points out that the rules of the World Trade Organisation cannot constitute a criterion of legality since they do not have direct effect, that being the explicit intention of the Council which, in the act concluding the WTO Agreements and in its decision of 22 December 1994, expressly ruled out the possibility of invoking provisions of the Agreement or its Annexes 'in Community or Member State courts' (eleventh recital in the preamble to Decision 94/800).

In order to decide on the admissibility of the pleas of illegality advanced by the Portuguese Government, it is necessary to determine the effect of international agreements on the Community legal order, in particular with reference to the case-law on the General Agreement on Tariffs and Trade.

15. Article 228(7) of the Treaty establishes that agreements concluded under the conditions set out in that article between the Community and one or more States or an international organisation 'shall be binding on the institutions of the Community and on Member States'. International agreements therefore constitute sources of law with which the institutions must comply. As the Court ruled in its judgment in *Haegeman* in 1974, they constitute, 'as far as concerns the Community, an act of one of the institutions of the Community within

13 — Judgment in Case C-280/93 [1994] ECR I-4973.

the meaning of subparagraph (b) of the first paragraph of Article 177. The provisions of the agreement, from the coming into force thereof, form an integral part of Community law'. [14] When the institutions adopt acts of secondary legislation, they must therefore comply with the rules contained in agreements, from the time when the international agreements are concluded. Any conflict between a Community source and a source contained in an agreement generally constitutes a defect in the Community measure which justifies its annulment.

The Court, in exercising its function as the organ which ensures compliance with Community law and consequently with all legal sources which produce effects within the Community legal order, including international agreements concluded by the Community, has recognised that it has jurisdiction to give preliminary rulings on the interpretation of such agreements with the aim of 'ensuring their uniform application throughout the Community'. [15] In numerous judgments on the interpretation of international agreements, the Court has held that, to determine whether a provision in an international agreement has direct effect within the legal order of the Member States, it is necessary first to ascertain whether the content of that provision is clear, precise and unconditional, and then to evaluate the content in the light of the aims and context of the agreement. [16]

16. As regards the rules contained in the GATT or in agreements concluded within the framework of the GATT, the Community judicature has held that it has in principle no jurisdiction either to interpret GATT rules or to determine the legality of Community acts conflicting with such rules, and has therefore not admitted these international rules as a criterion of the legality of Community acts.

Let me retrace the steps that led the Court to that conclusion. In *International Fruit (1972)*, [17] the validity of three regulations on the common organisation of the markets in the fruit and vegetable sector was questioned; it was claimed that they were contrary to Article XI of the GATT. The Court confirmed that it has jurisdiction to give preliminary rulings concerning the validity of acts of the institutions of the

14 — Judgment in Case 181/73 *Haegeman* v *Belgium* [1974] ECR 449, in particular paragraphs 2 to 6.

15 — See the judgment in *Haegeman*, cited above, paragraph 6.

16 — See judgments in Case 87/75 *Bresciani* [1976] ECR 129, paragraph 16; Case 270/80 *Polydor* v *Harlequin* [1982] ECR 329, paragraph 14 et seq.; Case 17/81 *Pabst* [1982] ECR 1331, paragraphs 26 and 27; Case 104/81 *Kupferberg* [1982] ECR 3641, paragraphs 11 to 14 and 23; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 14; Case 192/89 *Sevince* [1990] ECR I-3461, paragraph 15; Case C-18/90 *Kziber* [1991] ECR I-199, paragraph 15; Case C-432/92 *Anastasiou* [1994] ECR I-3087.

17 — See judgment in Joined Cases 21/72 and 24/72 *International Fruit* [1972] ECR 1219.

Community, even if the ground on which their validity is contested is that they are contrary to a rule of international law, but held that, 'before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision'. Thus the Court, while confirming its own jurisdiction to examine 'whether their validity may be affected by reason of the fact that they are contrary to a rule of international law', nevertheless made the exercise of that jurisdiction subject to the condition that it should be possible to invoke GATT rules before a national court. In fact, the Court ruled that 'before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts' (paragraphs 4 to 9).

The Court then considered whether the GATT 'confers rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure'. For this purpose, the judge continued, 'the spirit, the general scheme and the terms of the GATT must be considered' (paragraphs 19 and 20). In its analysis of the characteristics of the GATT, the Court concluded that the provisions of that agreement may not be invoked before national courts, essentially for two reasons: first, the great flexibility of its provisions, in particular those conferring the possibility of derogations and the option for States to adopt unilateral measures when confronted with exceptional difficulties; and second, the inadequacy of the arrangements for the settlement of conflicts between the contracting parties. The Court therefore concluded that, although under the EC Treaty the Community had assumed powers previously exercised by Member States in implementing the GATT and although the provisions of that agreement are to be regarded as binding within the Community legal order, nevertheless the General Agreement cannot be invoked by an individual before a national court and, therefore, the Court may not give a ruling on incompatibility between a Community measure and GATT rules in the context of a question on validity raised under Article 177. [18] Later, in its judgments in *SIOT*, *SAMI* and *Chiquita* [19] the Court, following the same reasoning, also held that it did not have jurisdiction to interpret the GATT rules in the context of references for a preliminary ruling under Article 177 of the Treaty.

17. In the judgment of 5 October 1994 in *Germany* v *Council*, relied on by the parties in the present case, the limited jurisdiction

18 — See judgment in Case 9/73 *Schlüter* [1973] ECR 1135, paragraph 27.

19 — See judgments in Case 266/81 *SIOT* [1983] ECR 731, paragraph 12; Joined Cases 267/81 and 269/81 *SAMI* [1983] ECR 801, paragraphs 23 and 24; Case C-469/93 *Chiquita Italia* [1995] ECR I-4533, paragraphs 25 to 29.

of the Community judicature was held to apply also to an action brought under Article 173 of the Treaty. The judgment repeated that the great flexibility of the GATT provisions and the loose arrangements for the settlement of conflicts not only mean that 'an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, [but] also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a [Community act] in an action brought by a Member State under the first paragraph of Article 173 of the Treaty' (paragraph 109). In other words, as the GATT does not have direct effect, national courts may not apply the rules of the agreement or refer questions for preliminary ruling on any conflict between the two sources of law, nor may the Court give a ruling on the lawfulness of a Community act which is claimed to be contrary to a GATT rule in an action for annulment. The Court added that 'the special features [of the GATT] show that the GATT rules *are not unconditional*', although their content may be, and that 'an obligation to recognise them as rules of international law which are directly applicable in the domestic legal systems of the Contracting Parties cannot be based on the spirit, general scheme or terms of GATT'. The Court concludes from this that *in the absence of such an obligation*, it is not required to review the lawfulness of a Community act that is alleged to conflict with the GATT rules. In the same judgment, *Germany* v *Council*, the Court, citing two previous judgments [20] held that it had jurisdiction to review the lawfulness of such an act only 'if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT' (paragraph 111). The Court, therefore, citing judgments which apparently are not entirely in line with the settled case-law which denies that the GATT rules have

20 — The judgment in *Germany* v *Council* [1994] expressly refers to two previous judgments which, at first sight, constitute exceptions to the general case-law on the legal effect of the GATT rules. The first, in Case 70/87 *Fediol* v *Commission* [1989] ECR 1781 dates back to 22 June 1989. In that case the federation Fediol was challenging the lawfulness of a Commission decision rejecting a complaint brought under Article 3(5) of Council Regulation (EEC) No 2641 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (OJ 1984 L 252, p. 1). Article 2(1) of that regulation establishes that any *international trade* practices attributable to third countries which are incompatible with international law or with the generally accepted rules are to be considered unlawful. The Court ruled that the combined provisions of Articles 2 and 3 of the regulation entitle the economic agents concerned 'to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them'. In that case the Court affirmed its jurisdiction to exercise 'powers of review over the legality of the Commission's decision applying those provisions' (paragraph 22). The Court therefore held that although the GATT rules do not in general have direct effect, the express reference in Regulation 2641/84 confers on individuals the right to invoke those provisions before a court. The judgment appears to be in line with the general legal view on the lack of direct effect of the GATT rules. The other judgment cited by the Court in *Germany* v *Council*, the judgment in Case C-69/89 *Nakajima* [1991] ECR I-2069 is quite different. In that case the Court proceeded on the assumption that the provisions of the GATT had the effect of binding the Community and that this also applied to the Anti-Dumping Code 'adopted for the purpose of implementing Article VI of the GATT'. It follows, according to the Court, that when a measure adopted in order to comply with international obligations arising from that code is challenged, the Court must 'ensure compliance with the General Agreement and its implementing measures' and consequently 'examine whether the Council went beyond the legal framework thus laid down ' and whether by adopting the disputed provision, it acted in breach of 'the Anti-Dumping Code'. In that case, Nakajima had claimed that Council Regulation (EEC) No 2423 of 11 July 1988 (OJ 1988 L 209, p. 1) was at variance with the Anti-Dumping Code implementing Article VI of the General Agreement on Tariffs and Trade, approved on behalf of the Community in Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980, L 71, p. 1). That judgment is, in my opinion, more consistent with the general case-law on international agreements and is based on different criteria from those used to evaluate the effects of the GATT with regard to Community secondary legislation.

direct effect and may therefore be enforced by the Community judicature, held that these provisions produce binding effects within the Community legal order only if the contested act implements the GATT, that is, if there is a functional relationship between the GATT rules and the Community rules, and also if the Community act refers expressly to the international rules.

18. The case-law cited above is surprising: the Court has held that for the GATT and the agreements concluded on the basis of the General Agreement to be considered as a source of law and therefore as a criterion for determining the legality of Community acts within the Community order, individuals must be able to invoke its provisions before a court of law. That condition was set out for the first time in a preliminary ruling on validity and therefore in the context of proceedings before a national court. In its judgment in *International Fruit* the Court concluded that the GATT rules were not applicable because they could not be invoked before a national court and that the national court consequently could not refer a question for a preliminary ruling on the validity of a Community measure by reference to the rules of the agreement in question. On this I shall simply point out that, in principle, the right to review the legality of a Community act does not depend on whether the rules invoked as a criterion for determining the legality of that act have direct effect, in cases where it is claimed that the Community act infringes rules of international law other than the GATT.[21] What is even more surprising is the conclusion that privileged persons, such as Member States, may not invoke the provisions of the GATT as a criterion of legality in direct actions brought under Article 173 of the Treaty. It is not clear why the functioning of an international agreement, as a criterion of legality for Community acts, should be subject to the conditions normally required, in a specifically Community context, for the direct effect of the provisions of international agreements concluded by the Community to be recognised. In my view, an international agreement, by virtue of its clear, precise and unconditional terms, can in principle constitute a criterion of legality for Community acts. This does not mean — in the light of Community law on the subject — that a rule displaying those characteristics necessarily confers on individuals rights on which they may rely in actions before the courts. For this result to be achieved in the Community legal order, this is, for individuals to be entitled to rely on a provision in an agreement before the courts, it must be implicit in the general context of the agreement that its provisions may be

21 — Recently, the Court, replying to a question of validity arising from conflict between a Council regulation suspending an international agreement concluded with Yugoslavia and the rule of customary international law contained in Article 65 of the Vienna Convention on the Law of Treaties, held that the possibility of relying on rules of customary international law is separate from the question of their direct effect, for these rules are nevertheless binding on the Community which must respect international law in the exercise of its powers. The Court held that an individual may invoke fundamental rules of customary international law against the disputed regulation, which was taken pursuant to those rules and deprives [him] of the rights to preferential treatment (judgment of 16 June 1998 in Case C-162/96 *Racke v Hauptzollamt Mainz*, not yet published in the ECR, paragraph 48).

invoked before the courts. That being so, I believe that a provision of an agreement may be held not to have direct effect but that does not justify failing to recognise it as binding on the Community institutions and thence excluding it as a criterion of legality (for the Community).

Furthermore, to restrict the Court's jurisdiction to interpreting and applying WTO rules only where Community measures enforce the rules or expressly refer to them would mean that the rules of the WTO Agreement could not be applied unless the international agreement had been incorporated in the Community legal order by means of a transposing or enabling act, and would thus reduce the scope of Article 228(7) of the Treaty which, according to the Court's interpretation, provides for international agreements to be binding within the Community legal order from the time they are concluded.

(b) Direct applicability of WTO provisions and the scope of the eleventh recital in the preamble to Council Decision 94/800

19. On the basis of the above considerations, let us now consider the effectiveness and, thence, the possibility of direct applicability — as discussed above — of the WTO provisions. In academic writings it has rightly been stressed that the rules of the World Trade Organisation differ in nature from those of its predecessor, the GATT, an essentially provisional agreement providing for a flexible system of powers of the Member States which limited the extent to which individual provisions could be binding and, on the same principle, did not (as the Court has stressed) establish a clearly defined, fixed system for the settlement of disputes. While it must be recognised, on the basis of my earlier observations, that such characteristics do not, in principle, preclude the possibility that a particular provision in an international agreement may have specific legally binding effects on persons in international law — and therefore on their institutions — which have ratified the agreement or which (as in the case of the Community in the context of the GATT Agreement of 1947) are bound indirectly by them, the process of amendment of the agreements on the liberalisation of international trade must also be considered, a process which led to the creation of an international body of an institutional nature such as the World Trade Organisation, with a more balanced and stable structure than that of the organisation established under the 1947 agreement. Above all, it must be recognised that many provisions of the agreements attached to the Agreement establishing the

WTO give rise to obligations and prohibitions that are unconditional and include specific undertakings for commitments by the contracting parties in the context of their reciprocal relations.

Much has been written about the reform of the system for the settlement of disputes and it has rightly been held that the present system gives little latitude to States who believe they are victims of illegal conduct on the part of another contracting party. The general system [22] provides for the establishment of a General Council which is responsible, amongst other things, for dispute settlement (Article IV(3), WTO Agreement). The Dispute Settlement Body appoints a panel which adjudicates completely autonomously on any possible breach of the rules in the WTO Agreements (Article 6(1) of the Understanding on Rules and Procedures governing the Settlement of Disputes). The panel's report is adopted by the Members of the Body by a majority vote of members present. Unanimity is required only where the report is not adopted, with the result that any veto by the State accused of breaching a WTO provision is not sufficient to prevent adoption of that report (Article 16(4) of the Understanding on the Settlement of Disputes, cited above). [23]

20. In the decision on the conclusion of the WTO Agreement, the Council stated in the last recital in the preamble to Decision 94/800 that by its nature, the Agreement establishing the World Trade Organisation, including the annexes thereto, is not susceptible to being directly invoked in Community or Member State courts. It seems that the Council intended thus to limit the effects of the agreement and to align itself with the approach of the other contracting parties who made it quite clear that they

22 — The Agreement on Textiles and Clothing, as stated above, provides for its own dispute settlement system which is in accordance with the general system (pursuant to Article 1(2) of the Memorandum of Understanding cited above on the settlement of disputes regarding the WTO agreements). A Textiles Monitoring Body (TMB) is established which, on the basis of 'information' and 'notifications' by parties to the agreement and in the absence of 'any mutually agreed solution in the bilateral consultations' provided for in the agreement, and at the request of either Member, 'shall make recommendations to the Members concerned' (Article 8 of the ATC).

23 — In cases where claims of a breach of WTO rules have been ruled inadmissible, the Court has admitted that it has jurisdiction in two respects. First it declared it was competent, in the context of preliminary ruling proceedings, to interpret Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C to the WTO Agreement), which provides for national courts to adopt provisional measures to prevent an infringement of an intellectual property right. According to the Court, as it is solely for the national court to decide whether to adopt such measures, the Court is bound to give a ruling on questions submitted for preliminary ruling on matters of interpretation relating to such a decision. Furthermore, the Court states that, 'where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply' (see judgment in Case C-53/96 *Hermès* [1998] ECR 3603, paragraphs 31 and 32). In a later judgment in a direct action by Italy contesting a Council Regulation on import quotas for rice in which the conflict with Article XXIV(6) of the GATT was invoked and in particular paragraph 5 et seq. of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade of 1994, the Court refused to admit the plea of inadmissibility in the action for annulment, stating that the contested regulation was 'intended to implement a particular obligation entered into within the framework of GATT' and that, therefore, 'the Court must review the lawfulness of the Community act in question from the point of view of the GATT rules' (see judgment of 12 November 1998 in Case C-352/96 *Italy* v *Council*, not yet published in ECR, in particular paragraphs 19 to 21).

wished to limit the possibility of relying on provisions of that agreement before national courts.

Although the wording of the recital is clear, there remain doubts as to the effects that a declaration of this kind might produce at international level, in relations with third countries, and at Community level. It need hardly be stated that a unilateral interpretation of the agreement made in the context of an internal adoption procedure cannot — outside the system of reservations — limit the effects of the agreement itself. This interpretation, which favours the objective content of provisions of the agreement over wishes expressed in separate unilateral declarations is in accordance with customary law on the interpretation of treaties, embodied in the Vienna Convention of 22 May 1969, in particular in Articles 31 to 33.[24] According to this case-law, 'Embodying customary international law, Article 31 provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The text of the treaty is the primary source for interpretation, while external aids such as *travaux préparatoires*, constitute a supplementary source'.[25]

In respect of the scope of that declaration in the context of the Community legal order, it is sufficient here to point out that the WTO Agreements, by virtue of their status as international agreements, are binding on all the institutions (under Article 228(7) of the Treaty, cited several times above) and therefore constitute a source of Community law. The Court of Justice therefore has an obligation to ensure that the agreements are respected both by the Community institutions and by the Member States, and, furthermore, the Council may not, by an act of secondary legislation, limit the Court's jurisdiction, nor decide to rule out the jurisdiction of national courts to apply these agreements.[26]

In the light of these considerations, I maintain that, contrary to what the Commission has stated, the declaration contained in the 14th recital in the preamble to the decision is simply a policy statement and, as such, cannot affect the jurisdiction of either Community or national courts to interpret and apply the rules in the WTO Agreements.

21. Similarly, any statements by other States which have acceded to the WTO Agreements and which reject the direct effect of the provisions of the agreements

24 — See, lastly, judgment of 16 June 1998 in *Racke*, cited above, paragraphs 45 to 48.

25 — See, *inter alia*, judgment of the International Court of Justice of 3 February 1994, *Libyan Arab Jamahiriya* v *Chad*.

26 — See the Opinion of Advocate General Tesauro on this subject delivered on 13 November 1997 in Case C-53/96 *Hermès*, paragraph 24.

cannot be considered relevant. Statements of this kind do not affect the scope of those provisions or the question whether they are binding within the Community legal order. In other words, I would find it difficult to admit that such statements can in themselves limit the binding nature of the whole system of WTO agreements with respect to all other contracting states. A strong argument for the proposition that the WTO rules are not binding because of the reciprocal nature of obligations undertaken in an international context, might be failure by a contracting state to comply with one or more provisions of the agreement combined with the fact that there are no adequate instruments for imposing sanctions for any breach or failure to comply by the authorities of the State concerned. It should be remembered here that, on the basis of the rule of international customary law, *inadimplenti non est adimplendum*, the breach of a provision of an agreement by a third country, if it is a material breach, may justify the agreement being suspended or even extinguished, either for all contracting States or only for the State in breach (Article 60 of the Vienna Convention on the Law of Treaties). [27] A breach of this kind could therefore justify a suspension of the WTO Agreement and preclude application of the provisions of the agreement by the judiciary. [28]

22. It is worth adding that a breach on the part of a contracting party is not the only reason for the WTO Agreement to be suspended and therefore not to be applied by the judicature. The WTO Agreement, like the other international agreements attached to it, does not preclude the option of recourse to all the grounds for termination or suspension of the Agreement provided for by customary law and listed in the

27 — Under Article 60 of the Vienna Convention, a material breach of a bilateral treaty by one party 'entitles' the other party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in relations between itself and the defaulting State [paragraph 2(b)]. In a case of this kind, the Community institutions are entitled to decide to suspend the agreement and to adopt measures and conduct contrary to the provisions of the WTO Agreement in respect of individual States who have breached these provisions.

28 — It is true that that in Community case-law, failure by courts of third countries to apply international rules of an agreement has not been seen as a reason for precluding the possibility that such provisions may be binding. In its judgment, in *Kupferberg* the Court stated that, '[a]lthough each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system'. However, 'the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application [and may therefore be invoked by individuals] whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement' (paragraph 18). It appears then that the Court has decided that failure by the courts of a contracting state to recognise the possibility of invoking rules of the agreement does not constitute a breach which may justify failure to comply with that agreement by the Community institutions and thus preclude individuals from invoking its provisions within the Community legal order. As has rightly been noted in academic writings, these remarks by the Community judicature should not be interpreted as meaning that in the Community legal order any possibility of relying on rules of an agreement before the court of a third country should be completely ruled out, and consequently that if a national judicature fails to comply with an international rule, this can justify a breach by a national court or the Community of that same international provision. The paragraph should be interpreted instead as meaning that ruling out the option to invoke such a rule before the courts does not mean a third country may not have provided other instruments to defend the interests and rights of individuals and that, therefore, the existence of an alternative system of protection of these rights prevents any breach by the third country from having extreme consequences. See the Opinion of Advocate General Tesauro in the *Hermès* case, cited above, paragraphs 31 et seq.

Vienna Convention in Articles 54 to 64 (for example, the *rebus sic stantibus* rule).

There is also a strong case for holding that the rules of the agreement are not applicable or *a fortiori* binding even if the agreement was not suspended or extinguished, whenever the fulfilment of an obligation under the WTO entails a risk for the Community of jeopardising the balanced operation of the Community legal order and the pursuit of its objectives. In other words, whenever implementating the WTO Agreements entails failing to comply with rules of Community primary law or general principles which have assumed the nature of constitutional rules in the Community legal order, the Court may, in my opinion, hold the obligation assumed in the context of the agreement to be unlawful and may refrain from applying the rule of the agreement in the particular instance. Even if this may cause the Community to be held to be in breach of international law, the Court, which has the duty to ensure respect of the independence of the Community legal order, may not apply provisions that require the institutions to act in a manner that is inconsistent with the proper functioning and the objectives of the Treaty.

23. In its defence, the Council states that the WTO Agreements provide for an autonomous system for the settlement of disputes which usurps the Court's powers to interpret and apply the rules of the agreements. In my opinion, the system provided for in the WTO Agreements, and in particular in the Understanding on the Settlement of Disputes, does not imply any limitation on the jurisdiction of the Court of Justice because, first, it does not provide for the establishment of a judicial body but for a system for the settlement of disputes between persons subject to international law: the body which adopts the decisions or recommendations is a political body to which individuals within a particular domestic legal order have no access; and, second, the establishment of a judicial body whose jurisdiction was not limited to interpreting and applying the agreement but also included the power to annul measures of the Community institutions would be incompatible with the Community legal order inasmuch as it would clearly conflict with Article 164 of the EC Treaty.[29] In any case, it is evident that internal review of the rules of agreements by the Community institutions and the Member States cannot fail to offer a stronger guarantee of the fulfilment of the obligations undertaken at international

29 — On the possibility of establishing systems of dispute settlement within the framework of an international agreement, in parallel to that provided by the Treaty, see the judgment in *Kupferberg*, cited above, in which the Court held that the establishment within the framework of the agreement between the European Economic Community and Portugal of 22 July 1972 of joint committees, responsible for the administration of the agreements and for their proper implementation was not sufficient 'to exclude all judicial application of that agreement' (see paragraphs 19 and 20); see too Opinion 1/91 of 14 December 1991 on the draft agreement between the Community and the countries of the European Free Trade Association on the creation of the European Economic Area, [1991] ECR I-6079, in which the Court stated that, 'the Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions'. So an international agreement providing for such a system of courts is in principle compatible with Community law. However, in so far as the agreement establishes a judicial system whose decisions are binding on the Court of Justice in respect of its interpretation and application of rules that are an integral part of the Community legal order, the agreement conditions the interpretation of Community rules and therefore 'conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community' (see Section V of Opinion 1/91 [1991], ECR I-6104).

level and is therefore in keeping with the objectives of the agreement. The fact that the contracting parties have undertaken to use the dispute settlement system provided by the WTO Agreements to settle disputes arising from breaches of the agreement and the possible adoption of retaliation measures, does not preclude the parties themselves from annulling or sanctioning internal measures which might be contrary to the rules of the agreement.

24. For the reasons given above, I believe that, in the present case where a Member State has brought a direct action under Article 173 of the Treaty challenging an act of the Council, the applicant's wish to invoke the WTO Agreements is in no way inadmissible.

— *Substance: (a) the pleas regarding breach of the provisions of the World Trade Organisation Agreements and (b) the pleas claiming a connection with the alleged contradictions between the rules of the agreements*

25. (a) The Portuguese Government claims that the contested decision is contrary to the WTO rules on four grounds. It disputes the lawfulness of the option granted to the Indian government to reintroduce alternative specific duties and to grant export licences under procedures not provided for in the WTO Agreements on the ground that these powers are contrary both to Article II of the GATT and the provisions of the Agreement on Import Licensing Procedures (which appears in Annex 1A to the WTO Agreement). The Portuguese Government claims, furthermore, that the imbalance between the commitments undertaken by the Community and those undertaken by India and Pakistan on opening up their respective textiles markets is unlawful, particularly in respect of the option of granting requests for exceptional flexibility. Finally, it relies on a breach of the obligation to publish international agreements provided by Article X of the GATT.

26. Before considering whether these pleas are well-founded, it is appropriate to recall briefly the text of the Memoranda of Understanding.

The Memorandum of Understanding with Pakistan includes a series of commitments by the Community and by Pakistan. In particular, Pakistan undertakes to remove all quantitative restrictions on a number of textile products listed in detail in Annex II to the Memorandum of Understanding. However, 'should a critical situation arise in the textiles industry of Pakistan or in relation to the balance of payments situation of Pakistan, the Government of Pakistan retains the right under GATT 1994 and the WTO to reintroduce, after necessary consultations with the European Commission, quantitative restrictions' (paragraph 4). The Commission, on the other hand, is committed to ensuring that 'all restrictions currently affecting the importa-

tion of products of the handloom and cottage industries of Pakistan are removed before entry into force of the WTO' (paragraph 7) and to giving 'favourable consideration to requests which the Government of Pakistan might introduce in respect of the management of existing quota restrictions for exceptional flexibility' (paragraph 6).

The Memorandum of Understanding with India establishes that the Indian Government will bind its tariffs on the textiles and clothing items listed in the Attachment to the Memorandum of Understanding, and that 'these rates will be notified to the WTO Secretariat within 60 days of the date of entry into force of the WTO'. However, 'if the integration process envisaged in Article 2, subparagraphs 6 and 8 of the WTO Agreement on Textiles and Clothing does not materialise in full or is delayed, duties will revert to the levels prevailing on 1 January 1990'. Furthermore, the Indian Government may 'introduce alternative specific duties for particular products' and those duties 'will be indicated as a percentage *ad valorem* or an amount in INR per item/square metre/kg' (paragraph 2). The Indian Government agrees, 'if the EC considers that such duties are having an adverse impact' on its exports of the products in question, 'to address the concerns raised in a mutually acceptable manner' with the Community (paragraph 2). The European Community, for its part, agreed to remove, with effect from 1 January 1995, all restrictions currently applicable to India's exports of handloom products and cottage industry products as referred to in Article 5 of the EC-India agreement (paragraph 5). The Community undertakes to give favourable consideration to requests 'which the Government of India might introduce for exceptional flexibilities, in addition to the flexibilities applicable under the bilateral textiles agreement' up to the specific amounts set out in the Memorandum of Understanding. It is presumed, lastly, that the Indian Government will invoke such exceptional flexibilities in the order of carry-over, inter-category transfer and carry forward to the extent of the possibilities existing on the basis of the utilisation of quotas (paragraph 6).

27. The Portuguese Government maintains, in its first plea for annulment, that the fact that paragraph 2 of the Memorandum of Understanding with India provides that it may 'introduce alternative specific duties for particular products' and that it may levy those duties on the basis of the value of the goods or on the basis of 'export data to be provided by the EC', constitutes a right which clearly goes against the requirement to bind customs duties laid down in Article II of the GATT. In its view, the provision that the Indian Government may modify the system of duties if these 'have an adverse impact' on exports from the Community does not prevent the system from being unlawful.

The second plea for annulment invoked by the Portuguese Government, as already

mentioned, concerns the procedure for granting export licences. It is clear from the annex to the Memorandum of Understanding with India that India will continue to issue special import licences (known as SILs). According to the Portuguese Government, these licences are normally issued by the Government to Indian exporters who sell them on to operators from other countries or to Indian importers: they are thus not issued to foreigners who intend to export to India, but to Indian operators who then sell them on at a price that is not subject to control by the national authorities. This system, Portugal claims, is contrary to the rules of procedure laid down in the agreement which appears in Annex 1A to the WTO Agreement.

That agreement makes provision for two import licensing procedures: the first requires licences to be granted automatically to all operators who apply for them (Article 2); the second does not make provision for licences to be granted but prohibits the State from introducing limits greater than a fixed quantitative restriction for the trade in its products. As part of this procedure States must publish the overall amount of quotas to be applied by quantity and/or value, the opening and closing dates of quotas, and any change thereof [Article 3(5)(b)]. Once the licensing system has been set up, any 'person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence'. If the licence application is not approved, the applicant may ask why and may bring an appeal or apply for a review in accordance with the domestic legislation or internal procedures of the importing Member [Article 3(5)(e)].

28. The third alleged ground of incompatibility with the WTO rules concerns the balance between the commitments entered into by the contracting parties. The Portuguese Government considers that India and Pakistan have in fact agreed to a 'random' opening up of their market, since, on the one hand, India has reserved the right to reintroduce in an arbitrary and discretionary manner specific duties and to maintain the system of special licences and, on the other hand, the Community has undertaken to grant exceptional flexibilities, that is to say to respond to requests for derogations from tariff quotas fixed for the import of textile products from these countries. Such a system of flexibility would create a global import quota for all categories of textile products, thwarting the quantitative limits placed on each textile category to protect Community producers, and would also lead to a sharp acceleration of the liberalisation process agreed within the framework of the Agreement on Textiles and Clothing attached to the WTO Agree-

ment. Such an imbalance would clearly be contrary to Articles 4 and 7 of the ATC.

I should point out that Article 4(2), cited above, states that 'the introduction of changes, such as changes in practices, rules, procedures ... , in the implementation or administration of those restrictions notified or applied under [the ATC] should not: upset the balance of rights and obligations between the Members concerned under this agreement' or 'disrupt trade' in textiles. Article 7, in particular paragraph 1, states, furthermore, that all Members are to take 'such actions as may be necessary to abide by GATT 1994 rules'. They must also 'avoid discrimination against imports in the textiles and clothing sector' (Article 7(1)(c)).

29. Before considering these claims, which will be evaluated together given the clear link between the various arguments, it should be recalled that the WTO provisions invoked as a criterion of the lawfulness of the Community acts are clear, precise and unconditional: Article II of the GATT Agreement explicitly prohibits the introduction of new import restrictions, while the Agreement on Import Licensing Procedures attached to the WTO Agreement imposes specific obligations on contracting states to adopt an internal system of licensing. Articles 4 and 7 of the ATC explicitly prohibit measures which might upset the 'harmonised system' of the WTO and the liberalisation process provided for by the agreement itself.

In view of the content of the contested bilateral agreements — in particular the agreement concluded with India — and of the multilateral agreements cited above, it is impossible to avoid the conclusion that there are indeed systemic disparities between the WTO provisions invoked by Portugal and the provisions of the bilateral agreements in all the aspects that Portugal raises. In my opinion, however, such disparities do not automatically signal incompatibility between the WTO multilateral agreements and the bilateral agreements in issue, but simply a modification of the earlier agreements. According to international customary law, parties to a multilateral treaty may, in principle, modify the treaty as between themselves by means of a subsequent bilateral agreement, as provided by Article 41(1)(b) of the Vienna Convention on the Law of Treaties which transcribes a rule of customary law, provided that the modification in question '(i) does not affect enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'. For a bilateral agreement to be considered incompatible with a prior multilateral agreement therefore — solely with regard to the aspects of interest in the present case — the bilateral agreement must materially inhibit the effects of the first agreement, in particular with regard to the rights and obligations entered into by contracting

parties which are not parties to the second agreement. However, as the Commission has rightly pointed out, any incompatibility is not, from the point of view of international law, a ground for the subsequent bilateral agreement to be declared invalid although it might give rise to a breach of international law by the Community vis-à-vis the parties to the earlier multilateral agreement.

In the present case it seems clear that the agreements between the Community and India and the Community and Pakistan do not affect relations between the contracting parties to the two bilateral agreements and the WTO Agreements in any way, nor do they compromise the reciprocal commitments entered into within the framework of the international negotiations. In this connection, the fact that a Community Member State, such as Portugal, suffers as a result of the content of the bilateral agreements is, contrary the Portuguese Government's contentions, irrelevant for the purpose of considering the lawfulness of the two bilateral agreements. Although Member States of the Community have acceded autonomously to the WTO Agreements, on the basis of their being mixed agreements, they cannot consider themselves as third parties with regard to a bilateral agreement, such as the one in issue, concluded by the Community after the entry into force of the multilateral agreements. The disputed agreements were in fact concluded by the Council on the basis of its exclusive powers in the area of the common commercial policy. These powers were expressly conferred on the Council under Article 113 of the Treaty and have therefore been transferred directly to it by the Member States. If follows that Portugal must be regarded as a contracting party not only to the WTO multilateral agreements but also to the bilateral agreements concluded with India and Pakistan respectively.

In respect of the content of the rules of the agreements at issue, I should point out that the bilateral agreements, contrary to what Portugal maintains, further the integration of the textiles markets of the contracting states and are therefore in line with the objectives of the multilateral agreements invoked, in respect of their relations both with one another and with other Member countries of the WTO. It is apparent from the statements of the parties, that India and Pakistan offered, as a concession to initiate the liberalisation process, to set nominal quotas to begin with and that the decision to negotiate bilateral agreements with these States was taken precisely with a view to achieving the objective of the WTO Agreement of gradually opening up the respective markets completely. It appears, therefore, that the modest initial concessions which India is required to make are, in any case, less than those provided for in the bilateral agreement. The fact then that, according to the bilateral agreement, India, in spite of its commitment to bind existing duties (rates hitherto notified to the WTO Secretariat), may introduce new duties and thus fail to honour the commitment to bind them is certainly not in line with the general aims of the WTO system. However, the introduction of such duties does not appear to affect the process of liberalisation of the

textiles trade initiated by the multilateral agreement, given the non-specific and provisional nature of the measure. In the same way, the option in the agreement with India for that country to grant to 'special import licenses' in accordance with a procedure — described by the Portuguese Government and not contested by other contracting parties — which provides that recipients of licences are to be Indian operators and not exporters, is not based on the general rules of procedure laid down in the multilateral agreement. Nevertheless, that provision does not appear to have a bearing on the effects of the WTO Agreement: applications for licences are for a fixed period of time (see the 'Special Import Licences' column in the annex to the agreement) and do not affect the whole range of products.

As regards the alleged 'imbalance' between the benefits for each of the contracting parties, it is clear from the text of the two Memoranda of Understanding that there is a considerable discrepancy between the periods of time agreed on for opening up their respective markets. The memoranda, in fact, make provision for a commitment by the Community to remove current restrictions on the import of cottage industry textile products and, furthermore, to grant any requests for exceptional flexibility, that is to say derogations from the import quota systems established by the Community. In return for these commitments, Pakistan states that it is prepared to remove all quantitative restrictions on a fixed list of textile products attached to the memorandum, while India merely undertakes not to introduce new duties and therefore not to place any further restriction on the import of textile products, while reserving the option to reintroduce certain specific duties *ad valorem*, and in particular to issue the Special Import Licences referred to above. However, an imbalance of this kind does not constitute grounds for declaring the memorandum invalid, since international treaty law does not require an exact match between the benefits gained by the contracting parties and since the WTO rules — particularly Articles 4 and 7 of the ATC invoked by the Portuguese Government — do not, even implicitly, prohibit the conclusion of bilateral agreements of this kind, but prohibit only measures which may affect the operation of the multilateral agreement by restricting the market liberalisation process envisaged in the WTO Agreements. For the reasons explained earlier, I believe that the memoranda in issue do not produce an effect of this kind. [30] Moreover, contrary to what the Portuguese Government argues, the WTO provisions invoked do not prohibit a flexible system, that is to say derogations from import quotas, such as the system provided for by the Agreements with India and Pakistan.

30 — In support of the arguments concerning the unlawfulness of the imbalance between concessions by the contracting parties to the two bilateral agreements at issue, Portugal, in its reply, invokes a breach of Article XXVIII of the GATT. Such a plea, advanced at this stage is not only too late and therefore inadmissible, it is also unfounded in that the reference to 'concessions granted on a reciprocal and mutually advantageous basis' in paragraph one of the Article does not, in my opinion, concern equivalence of benefits, but reciprocity in discharging the obligations assumed under the GATT and therefore actual observance of the concessions granted in the context of the agreement.

30. On the last plea of illegality invoked by the Portuguese Government, concerning the failure to comply with the requirement to publish international agreements provided for by Article X of the GATT,[31] I simply refer to my earlier remarks, with regard to the facts, that Portugal's plea of a breach of the same requirement in Community law was unfounded. It is true that the decision, together with the two Memoranda of Understanding, was published after Portugal brought the action and four months after its adoption, but a delay of this kind is not excessively lengthy and, in my opinion, does not justify annulment of the decision on the grounds that it is in breach of the international rules invoked.

31. (b) I turn now to the pleas concerning breach of principles of Community law which are closely connected to the arguments put forward in support of the alleged conflict between the bilateral agreements concluded with India and Pakistan and the WTO Agreements. These pleas concern a breach of the principle of cooperation in good faith in relations between the Community and the Member States, breach of the principle of the protection of legitimate expectations, breach of the principle of economic and social cohesion and, finally, breach of the principle of equality between economic operators.

32. In respect of the plea concerning cooperation in good faith in relations between the Community institutions and the Member States, the Portuguese Government maintains that the bilateral agreements were concluded without regard for its position on opening up the Community market to India and Pakistan. Portugal recalls that it stated on a number of occasions that it was willing to accede to the WTO Agreements only if the Community did not derogate from the commitments it had made in the multilateral framework by offering these two third countries concessions, in return for opening up their markets, that set quantitative limits that were higher than those proposed in the WTO forum. Portugal claims that it expressly stated its official position at the Council meeting of 15 December 1993 at which it was decided to accede to the WTO agreements, and in a letter of 7 April 1994 from the Portuguese Minister for Foreign Affairs to the Council.[32] Despite these statements, the Council, Portugal claims,

31 — Article X of the GATT specifically provides that: 'Agreements affecting international trade policy which are in force between the Government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published.'

32 — The letter of 7 April 1994 from the Portuguese Minister for Foreign Affairs stated that: 'Portugal's acceptance of this compromise, including dismantling the Multifibre Arrangement, was closely tied to the observance of three conditions: effective and complete opening up of all markets, strengthening the GATT rules and discipline, and use of the Community system of generalised preferences as a means of correcting imbalance in the case of any breaches by third countries. I note with concern, in particular in the textiles sector, unfavourable developments in that certain contracting parties are not fulfilling obligations they agreed to, refusing to open up their markets. I am referring specifically to the case of India and Pakistan which, so far, still have not put forward their proposals. The European Union, acting through the Commission, should oblige our partners to fulfil all the obligations they entered into on 15 December, on the basis of the policy established by the Council. You will understand that these commitments are not negotiable and that the European Union cannot offer any further concessions, in particular in the most sensitive sectors, such as textiles and clothing'.

negotiated the agreements with India and Pakistan, providing for acceleration of the process of opening up the textiles market and thus dismantling the Community system of tariff quotas for these products.

The Council does not dispute the Portuguese Government's reconstruction of events but emphasises that the position expressed by Portugal, in particular in the letter from the Minister for Foreign Affairs of 7 April 1994, is of a political nature and led to the adoption of Regulation 852/95 whereby the Council granted a series of subsidies to the Portuguese textile industry. [33] The Council maintains that, since the contested decision is a commercial policy measure, it could be adopted by qualified majority of the members of the Council (Article 113(4) of the Treaty). To recognise that Portugal's position was relevant to the adoption of the decision would mean calling the legal basis of the contested measure into question, as it would no longer require a qualified majority but unanimity for it to be adopted.

The arguments of the Council appear to be well founded. The position of the Portuguese Government, and in particular the Minister's statement of 7 April 1994 quoted above, are of a merely political nature and as such, therefore, are not relevant for the purpose of determining the lawfulness of the decision. Even if that position were held to produce legal effects, it would constitute a reservation on Portugal's accession to the WTO Agreements and could not therefore affect the validity of the contested bilateral agreements. Furthermore, the principle of cooperation between institutions and States that has been invoked is intended to ensure that the objectives of the Treaty are achieved; it does not affect the choice of the legal basis for Community acts or the legislative procedure to be followed in adopting them. [34] In the present case, the contested decision is clearly a common commercial policy measure which, under Article 113(4) of the Treaty must be adopted by qualified majority. It follows that opposition to it by one Member State does not constitute a

33 — Council Regulation (EC) No 852/95 of 10 April 1995 on the grant of financial assistance to Portugal for a specific programme for the modernisation of the Portuguese textile and clothing industry (OJ 1995 L 86, p. 10).

34 — On the implementation by the Community institutions of the requirement of cooperation in good faith under Article 5 of the judgment, see Judgments in Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraphs 36 to 38, Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraphs 34 to 36 and the Order of the Court in Case C-2/88 *Zwartveld and Others* [1990] ECR I-3365, paragraphs 17 to 21.

defect which could justify its annulment. For this reason the plea for annulment should be held to be unfounded.

33. The Portuguese Government also claims that, in adopting the contested decision, the Council breached the principle of protection of legitimate expectations in that the agreements concluded with India and Pakistan entailed a significant acceleration of the process of liberalising the trade in products from those countries and would therefore disappoint all the expectations Community operators in the sector had formed on the basis of the gradual opening up of the market envisaged by the WTO Agreements, in particular the ATC Agreement, and the Community legislation in force, particularly Regulation No 3030/93 as amended by Regulation No 3289/94 which transposes the ATC into Community law. The Council points out in this connection that the bilateral agreements do not materially affect the content of the commitments entered into at multilateral level, as regards either gradual opening up of the contracting parties' markets or the possibility of granting exceptional flexibilities in the form of derogations to quantitative import limits, and that they do not greatly affect the future framework of the WTO Agreements. The Council doubts whether operators in the sector could have been unaware of the opening of bilateral negotiations between the Community and India and Pakistan with a view to reaching agreements on the trade in textiles, since the Director General of the GATT had invited the Community to conclude its bilateral negotiations with these two third countries as long ago as December 1993.

I feel I should make two points on this issue. First, a regulation such as the one in this case, which fixes import quantities in a general way by category of products, cannot be regarded as constituting concrete and specific expectations on the part of the various economic operators capable of founding a legitimate expectation in the provision in force not being changed. According to settled case-law, compliance with the principle of the protection of legitimate expectations cannot justify the immutability of a provision, especially in sectors — such as the importation of textiles — where it is necessary to adapt the rules constantly by reference to changes in the economic situation and such changes may reasonably be expected.[35] Second, although under the terms of the bilateral agreements, as a result of the various stages of opening up the Community market and the express option of granting derogations from import tariff quotas, the Community has allowed its market to be opened up more rapidly than was envisaged in the multilateral agreements, nevertheless, given the extent of the discrepancy in the timetables set for liberalisation, this does not, as we have seen, imply actual conflict with WTO provisions, in particular those of the ATC. It follows that no appreciable differences in treatment can be established

35 — See my Opinion, delivered on 16 July 1998, in Case C-159/96 *Portugal* v *Commission*, paragraphs 79 to 81.

between Indian and Pakistani products, on the one hand, and those from other States which have acceded to the WTO, on the other, and in any event no differences such as to prejudice the expectations of the operators concerned.

34. Portugal then claims a breach of the principle of economic and social cohesion set out in Articles 2, 3(j) and 130a to 130e of the Treaty. Portugal maintains that the fact that the Community did not adhere to the policy expressed during the negotiation of the multilateral agreements, in the course of which the interests of economic operators of different regions of the Community were weighed up, led to the penalisation of one particular type of operator, namely the Portuguese textiles industry. This, it claims, led to the need to adopt Regulation No 852/95 which made provision for grants to Portuguese operators in the sector.

This plea seems to me to be clearly unfounded. It is true that the Community has a duty in its actions, particularly when legislating, to ensure economic and social cohesion, as provided under Articles 2 and 3 of the Treaty; a political objective of this kind, however, is not a principle of law and therefore a criterion of the lawfulness of Community measures. It follows that, in this case, the decision cannot be annulled merely by reason of the fact that it harms the market position of a category of economic operators in a particular area of Community territory.

35. These considerations lead me to conclude that Portugal's last plea, on breach of the principle of equality between economic operators, is likewise unfounded. On this point, the Portuguese Government maintains that the contested decision favours wool producers over cotton producers since, in the bilateral agreement, the Indian market is to be opened up only for the former category of products. In my opinion a decision such as this, concerning import quotas having effects such as to favour a particular category of producers at the expense of those operating in the same sector but in different markets, cannot be regarded as illegal on the ground that it supposedly discriminates against those to whom it is addressed. The principle of non-discrimination in fact requires of the Community legislature 'that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified'. [36] In this case, operators in the sector work in two distinct markets, wool and cotton, and therefore any economic prejudice suffered by one of the two categories of producers does not constitute a breach of the principle of non-discrimination.

36 — See in particular judgment in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 67.

Conclusion

36. In the light of the foregoing considerations, I propose that the Court should:

— dismiss the application;

— order the Portuguese Republic to pay the Council's costs;

— order each of the interveners to bear its own costs.