OPINION OF ADVOCATE GENERAL TESAURO

delivered on 7 May 1996 *

1. In these proceedings the Commission asks the Court to declare that, by authorizing the importation of dairy products under the inward processing relief arrangements, when the customs value of the goods is lower than the minimum price prescribed by the International Dairy Arrangement ('the IDA') — agreed under the GATT and approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations [1] — the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

Specifically, the Commission alleges that the German Government has thereby infringed, or at any rate disregarded: (a) the obligation laid down in the three Protocols annexed to the IDA to cooperate in implementing the minimum prices in respect of imports (Article 6(1)(a) of Protocol I and Article 6(a) of Protocols II and III); (b) the obligation under Article 3(1) of each of those Protocols to comply with the minimum export prices; (c) Articles 5 to 8 of Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements, [2] in particular as regards the fulfilment of the economic conditions which make the granting of authorization permissible.

2. The scope of the Commission's allegations and Germany's arguments in rebuttal will be best understood if I first recapitulate the relevant provisions of the IDA and of the inward processing relief arrangements, and describe the steps taken in the pre-litigation procedure.

The relevant legislation

3. The IDA, which entered into force on 1 January 1980, takes as its objective the expansion and ever-greater liberalization of world trade in dairy products under market conditions as stable as possible, on the basis of mutual benefit to exporting and importing countries (Article I). It covers milk and cream, whether or not concentrated or sweetened; butter; cheese and curd; and casein (Article II). Participating States are

* Original language: Italian.

1 — OJ 1980 L 71, p. 1.

2 — OJ 1985 L 188, p. 1.

placed under general obligations to provide information (Article III) and to cooperate with one another (Article IV), particularly as regards aid to developing countries (Article V). The functions necessary to implement the IDA are to be carried out by the International Dairy Products Council, established directly by the IDA and comprising representatives of all participants (Article VII).

Three protocols are annexed to the IDA concerning, respectively, certain milk powders (Protocol I), milk fat (Protocol II) and certain cheeses (Protocol III). They form an integral part of the IDA and lay down analogous obligations: (a) export prices must not be less than the minimum prices prescribed by the IDA (Article 3(1) of each protocol); (b) each protocol is applicable to exports of products which are manufactured or repacked inside the customs territory of any of the participating States (Article 3(7) of Protocol I; Article 3(6) of Protocols II and III); (c) as far as possible, products covered by the protocols must not be imported at prices lower than the appropriate customs valuation equivalent to the prescribed minimum prices (Article 6(1)(a) of Protocol I and Article 6(a) of Protocols II and III); (d) participating States undertake to take appropriate remedial action if imports at prices lower than the minimum prices threaten the operation of the protocol concerned (Article 6(1)(c) of Protocol I and Article 6(c) of Protocols II and III); (e) at the request of one of the participating States, derogations may be granted from the obligation under Article 3(1) of each protocol to observe the minimum prices (Article 7 of each protocol). [3]

4. As regards the Community inward processing relief arrangements, the first point to note is that, under Article 1(2) of Regulation No 1999/85, those arrangements enable — subject to the requisite authorization — the following goods to be used in the customs territory of the Community in one or more processing operations: (a) non-Community goods intended for re-export outside the Community in the form of compensating products, those goods not being subject to import duties (suspension system); (b) goods released for free circulation with refund or remission of the import duties levied on such goods if they are re-exported outside the Community in the form of compensating products (drawback system). Processing operations, according to the definition given in Article 1(3)(h), comprise the working, processing and repair of goods, and the use of certain specified goods which allow or facilitate the production of compensating products and which are designed to be used up in the process.

3 — For example, a derogation is provided for milk powder intended for use as animal feed (Article 3(5) of Protocol I).

Under Article 5 of Regulation No 1999/85, the authorization necessary for the use of inward processing relief arrangements is granted where they 'may contribute towards creating the most favourable conditions for the export of compensating products, provided that the essential interests of Community producers are not affected (economic conditions)'. Economic conditions are considered fulfilled where, *inter alia*, the goods which are intended to be processed 'are produced in the Community but cannot be used because their price is such as to make the proposed commercial operation economically impracticable' (Article 6(1)(d)).

5. For our purposes, mention should also be made of Commission Regulation (EEC) No 2228/91 of 26 June 1991 [4] laying down provisions for the implementation of Regulation No 1999/85. Article 16 of Regulation No 2228/91 provides that, where goods are entered for the inward processing relief arrangements using the suspension system, any specific commercial policy measures to which imports of such goods are subject do not apply. [5] Specific commercial policy measures are non-tariff measures laid down as part of the common commercial policy in the form of Community rules governing arrangements for the import or export of goods, such as surveillance or safeguard measures, quantitative limits or restrictions and import or export bans (Article 1(12)).

Lastly, although not applicable at the material time for the purposes of this case, it should be noted that Article 114(1)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [6] (which, moreover, repealed and replaced Regulation No 1999/85) provides that the inward processing procedure allows 'non-Community goods intended for re-export from the customs territory of the Community in the form of compensating products' to be used in the customs territory of the Community in one or more processing operations 'without such goods being subject to import duties or *commercial policy measures*'. [7]

The pre-litigation stage

6. By letter of formal notice of 26 March 1991, the Commission initiated the infringement procedure in relation to Germany because, in its view, the practice of authorizing inward processing when the customs

4 — OJ 1991 L 210, p. 1.

5 — This provision is identical to Article 16 of Council Regulation (EEC) No 3677/86 (OJ 1986 L 351, p. 1), which was consolidated and thus repealed by Regulation No 2228/91.

6 — OJ 1992 L 302, p. 1.

7 — Emphasis added.

value of goods is lower than the minimum price prescribed by the IDA is contrary to Community law. By letter of 8 May 1991, the German Government contended that goods entered for inward processing do not constitute imports for the purposes of the IDA and stated that, in any case, it had referred the matter to the Article 113 Committee for clarification of that point.

Not satisfied with the German Government's explanations, the Commission delivered a reasoned opinion on 3 February 1993 in which it re-stated its own position and called for the infringement to cease within two months. In response, the German Government argued that, under the Community rules on inward processing, commercial policy measures are not to be applied to goods entered for those arrangements, and that the Article 113 Committee had not yet examined the issue.

7. I should explain that, according to a document produced by the Commission at the Court's request, the point raised by the German authorities was brought to the attention of the Article 113 Committee at its meeting on 15 February 1991. According to the record of those proceedings, 'the Commission undertook to examine — with interested delegations — a problem raised by the D [German] delegation concerning difficulties arising from an *apparent discrepancy* between Community legislation on inward processing of dairy products and the provisions on minimum prices of the International Dairy [Arrangement]; the Committee agreed to return to the matter once the Commission had clarified the situation'. [8]

However, the Commission did not bring the matter before the Committee again. It explained in the course of the procedure that this was because bilateral contacts with the various delegations had led it to conclude that the German Government was 'isolated' in its position. On 26 January 1994 the Commission therefore brought these proceedings.

Admissibility

8. Although Germany has not formally raised an objection of inadmissibility, it maintains nevertheless that the Commission should have awaited the outcome of the Article 113 Committee's investigations before bringing the present action. In particular, Germany emphasizes that the Committee's primary purpose is to make sure that international treaties are properly interpreted and complied with and, to that end, to establish a common Community position with

8 — My italics: the French rendering of that phrase was 'contradiction évidente'.

regard to issues on which Member States disagree amongst themselves or with the Commission. Therefore, Germany maintains, it is quite in order to query whether the Commission is entitled, in order to seek a declaration that an international agreement has been infringed, to initiate the Article 169 procedure in a case such as this, where the Article 113 Committee, before which the matter has been brought, has not yet adopted a position.

On this point, suffice it to note that Article 169 confers on the Commission a broad discretion [9] both as regards initiation of the infringement procedure, for which it is sufficient that the Commission '*considers* that a Member State has failed to fulfil an obligation under [the] Treaty', and as regards commencement of judicial proceedings, given that it '*may* bring the matter before the Court of Justice'. The exercise of that discretion cannot therefore be predicated on conditions other and more stringent than those laid down in Article 169 itself, and certainly not on the opinion of the Article 113 Committee. Consequently, so far as is relevant here, the Commission's decision to bring these proceedings without awaiting the Committee's opinion — even though it has been sought — may undoubtedly be open to question, but has no bearing whatsoever on the admissibility of the application.

9 — The Commission's discretionary power has been emphasized by the Court on several occasions, albeit in a different context. See, for example, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11.

Substance

9. As mentioned above, the Commission challenges Germany's practice of authorizing inward processing relief even when the minimum prices prescribed by the IDA are not observed in the case of *imports*. According to the Commission, that amounts to an infringement of the obligation to comply with the minimum *export* prices fixed by the IDA and of Regulation No 1999/85, in that the very fact that authorizations were granted in those circumstances entails a failure to fulfil the economic conditions referred to in Articles 5 to 8.

The German Government does not deny authorizing for inward processing the importation of dairy products at prices lower than the minimum prices prescribed by the IDA. In its view, however, that is a matter which does not even fall within the scope of the IDA. In support of that contention, the German Government argues that: (a) for the purposes of the IDA, the terms 'imports' and 'exports' concern products which have been released for free circulation within the Community and not products subject to inward processing relief arrangements; (b) the application of commercial policy measures — and hence also of the IDA — to goods placed under inward processing relief arrangements is expressly precluded by Article 16 of Regulation No 2228/91 (which reproduces verba-

tim Article 16 of the earlier regulation, No 3677/86) and, as from 1 January 1994, by Article 114(1)(a) of the Community Customs Code.

10. In view of those arguments, it is necessary first to establish whether or not the IDA, which is silent on this point, applies to trade with non-member countries in so far as concerns inward processing.

11. The parties' arguments as to the way in which the IDA should be construed seem inconclusive. Admittedly, as the Commission pointed out, Article 3(7) of Protocol I and Article 3(6) of Protocols II and III, in stating that they apply to exports of the products specified, whether 'manufactured' or 'repacked' inside the customs territory of any of the participating States — including, therefore, that of the Community — do not provide for any exceptions. The fact remains, however, that products 'manufactured' or 'repacked' inside the customs territory of the Community are not co-extensive, at least not necessarily, with products which have been obtained through the working, processing or repair of goods within the meaning of the legislation on inward processing. In any case, moreover, even if the Commission's interpretation were accepted as correct, it would mean at most that the IDA is also applicable to goods exported following inward processing, but not necessarily to imports of goods placed under the relief arrangements.

The Commission maintains, however, that a different interpretation not only runs counter to the aims of the IDA, but would also invite non-compliance with its terms in that the participating States could purchase the products in question in countries which are not parties to the IDA at prices lower than those prescribed by it and perhaps re-export them, once they had been worked or processed under the inward processing relief arrangements, without even observing the minimum export prices.

12. The first point to note is that the aim of market stability pursued by the IDA in order to ensure the expansion and liberalization of world trade in dairy products would be jeopardized if Community traders were permitted to disregard, even if solely in the context of inward processing, the minimum prices prescribed by the IDA. Bearing in mind, moreover, that Community prices are much higher than world prices, it is all too clear that to exclude goods entered for inward processing from the scope of the IDA would inevitably damage the interests of Community producers.

I therefore believe that, unless the IDA expressly provides otherwise, the Commission's view must be endorsed. That means, of course, that the very fact of authorizing inward processing when the customs value is lower than the minimum prices prescribed

by the IDA in respect of imports constitutes in principle an infringement of the IDA.

13. In that connection, the argument put forward by the German Government that the obligation in question constitutes a mere duty of cooperation is irrelevant. Admittedly, the relevant provision requires participating States merely 'to cooperate in implementing the minimum prices objective of this Protocol and to ensure, as far as possible, that the products [...] are not imported at less than the appropriate customs valuation equivalent to the prescribed minimum prices'. [10] It is equally true, as the Commission maintained, that the wording of that rule owes everything to the fact that participating States are not always able to prevent the importation of dairy products at prices lower than the minimum prices prescribed by the IDA.

In the present case, it is quite clear that the State concerned is in a position to prevent the imports: all it has to do is to refuse to grant the necessary authorization.

14. On the other hand, the complaint alleging failure to observe the minimum *export* prices is, in my opinion, unfounded. On that point, the Commission argues simply that, if the minimum prices are not observed in the case of imports, it automatically follows that the products in question will be re-exported at prices lower than the prescribed minimum prices. The German Government's rejoinder is that processing costs (working, processing or repair), combined with transport costs, would ensure that the products in question were re-exported at prices higher than those prescribed by the IDA.

In the light of that contention — not satisfactorily rebutted by the Commission which, let us not forget, bears the onus of establishing the alleged infringement [11] — the complaint in question should in any event be rejected.

15. That said, I now turn to the alleged discrepancy between the IDA and the legislation on inward processing. As mentioned in passing, the German Government argues that — pursuant to Article 16 of Regulation No 2228/91 and, with effect from 1 January 1994, Article 114(1)(a) of the Community Customs Code — as a result of goods being entered for inward processing relief arrange-

10 — See Article 6(1)(a) of Protocol I and the corresponding provisions of the other two protocols. I should also mention that, on the basis of Article 6(1)(c) of Protocol I and the corresponding provisions of the other two protocols, the participating States also undertake 'to consider sympathetically proposals for appropriate remedial action if imports at prices inconsistent with the minimum prices threaten the operation of this Protocol'.

11 — See, most recently, Case C-375/90 *Commission* v *Greece* [1993] ECR I-2055, paragraph 33.

ments using the suspension system, commercial policy measures to which such goods are subject do not apply.

16. For its part, the Commission regards the reference to Article 16 of its implementing regulation as irrelevant, since the regulation refers to *specific commercial policy measures to which imports of the said goods are subject*, whereas in the present case the measures at issue are not specific to imports, but serve to supplement the export regime. In any case, according to the Commission, the German Government cannot validly invoke the provisions in question, since they appear in one of the Commission's own implementing regulations and not in the Council's basic regulation.

The Commission recognizes that the force of its argument has been diminished by the entry into force of the Customs Code, Article 114(1)(a) of which precludes in general terms the application of commercial policy measures to goods placed under inward processing relief arrangements. While endeavouring nevertheless to explain that that provision is compatible with the IDA, the Commission confined itself at the hearing to stating that, since the Customs Code only entered into force after the expiry of the reasoned opinion, the provision in question is not applicable to the facts of the case.

17. On that last point, it should first be recalled that, as the Court has consistently held, a failure to fulfil obligations is established by reference to the date on which the reasoned opinion expires. [12] As a result, for the purposes of this case, the infringement with which Germany is charged cannot strictly be evaluated by reference to Article 114(1)(a) of the Customs Code, since that provision entered into force on 1 January 1994 and the period set in the reasoned opinion expired in April 1993.

However, considerations of procedural economy would suggest a different approach. Apart from the fact that the effect of the forthcoming judgment would be confined to the past, with the result that this issue would arise again in respect of the period from

12 — The effects of that case-law, concerning conduct and/or legislative amendments which have occurred after that date, are twofold: it serves the Commission's interest in obtaining a declaration that there has been a failure to fulfil obligations, even though it may meanwhile have ceased (see, for example, Case 283/86 *Commission* v *Belgium* [1988] ECR 3271, paragraph 6, and Case C-433/93 *Commission* v *Germany* [1995] ECR I-2303, paragraph 15), and the Member State's interest in not being confronted with charges which are different from those alleged during the pre-litigation procedure, the essential purposes of which would otherwise be thwarted, in particular as regards the principle of *audi alteram partem* (see, among many, Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 16, and Case 298/86 *Commission* v *Belgium* [1988] ECR 4343, paragraph 10). The latter statement should not, however, be seen as unconditional. The Court has recognized that, in cases where legislation is altered between the pre-litigation stage and the initiation of proceedings, for new complaints to be admissible it is sufficient 'that the system established by the legislation contested in the pre-litigation procedure has as a whole been maintained by the new measures which were adopted by the Member State after the issue of the reasoned opinion and have been challenged in the application' (Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, paragraph 13). If the same approach were also adopted with respect to amendments made to Community legislation, it seems to me that the arguments put forward by the German Government on the basis of Article 114(1)(a) of the Customs Code would merit consideration.

1 January 1994, it must also be emphasized that it was the Commission itself which first referred — in its application — to Article 114(1)(a) of the Customs Code and considered whether it was such as to remedy Germany's alleged failure to fulfil its obligations. Moreover, in its written reply to a specific question from the Court, the Commission itself stated that, if the conduct complained of on the part of the German Government were found to be permissible under a Council regulation, an action under Article 173 for the annulment of that act would undoubtedly be more appropriate than proceedings under Article 169 against the Member State 'in default'.

In any case, since Article 114(1)(a) of the Customs Code incorporates and enlarges upon Article 16 of Regulation No 2228/91, with the result that any discrepancy between that provision and the IDA would entail an even more glaring discrepancy between Article 114(1)(a) of the Customs Code and the IDA, it is appropriate to verify first of all whether or not the IDA may be regarded, for the purposes of Article 16 of Regulation No 2228/91, as a specific commercial policy measure to which imports are subject.

18. The Commission's laconic statement that the measure in question serves in fact to supplement the export regime does not seem convincing and in any case is not supported by adequate reasons. If the Commission meant that the obligation to observe the minimum prices is binding only for exports, whereas for imports the obligation placed on the participants is merely 'to cooperate in implementing the minimum prices objective of this Protocol and to ensure, as far as possible, that the products [...] are not imported at less than the appropriate customs valuation equivalent to the prescribed minimum prices', [13] then I believe that the argument in question is ultimately contradicted, not only by the terms of the IDA, but also by the Commission itself.

The Commission has in fact emphasized in the course of the procedure that the only reason why the obligation to observe the minimum prices in respect of imports is not unconditional is because it is not always legally possible for participating States to prevent imports at prices lower than those prescribed. That argument indicates that the IDA, at least so far as concerns its object and as a matter of principle, has laid down rules which apply to both imports and exports; this is confirmed by the aim of the IDA as elucidated above (see points 11 and 12). It is scarcely necessary to add that, being applicable to imports and exports, the IDA falls well within the definition of specific

13 — See Article 6(1)(c) of Protocol I and the corresponding articles in the other two protocols.

commercial policy measures given in Article 1(12) of Regulation No 2228/91. [14]

19. Furthermore, it strikes me as decidedly odd, not to say surprising, that the Commission should argue that Article 16 of Regulation No 2228/91 cannot be relied on here, since it appears in one of its own implementing regulations and not in the basic regulation adopted by the Council. I confess that I am not entirely clear as to whether the Commission seeks thereby to argue that it may adopt implementing regulations which conflict with an international agreement to which the Community is party and at the same time take steps against States which comply with such regulations, or whether infringement of an international agreement occasioned by Community rules is significant only where brought about by the Council.

However that may be, it seems to me quite obvious that, in so far as it is not alleged here that Article 16 of Regulation No 2228/91 in any way infringes the basic regulation, the Commission's argument is not only obscure but also irrelevant. The fact remains that Article 16 is contrary to the IDA simply because it prevents the IDA's application to goods entered for inward processing, a discrepancy exacerbated by the entry into force of the Community Customs Code. The wording of Article 114(1)(a) of that Code is quite unequivocal as regards the non-applicability of commercial policy measures to goods entered for those arrangements, with the result that the above observations apply *a fortiori* to that provision: the discrepancy noted between the legislation on inward processing and the IDA is thereby confirmed and, at the time of writing, has become even more pronounced.

20. Regard being had to that discrepancy, it must now be ascertained whether the German Government was none the less under a duty to comply with the IDA and whether, in spite of the special circumstances of this case, the action should in any event be upheld.

The Commission — given that, in accordance with Article 228(7) of the EC Treaty, agreements concluded between the Community and one or more non-member countries are binding on the Community institutions and on the Member States — argues that 'if the German authorities scrupulously applied both the Community inward processing relief arrangements and the GATT arrangement [the IDA], authorization for inward processing would not in any case be granted', and so the issue of discrepancy would

14 — The non-applicability of commercial policy measures to goods entered for inward processing under the suspension system is indirectly confirmed also by Article 51 of that regulation, on the basis of which the release for free circulation of import goods 'is subject to the application by the customs authority of any specific commercial policy measures in force for the import goods at the time when the entry for release for free circulation was accepted'.

not even arise. Essentially, the Commission is saying that, when prices are lower than the minimum prescribed by the IDA, the import authorizations should be refused — or, if already granted, revoked — since, in those circumstances, the economic conditions laid down by the rules for granting those authorizations would not be fulfilled. The main reason for this is that, where the minimum prices prescribed by the IDA are not observed, the higher costs to the Community in terms of agricultural expenditure would have negative repercussions for Community producers.

21. This argument, as advanced by the Commission, appears to imply that a failure to fulfil obligations would arise even if there were no IDA, specifically if there were no obligation, as laid down by that agreement, to observe the minimum prices. On closer scrutiny, however, that is patently not the case. The Commission, in fact, is not contesting at all the German Government's argument that the authorizations were granted in accordance with Article 6(1)(d) of Regulation No 1999/85. [15] On the contrary, it recognizes that the circumstances envisaged by that provision often arise with regard to the products in question and that, therefore, strictly speaking, there is no infringement of the regulation so far as concerns fulfilment of the economic conditions. Nevertheless, the Commission argues that the Community can never allow transactions at prices lower than the minimum prescribed to enjoy protection, the reason being the relevant provisions of the IDA and their binding nature by virtue of Article 228(7) of the Treaty.

In short, according to the Commission, if the Community legislation were interpreted in keeping with the IDA, the economic conditions laid down by Regulation No 1999/85 would not be capable of being relied on, even where they are in fact fulfilled, since, under Article 228(7), the IDA prevails over the regulation. That means, however, that the discrepancy between the IDA and the inward processing relief arrangements goes far beyond the delimitation of their respective fields of application and that, ultimately, consistent interpretation does not eliminate that disparity.

22. But that is not all. The Commission's reasoning, which is ultimately circular, inevitably leads to the conclusion that the complaint relating to the infringement of the regulation is unfounded. The grant of authorizations even when the prices of dairy products are lower than the minimum prescribed by the IDA may imply a failure to comply with the latter but certainly not — at least not as such — disregard for the economic

15 — On the basis of that provision, the economic conditions are fulfilled when the goods intended to be processed are produced in the Community but cannot be used because their price is such as to make the proposed commercial operation economically impracticable.

conditions referred to in Articles 5 to 8 of Regulation No 1999/85. It is worth repeating that even the Commission does not deny that, in the present case, those conditions are fulfilled by virtue of Article 6(1)(d) of that regulation.

In those circumstances, the complaint based on the alleged infringement of the regulation must therefore be rejected. The question remains, however, whether the discrepancy noted between the inward processing relief arrangements and the IDA may or must — by virtue of the latter's prevalence over the former — lead to a finding that the Federal Republic of Germany has fallen short of its obligations but only — let us not forget — in failing to observe the minimum prices in respect of imports.

23. In my opinion, that question should be answered in the negative. Let me make it quite clear that I am not in any way questioning the primacy of the IDA over secondary legislation. Nevertheless, I have to point out that the Commission's approach appears to disregard the fact that, pursuant to Article 228(7) of the Treaty, international agreements to which the Community is party are binding not only on the Member States but also on the institutions, hence also on the Council and the Commission itself. Clearly, I accept the Commission's statement that the Member States can neither rely on their own interpretation of the obligations incumbent upon them under the GATT and unilaterally decide whether or not to observe them, nor rely on their interpretation to argue that a provision of secondary legislation is inconsistent with those obligations. In both cases, the Commission asserts the right — given that the EC alone is responsible for dealing with external relations — to decide the correct 'Community' interpretation of obligations entered into under the GATT.

That position obviously means that the Court of Justice may verify compliance with an agreement binding on both the Member States and the Community only where an infringement is committed by a Member State and not where it is brought about by the institutions themselves. In the latter case, any infringement of GATT obligations can be sanctioned only by the means provided for under international law. I take note of the fact that this approach (as to which, I admit, I have misgivings) has already received the Court's seal of approval: [16] obligations entered into under the GATT are not

16 — I refer, in particular, to Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, in which the Court stated that, since the GATT rules do not have direct effect, it could not 'assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty' (paragraph 109) and that, therefore, 'it is 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, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules' (paragraph 111).

a yardstick against which to test the lawfulnessness of the institutions' conduct, even where it takes the form of a legislative measure which is in principle binding on the Member States. [17]

On that point, I would merely observe that, if the GATT rules cannot be relied on in order to challenge the validity of Community legislation and, as a consequence, the Council and the Commission are accorded a broad discretion as regards the content and effects of obligations entered into in that regard, such an approach cannot go so far as to entail that a Member State can be censured for having complied with the regulation and not the IDA. Indeed, it cannot be accepted that such a discrepancy between Community legislation and the IDA is of no significance.

24. That case-law, applied here, would preclude the Court from assessing Germany's conduct in the light of the alleged discrepancy between the inward processing relief arrangements and the IDA, since — let me make this clear — that discrepancy clearly reveals that first the Commission (Article 16 of Regulation No 2228/91) and then the Council (Article 114(1)(a) of the Community Customs Code) infringed the IDA. However, that would be an unacceptable outcome, in particular if it led the Court to assess Germany's conduct by reference to the IDA alone, that is, without bearing in mind the fact that the conduct which the Commission is currently contesting is authorized by one of its own regulations, hence by a regulation adopted in breach of the IDA.

25. Lastly, I believe it is worth noting that the Court of Justice has consistently held that 'Community legislation must be unequivocal and its application must be predictable for those who are subject to it', [18] specifically in compliance with the principle of legal certainty which forms part of the Community legal order. [19]

17 — That line of decisions is not, however, without its critics: see, for example, Vellano, 'Osservazioni in tema di diretta applicabilità del GATT: l'opportunità di una svolta interpretativa', in *Giurisprudenza Italiana*, 1995, Sez. I, Col. 1145 et seq.; also, Hahn and Schuster, 'Le droit des États Membres de se prévaloir en justice d'un accord liant la Communauté', in *Revue Générale de Droit International Public*, 1995, p. 367 et seq. Hahn and Schuster observe in particular, given that the assessment of the question whether the GATT may be invoked is thus left entirely in the hands of the Council, that 'the Court of Justice must consider whether that approach is compatible with its duty under Article 164 of the EC Treaty to ensure that the law is observed' (p. 377).

18 — See, among many, Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11; Case 325/85 *Ireland* v *Commission* [1987] ECR 5041, paragraph 18; Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24; Case 332/85 *Germany* v *Commission* [1987] ECR 5143, paragraph 23; Case 336/85 *France* v *Commission* [1987] ECR 5173, paragraph 17; Case 348/85 *Denmark* v *Commission* [1987] ECR 5225, paragraph 19; and, most recently, Case C-325/91 *France* v *Commission* [1993] ECR I-3283, paragraph 26.

19 — See Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633, paragraph 30.

In my view, that assertion by the Court holds true *a fortiori* in a case such as this, in which the ambiguity and confusion generated by provisions which are manifestly irreconcilable exacerbate the difficulty faced by the State concerned in finding an internal (Community) solution to the problem, which it nevertheless endeavoured to do via the Article 113 Committee.

26. One last point. If the Court finds — on the same grounds as those which led it to disclaim jurisdiction to review the lawfulness of Community acts — that obligations entered into under the GATT cannot constitute a yardstick against which the lawfulness of the conduct of Member States may be tested, the outcome of the present case would obviously be a foregone conclusion and therefore simpler. The action should be declared manifestly unfounded, at least as regards the alleged infringement of the IDA and without prejudice to the merits; in fact, strictly speaking, it should be dismissed as inadmissible.

27. In the light of the foregoing, I propose that the Court:

— dismiss the application;

— order the Commission to pay the costs.