4. Article XI of the General Agreement on Tariffs and Trade (GATT) is not capable of conferring rights on citizens of the Community which they can invoke before the courts.

Consequently, the validity of Regulations Nos 459/70, 565/70 and 686/70 of the Commission (JO L 57, p. 20, L 69, p. 33 and L 84, p. 21 respectively) cannot be affected by that article.

In Joined Cases 21 to 24/72

Reference to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven, The Hague, for a preliminary ruling in the action pending before that court between

INTERNATIONAL FRUIT COMPANY NV, Rotterdam (Case 21/72),

KOOY ROTTERDAM NV, Rotterdam (Case 22/72),

VELLEMAN EN TAS NV, Rotterdam (Case 23/72),

JAN VAN DEN BRINK'S IM- EN EXPORTHANDEL NV, Rotterdam (Case 24/72),

and

PRODUKTSCHAP VOOR GROENTEN EN FRUIT, The Hague, on the interpretation of the said Article 177 and, if necessary, on the compatibility of certain regulations of the Commission with Article XI of the General Agreement on Tariffs and Trade (GATT),

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner, A. Trabucchi, J. Mertens de Wilmars and H. Kutscher (Rapporteur), Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. On the basis of its Regulation No 23 of 4 April 1962 on the progressive establishment of a common organization of the market in fruit and vegetables (OJ, English Special Edition 1959–1962, p. 97), on 9 December 1969 the Council adopted Regulation No 2513/69 on the coordination and standardization of the treatment accorded by each Member State to imports of fruit and vegetables from third countries (JO L 318, p. 6). The first paragraph of Article 1(1) of that regulation prohibits, *inter alia*, 'save as otherwise stated in Community provisions or derogations adopted by the Council', 'the application of any quantitative restrictions and all measures having equivalent effect' on imports from third countries of certain agricultural products including eating apples. Article 2 of the same regulation provides:

'1. If the Community market in one or several of the products referred to in Article 1 suffers from, or is threatened with, serious disturbance capable of jeopardizing the objectives of Article 39 of the Treaty, as a result of imports or exports, appropriate measures may be taken in regard to trade with third countries until the disturbance or threat of disturbance has disappeared.

2. If the situation postulated in paragraph (1) exists, the Commission, at the request of a Member State or on its own initiative, shall take the necessary measures. These shall be communicated to the Member States and implemented immediately. If the Commission has been approached by a Member State it shall make its decision within forty-eight hours of receiving the request.

3. ...'

2. On the basis in particular of paragraph 2 set out above, the Commission, on 11 March 1970 adopted Regulation No 459/70 laying down the protective measures applicable to the importation of eating apples (JO L 57, p. 20). In accordance with Article 1(1) of that regulation 'With effect from 1 April 1970 and until 30 June 1970, all imports into the Community of apples other than cider apples ... shall be subject to the presentation of an import licence'. Under Article 2(1) and (2) of the same regulation Member States shall notify the Commission each week of the quantities in respect of which licences have been requested and working on that basis the Commission 'shall appraise the situation and decide on the issue of licences'. According to the preamble to that regulation, these measures were justified by the following in particular: the increase in Community production of apples; the fact that 'a crisis situation ... was found to exist in Belgium, France, Italy and Luxembourg' and that the situation was proving difficult in the Netherlands and in Germany; the 'significant' amount of recent imports of apples into the Community and the risk that the liberalization of imports enacted by Regulation No 2513/69 would lead to an increase in the quantities imported; the 'conclusion that the Community market is threatened, because of imports, with serious disturbance capable of jeopardizing the objectives of Article 39 of the Treaty' and 'that it is necessary, in these circumstances, to take protective measures' having 'the effect of limiting imports to those which the Community market can absorb without the market situation being aggravated by their admission'; finally, the consideration 'that it is necessary to adopt for this purpose a mechanism for suspending imports by recourse to a system of import certificates issued to the extent required by the Com-

munity market situation.'
On 25 March 1970 the Commission adopted Regulation No 565/70 on the operation of the system of transport certificates for eating apples, amending Regulation No 459/70 (JO L 69 p. 33). Under Article 1 of that regulation 'applications for import certificates submitted up to 20 March 1970 shall be accepted, in accordance with the provisions of Article 1 of Regulation No 459/70, for the quantity indicated in the application and up to a maximum of 80% of a reference quantity. The date of 20 March 1970 was postponed on several occasions, in particular by Article 1 of Regulation No 686/70 of the Commission of 15 April 1970 (JO L 84, p. 21) and by Article 1 of Regulation No. 983/70 of the Commission of 28 May 1970 (JO L 116, p. 35).
According to Article 1(2) of Regulation No 565/70, 'the reference quantity shall be equal to the sum of the quantities of apples ... which the applicant has imported into the Community in 1969 during the month corresponding to that indicated in the application'.

3. In May 1970 the plaintiff firms in the main actions applied to the Produktschap voor Groenten en Fruit, the Netherlands Agency hereinafter referred to as 'the PGF', for import certificates for eating apples from third countries. The PGF replied that on the basis of Regulations Nos 459/70, 565/70 and 686/70 'the application must be rejected' or that 'it had decided to reject it'.
In proceedings brought on 5 August 1970 (Joined Cases 41 to 44/70) those firms made applications to the Court for the annulment of the Community measures which formed the basis of the rejection by the PGF. By judgment of 13 May 1971 ([1971] ECR p. 411 *et seq.*) the Court dismissed those applications as unfounded.
In addition, on 30 June 1970 the plaintiffs instituted proceedings in the College van Beroep voor het Bedrijfsleven for the annulment of the decisions of rejection of the PGF, contending in particular that the Netherlands State had, contrary to Regulation No 459/70, transferred powers and obligations deriving from that regulation to the PGF and that certain provisions of Netherlands law, applied by the said decisions, were contrary to Community rules. The national court then referred the matter to the Court under Article 177 of the EEC Treaty which delivered its judgment on 15 December 1971 (Joined Cases 51 to 54/71, Rec. 1971, p. 1108 *et seq.*)

4. Still in the same main action, the College van Beroep, basing its decision largely on the aforementioned judgments in relation to other questions and having noted that the plaintiffs were also alleging that Regulations Nos 459/70, 565/70 and 686/70 are incompatible with Article XI of GATT, decided on 5 May 1972 to submit the following questions to the Court:

'1. Does the validity of measures adopted by the institutions of the Community, which is one of the matters dealt with in Article 177 of the EEC Treaty, also cover the validity of these measures under an international law other than Community law?

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

Article XI of GATT is in the following terms:
'General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this article shall not extend to the following:

(a) export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(b) import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(c) import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

3. Throughout Articles XI, XII, XIII and XIV the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.'

5. The decision making the reference was received at the Court Registry on 8 May 1972.

By order of 5 July the Court decided to join the cases for the purposes of the oral procedure and judgment.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted by the plaintiff firms, the Government of the Kingdom of the Netherlands and the Commission of the European Communities.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided there was no need for any preparatory inquity. The oral observations of the plaintiffs in the main actions and of the Commission of the European Communities were presented at the hearing on 5 October 1972.

The plaintiff firms were represented by B. H. ter Kuile, advocate of the Hoge Raad of the Netherlands, the Netherlands Government by E.L.C. Schiff, Secretary-General of the Ministry for Foreign Affairs, and the Commission by its Legal Adviser, R. C. Fischer.

The Advocate-General delivered his opinion at the hearing on 25 October 1972.

II — Summary of the observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community

The observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

The first question

The *plaintiff firms* submit that this question should be viewed from an angle different from that adopted by the national court. GATT comes under the first paragraph of Article 234, under the terms of which 'The rights and obligations arising from arguments concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.' It is clear from this that the Community institutions do not have the power to take measures capable of affecting the rights and obligations arising under GATT. Such measures are incompatible with the said Article 234 and void as being *ultra vires*; parties affected by them may claim that they are inapplicable.

The *Netherlands Government* is of the opinion that the validity of a measure adopted by one of the institutions of the EEC must, in general, be judged in accordance with the rules of Community law, including Article 234 of the EEC Treaty. That provision must be interpreted as meaning that the said institutions are powerless to affect the rights and obligations deriving from international agreements. When two legal rules, contained in both a Community measure and an international agreement, are directly applicable in a Member State and incompatible *inter se*, such incompatibility leads in a practical case to a conflict of individual rights or obligations. The reply to the first question is thus in the affirmative.

In accordance with Articles 65 and 66 of the Constitution of the Netherlands, international law is, in certain circumstances, directly applicable by reason of the fact that it takes precedence over national law. Consequently, the Netherlands court, when called on to resolve a conflict between a Community measure and an international agreement, must either decide which of the two rules at issue is the one applicable to the case of which it is seised or define the scope to be attributed to each of the said rules in the particular case. The Court has jurisdiction to give a ruling when, in such a case, the national court has referred to it the problem of the validity of the Community measure. If it were otherwise, the courts of the different Member States might deliver differing judgments on the validity or scope of Community law.

The *Commission* begins by retracing the history of relations between the Community and Member States, on the one hand, and GATT, on the other, and by analysing the essential components of that agreement. To this end it states the following:

GATT was concluded by all the Member States with a large number of third countries before the entry into force of the Treaty. Up to the present its provisions have still not formally entered into force but are applicable on a provisional basis by the contracting parties. Far from considering this agreement as incompatible with the Treaty—in which case the Member States should have put an end to such incompatibility in accordance with Article 234 of the Treaty—the Community has, from the outset, considered itself bound by GATT and has in its own name exercised the rights and carried out the obligations of Member States in so far as those rights and obligations fall within its compass, which, at least since the end of the transitional period, is practically the case in respect of all the areas governed by GATT. It is true that the Community has never formally acceded to GATT and that only the Member States have the right to vote under it. Nevertheless, in all the deliberations

concerning matters of commercial policy, it is exclusively the Community, as represented by the Commission, which intervenes, while in voting the Member States always adopt the same position in accordance with the predetermined Community position. Third countries which are members of GATT accept that the Community in fact acts like a contracting party to this agreement. All these considerations amount to acceptance that GATT binds the Community on the same basis as the agreements concluded by it under Article 228 of the Treaty.

However, that does not mean that infringement of GATT by a measure adopted by a Community institution can be a ground in law for having the measure set aside. On the contrary, such an effect would not accord with the system of GATT. If the Court were to declare a disputed measure invalid as being incompatible with GATT, it would be interfering with the procedures set up under GATT to settle such disputes, which are of a diplomatic and not a judicial nature. It cannot be ignored, moreover, that the concessions and benefits provided in that agreement are limited by numerous exceptions. Those concessions can often be suspended or modified after consultation with the contracting parties concerned and in exchange for compensation agreed with the parties. The very absence of a compromise does not prevent the withdrawal of concessions but simply gives the other party the right to withdraw equivalent concessions. Under certain protocols established within the framework of GATT the contracting parties do not apply certain of its provisions, including Article XI, except 'in so far as compatible with legislation in force' etc. In these circumstances, it is not a question whether Article XI of GATT is sufficiently clear and complete to be applied by the courts.

Finally, paragraph 2 of that article lays down a certain number of exceptions to the prohibition stated in paragraph 1, among which those in subparagraph C are of special interest in this case. It is also for this reason that paragraph 1 cannot be relied on in contesting the validity of secondary Community law.

The second question

According to the *plaintiff firms*, the restrictions laid down in Regulations Nos 459/70, 565/70 and 686/70 are contrary to the obligations imposed on Member States by Article XI of GATT, as paragraph 2 of that article is not applicable in this case. Furthermore, the system of import limits, enacted by the last two of those regulations, conflicts with Article XIII of GATT. It is therefore necessary for the Court to rule that the three regulations in question are null and void since they are incompatible with Article 234 of the EEC Treaty and that their enactment was *ultra vires*.

The *Netherlands Government* takes no stand on the second question.

The *Commission* argues that neither the national court nor the plaintiff firms have advanced any arguments capable of establishing the illegality of the regulations in issue. Moreover, the argument of incompatibility is unfounded; the Commission refers to the arguments which it put forward in Joined Cases 41 to 44/70. If there was any doubt as to this, the temptation would be to eliminate any possible incompatibility by the interpretation to be given to the regulations in issue.

Grounds of judgment

1 By decision of 5 May 1972, received at the Court Registry on 8 May 1972, the College van Beroep voor het Bedrijfsleven referred to the Court, under Article 177 of the EEC Treaty, two questions relating to the interpretation of that article and to the validity of certain regulations adopted by the Commission.

2 The first question invites the Court to rule whether the validity of measures adopted by the institutions of the Community also refers, within the meaning of Article 177 of the EEC Treaty, to their validity under international law.

3 The second question, which is raised should the reply to the first question be in the affirmative, asks whether Regulations Nos 459/70, 565/70 and 686/70 of the Commission — which laid down, by way of protective measures, restrictions on the importation of apples from third countries — are 'invalid as being contrary to Article XI of the General Agreement on Tariffs and Trade (GATT)', hereinafter called 'the General Agreement'.

4 According to the first paragraph of Article 177 of the EEC Treaty 'The Court of justice shall have jurisdiction to give preliminary rulings concerning ... the validity ... of acts of the institutions of the Community'.

5 Under that formulation, the jurisdiction of the Court cannot be limited by the grounds on which the validity of those measures may be contested.

6 Since such jurisdiction extends to all grounds capable of invalidating those measures, the Court is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law.

7 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.

8 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.

9 It is therefore necessary to examine whether the General Agreement satisfies these two conditions.

10 It is clear that at the time when they concluded the Treaty establishing the European Economic Community the Member States were bound by the obligations of the General Agreement.

11 By concluding a treaty between them they could not withdraw from their obligations to third countries.

12 On the contrary, their desire to observe the undertakings of the General Agreement follows as much from the very provisions of the EEC Treaty as from the declarations made by Member States on the presentation of the Treaty to the contracting parties of the General Agreement in accordance with the obligation under Article XXIV thereof.

13 That intention was made clear in particular by Article 110 of the EEC Treaty, which seeks the adherence of the Community to the same aims as those sought by the General Agreement, as well as by the first paragraph of Article 234 which provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty, and in particular multilateral agreements concluded with the participation of Member States, are not affected by the provisions of the Treaty.

14 The Community has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period, by virtue of Articles 111 and 113 of the Treaty.

15 By conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the General Agreement.

16 Since the entry into force of the EEC Treaty and more particularly, since the setting up of the common external tariff, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the General Agreement and has been recognized by the other contracting parties.

17 In particular, since that time, the Community, acting through its own institutions, has appeared as a partner in the tariff negotiations and as a party to the agreements of all types concluded within the framework of the General Agreement, in accordance with the provisions of Article 114 of the EEC Treaty which provides that the tariff and trade agreements 'shall be concluded ... on behalf of the Community'.

18 It therefore appears that, in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community.

19 It is also necessary to examine whether the provisions of the General Agreement confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure.

20 For this purpose, the spirit, the general scheme and the terms of the General Agreement must be considered.

21 This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.

22 Consequently, according to the first paragraph of Article XXII 'Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to ... all matters affecting the operation of this Agreement'.

23 According to the second paragraph of the same article, 'the contracting parties' — this name designating 'the contracting parties acting jointly' as is stated in the first paragraph of Article XXV — 'may consult with one or more contracting parties on any question to which a satisfactory solution cannot be found through the consultations provided under paragraph (1)'.

24 If any contracting party should consider 'that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of', *inter alia*, 'the failure of another contracting party to carry out its obligations under this Agreement', Article XXIII lays down in detail the measures which the parties concerned, or the contracting parties acting jointly, may or must take in regard to such a situation.

25 Those measures include, for the settlement of conflicts, written recommendations or proposals which are to be 'given sympathetic consideration', investigations possibly followed by recommendations, consultations between or decisions of the *contracting parties*, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under the General Agreement and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement.

26 Finally, where by reason of an obligation assumed under the General Agreement or of a concession relating to a benefit, some producers suffer or are threatened with serious damage, Article XIX gives a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter is urgent and on a temporary basis, without prior consultation.

27 Those factors are sufficient to show that, when examined in such a context, Article XI of the General Agreement is not capable of conferring on citizens of the Community rights which they can invoke before the courts.

28 Accordingly, the validity of Regulations Nos 459/70, 565/70 and 686/70 of the Commission cannot be affected by Article XI of the General Agreement.

29 The costs incurred by the Government of the Kingdom of the Netherlands and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable and since these proceedings are, in so far as the parties to the main actions are concerned, in the nature of a step in the actions pending before the national court, costs are a matter for that court;

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiffs in the main actions and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 110, 113, 177 and 234;
Having regard to the General Agreement on Tariffs and Trade, especially Articles XI, XIX, XXII, XXIII and XXV;
Having regard to Regulation No 459/70 of the Commission of 11 March 1970 (JO L 57, p. 20);
Having regard to Regulation No 565/70 of the Commission of 25 March 1970 (JO L 69, p. 33);
Having regard to Regulation No 686/70 of the Commission of 15 April 1970 (JO L 84, p. 21);
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT,

in reply to the question referred to it by the College van Beroep voor het Bedrijfsleven in accordance with the decision delivered by that court on 5 May 1972, hereby rules:

1. **The validity, within the meaning of Article 177 of the EEC Treaty, of measures taken by the institutions may be judged with reference to a provision of international law when that provision binds the Community and is capable of conferring on individuals rights which they can invoke before the courts;**

2. **Since Article XI of the General Agreement does not have such an effect, the validity of Regulations Nos 459/70, 565/70 and 686/70 of the Commission (JO L 57, p. 20; L 69, p. 33; L 84, p. 21 respectively) cannot be affected by that provision.**

Lecourt Monaco Pescatore

Donner Trabucchi Mertens de Wilmars Kutscher

Delivered in open court in Luxembourg on 12 December 1972.

A. Van Houtte
Registrar

R. Lecourt
President

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

Mr President,
Members of the Court,

I — *Introduction*

1. *The problem*

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

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

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

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

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

1. Translated from the French