JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

14 December 2004 *

In Case T-317/02,

Fédération des industries condimentaires de France (FICF), established in Paris (France),

Confédération générale des producteurs de lait de brebis and des industriels de Roquefort, established in Millau (France),

Comité économique agricole régional 'fruits et légumes de la région Bretagne' (Cerafel), established in Morlaix (France),

Comité national interprofessionnel des palmipèdes à foie gras (CIFOG), established in Paris (France),

represented by O. Prost and M.-J. Jacquot, lawyers,

applicants,

* Language of the case: French.

Commission of the European Communities, represented by P.-J. Kuijper and G. Boudot, acting as Agents, with an address for service in Luxembourg,

defendant,

ACTION for annulment of Commission Decision 2002/604/EC of 9 July 2002 terminating the examination procedures concerning obstacles to trade, within the meaning of Council Regulation (EC) No 3286/94, consisting of trade practices maintained by the United States of America in relation to imports of prepared mustard (OJ 2002 L 195, p. 72),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of B. Vesterdorf, President, P. Mengozzi, M.E. Martins Ribeiro, F. Dehousse and I. Labucka, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 14 September 2004,

gives the following

Judgment

Legal framework

1 Article 1 of Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation (WTO) (OJ 1994 L 349, p. 71), as amended by Council Regulation (EC) No 356/95 of 20 February 1995 (OJ 1995 L 41, p. 3) ('Regulation No 3286/94'), provides:

'This Regulation establishes Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation which, subject to compliance with existing international obligations and procedures, are aimed at:

...

(b) responding to obstacles to trade that have an effect on the market of a third country, with a view to removing the adverse trade effects resulting therefrom.

These procedures shall be applied in particular to the initiation and subsequent conduct and termination of international dispute settlement procedures in the area of common commercial policy.'

2 Article 2 of Regulation No 3286/94 states:

'1. For the purposes of this Regulation, "obstacles to trade" shall be any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question.

2. For the purposes of this Regulation and subject to paragraph 8, "the Community's rights" shall be those international trade rights of which it may avail itself under international trade rules. In this context, "international trade rules" are primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement, but they can also be those laid down in any other agreement to which the Community is a party and which sets out rules applicable to trade between the Community and third countries.

...

4. For the purposes of this Regulation, "adverse trade effects" shall be those which an obstacle to trade causes or threatens to cause, in respect of a product or service, to Community enterprises on the market of any third country, and which have a material impact on the economy of the Community or of a region of the Community, or on a sector of economic activity therein. The fact that the

complainant suffers from such adverse effects shall not be considered sufficient to justify, on its own, that the Community institutions proceed with any action.

...'

3 Article 4 of Regulation No 3286/94 provides:

'1. Any Community enterprise, or any association, having or not legal personality, acting on behalf of one or more Community enterprises, which considers that such Community enterprises have suffered adverse trade effects as a result of obstacles to trade that have an effect on the market of a third country may lodge a written complaint. Such complaint, however, shall only be admissible if the obstacle to trade alleged therein is the subject of a right of action established under international trade rules laid down in a multilateral or plurilateral trade agreement.

2. The complaint must contain sufficient evidence of the existence of the obstacles to trade and of the adverse trade effects resulting therefrom. Evidence of adverse trade effects must be given on the basis of the illustrative list of factors indicated in Article 10, where applicable.'

4 Article 5 of Regulation No 3286/94, headed 'Complaint procedures', reads as follows:

'1. The complaint shall be submitted to the Commission, which shall send a copy thereof to the Member States.

2. The complaint may be withdrawn, in which case the procedure may be terminated unless such termination would not be in the interests of the Community.

3. Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.

4. The Commission shall take a decision as soon as possible on the opening of a Community examination procedure following any complaint made in accordance with Articles 3 or 4; the decision shall normally be taken within 45 days of the lodging of the complaint; this period may be suspended at the request, or with the agreement, of the complainant, in order to allow the provision of complementary information which may be needed to fully assess the validity of the complainant's case.'

5 Article 7(1) of Regulation No 3286/94 states:

'For the purpose of consultations pursuant to this Regulation, an Advisory Committee, hereinafter referred to as "the Committee", is hereby set up and shall consist of representatives of each Member State, with a representative of the Commission as chairman.'

6 Article 8 of Regulation No 3286/94 provides:

'1. Where, after consultation, it is apparent to the Commission that there is sufficient evidence to justify initiating an examination procedure and that it is necessary in the interest of the Community, the Commission shall act as follows:

(a) it shall announce the initiation of an examination procedure in the *Official Journal of the European Communities*; such announcement shall indicate the

product or service and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may apply to be heard orally by the Commission in accordance with paragraph 5;

(b) it shall officially notify the representatives of the country or countries which are the subject of the procedure, with whom, where appropriate, consultations may be held;

(c) it shall conduct the examination at Community level, acting in cooperation with the Member States.

...

4. (a) The complainants and the exporters and importers concerned, as well as the representatives of the country or countries concerned, may inspect all information made available to the Commission except for internal documents for the use of the Commission and the administrations, provided that such information is relevant to the protection of their interests and not confidential within the meaning of Article 9 and that it is used by the Commission in its examination procedure. The persons concerned shall address a reasoned request in writing to the Commission, indicating the information required.

(b) The complainants and the exporters and importers concerned and the representatives of the country or countries concerned may ask to be informed of the principal facts and considerations resulting from the examination procedure.

5. The Commission may hear the parties concerned. It shall hear them if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are a party primarily concerned by the result of the procedure.

...

8. When it has concluded its examination the Commission shall report to the Committee. The report should normally be presented within five months of the announcement of initiation of the procedure, unless the complexity of the examination is such that the Commission extends the period to seven months.'

7 Article 10 of Regulation No 3286/94, which relates to evidence, states:

'...

4. Where adverse trade effects are alleged, the Commission shall examine the impact of such adverse effects on the economy of the Community or of a region of the Community, or on a sector of economic activity therein. To this effect, the Commission may take into account, where relevant, factors of the type listed in paragraphs 1 and 2. Adverse trade effects may arise, inter alia, in situations in which trade flows concerning a product or service are prevented, impeded or diverted as a result of any obstacle to trade, or from situations in which obstacles to trade have materially affected the supply or inputs (e.g. parts and components or raw materials) to Community enterprises. Where a threat of adverse trade effects is alleged, the Commission shall also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual adverse trade effects.

5. The Commission shall also, in examining evidence of adverse trade effects, have regard to the provisions, principles or practice which govern the right of action under relevant international rules referred to in Article 2(1).

...'

8 Article 11(1) of Regulation No 3286/94 states:

'When it is found as a result of the examination procedure that the interests of the Community do not require any action to be taken, the procedure shall be terminated in accordance with Article 14.'

9 Article 12 of Regulation No 3286/94 provides:

'1. Where it is found (as a result of the examination procedure, unless the factual and legal situation is such that an examination procedure may not be required) that action is necessary in the interests of the Community in order to ensure the exercise of the Community's rights under international trade rules, with a view to removing ... the adverse trade effects resulting from obstacles to trade adopted or maintained by third countries, the appropriate measures shall be determined in accordance with the procedure set out in Article 13.

...'

10 Article 14 of Regulation No 3286/94 states:

'1. Should reference be made to the procedure provided for in this article, the matter shall be brought before the Committee by its chairman.

2. The Commission representative shall submit to the Committee a draft of the decision to be taken. The Committee shall discuss the matter within a period to be fixed by the chairman, depending on the urgency of the matter.

3. The Commission shall adopt a decision which it shall communicate to the Member States and which shall apply after a period of ten days if during this period no Member State has referred the matter to the Council.

4. The Council may, at the request of a Member State and acting by a qualified majority, revise the Commission's decision.

5. The Commission's decision shall apply after a period of 30 days if the Council has not given a ruling within this period, calculated from the day on which the matter was referred to the Council.'

Background

11 Between 1981 and 1996, the Council adopted several directives against the use of certain substances having a hormonal action in animal feedstuffs, in order, in particular, to protect human health.

12 The United States of America ('the United States') brought dispute settlement proceedings before the tribunals of the WTO in which they challenged the compliance of the Community provisions with the rules of the WTO.

13 On 18 August 1997, a panel declared the Community provisions to be contrary to the WTO rules.

14 On 16 January 1998, the Appellate Body adopted a report confirming that decision.

15 Following the adoption of that report by the Dispute Settlement Body ('the DSB') on 13 February 1998, the date by which Community legislation was required to be brought into compliance with the WTO rules was set by arbitral award at 13 May 1999.

16 As the European Community had not amended its legislation within the prescribed period the United States sought authorisation from the DSB on 3 June 1999 to suspend tariff concessions under Article 22(2) of the Understanding on Rules and Procedures governing the Settlement of Disputes ('the Understanding') annexed to the Agreement establishing the WTO, to the extent of USD 202 million per year. At the same time, the United States produced a list of products to which a suspension of tariff concessions might be applied, including prepared mustard.

17 Following an arbitral award of 12 July 1999 on the total amount of the tariff concessions to be suspended, the WTO authorised the United States on 26 July 1999 to suspend those concessions to the extent of USD 116.8 million per year and to impose additional customs duties of 100% on a number of products coming from the Member States of the European Community, including prepared mustard.

However, the United States decided not to apply the suspension to products from the United Kingdom.

18 On 7 June 2001, the Fédération des industries condimentaires de France ('the FICF' or 'the complainant'), which comprises the principal French producers of prepared mustard, lodged a complaint with the European Commission under Article 4 of Regulation No 3286/94.

19 That complaint stated in particular that the selective application of the US retaliatory measures was contrary to Article 22 of the Understanding, as the measures suspending the tariff concessions authorised by the WTO could only be applied to the 'Member concerned', previously found to be in breach, in the present case the European Community as a whole, and not purely to certain Member States. The complaint also stated that the obstacle to trade created by the United States caused adverse trade effects within the meaning of Regulation No 3286/94 in relation to exports of prepared mustard by members of the FICF and that it was in the interests of the Community to initiate a complaint procedure under Regulation No 3286/94 in relation to the measures taken by the United States.

20 In the light of the evidence produced by the complainant, the Commission published on 1 August 2001 a notice of initiation of an examination procedure under Article 8 of Regulation No 3286/94 concerning an obstacle to trade consisting of trade practices maintained by the United States in relation to the imports of prepared mustard (OJ 2001 C 215, p. 2).

21 Point 2 of that notice stated that 'the examination which the Commission is initiating may also cover other products which appear to be affected in a similar way to prepared mustard and in particular those in respect of which interested parties that make themselves known within [a period of 30 days following the publication of the notice] provide evidence that the alleged practices are applicable'.

22 Several trade organisations made themselves known to the Commission within the prescribed period, including the Comité national interprofessionnel des palmipèdes à foie gras, the Confédération générale des producteurs de lait de brebis et des industriels de Roquefort and the Comité économique agricole régional 'fruits et légumes de la région Bretagne'. Following those indications of interest, the Commission decided, under point 2 of the notice of initiation, to extend the procedure to foie gras, Roquefort and shallots.

23 On 6 March 2002, upon completion of its examination, the Commission informed the committee referred to in Article 7 of Regulation No 3286/94 of the findings of its enquiry, and then supplied it with a copy of the report of its examination on 27 March 2002. That report proposed that the procedure be terminated.

24 On 23 April 2002, the Commission sent a non-confidential version of the examination report to FICF's adviser. In its letter, the Commission stated that the committee referred to in Article 7 of Regulation No 3286/94 had approved the proposal to terminate the procedure and that a decision to that effect would therefore shortly be published in the *Official Journal of the European Communities*.

25 By letter of 17 May 2002, one of the FICF's advisers wrote to acknowledge receipt of the examination report. In that letter, he expressed surprise at the time taken by the Commission to send him that report and to adopt the decision in the matter. Noting the statement made by the Commission in its letter of 23 April 2002 that a decision would shortly be adopted, the FICF's adviser concluded that the Commission was not offering the complainant the right of reply, a practice which he considered contravened the right to a fair hearing.

26 In its reply to that letter of 4 June 2002, the Commission stated that it had fully complied with Regulation No 3286/94, in particular Article 8(4) and (8). In that regard, the Commission maintained that the complainant had never submitted a request to it under Article 8(4) of Regulation No 3286/94. The Commission also pointed out to the complainant that the latter had regularly been informed of the

evolution of the case and that it was aware of the outcome of the examination procedure well before the date of the official communication of the examination report.

27 On 6 June 2002, the Comité économique agricole régional 'fruits et légumes de la région Bretagne' sent a letter to the Commission in which it first expressed surprise that it had not received the examination report directly, but had received it through its advisers. It next expressed its disagreement with the statement that the examination procedure was to be terminated and lastly stated that the announcement that the decision to terminate the examination procedure was shortly to be adopted did not allow it to exercise its right of reply to the conclusions set out in the examination report.

28 On 7 June 2002, the Confédération générale des producteurs de lait de brebis et des industriels de Roquefort sent a letter to the Commission which was largely identical to that sent by the Comité économique agricole régional 'fruits et légumes de la région Bretagne'.

29 By letters of 14 June 2002, the Commission sent a non-confidential version of the examination report to the Confédération générale des producteurs de lait de brebis et des industriels de Roquefort and the Comité économique agricole régional 'fruits et légumes de la région Bretagne', reminding them that those trade organisations had intervened in the examination procedure only as interested parties and that this was why the Commission had not felt obliged to send copies of the examination report, which, moreover, was a public document, to them directly. In its letters, the Commission also stated that it had, in any event, complied with Article 8(8) of Regulation No 3286/94, that the advisers to both organisations had been kept regularly informed of the evolution of the case and that they were aware of the outcome of the examination procedure well before the date on which the official report of the examination procedure was communicated. The Commission stated lastly that the decision to terminate the procedure would be adopted shortly.

30 On 9 July 2002, the Commission adopted Decision 2002/604/EC terminating the examination procedures concerning obstacles to trade, within the meaning of Regulation No 3286/94, consisting of trade practices maintained by the United States of America in relation to imports of prepared mustard (OJ 2002 L 195, p. 72) ('the contested decision'). The contested decision was published in the *Official Journal of the European Communities* on 27 July 2002.

31 In recital (6) to the contested decision, the Commission stated:

'The examination procedure led to the conclusion that the alleged adverse trade effects do not appear to stem from the obstacle to trade claimed in the complaint, i. e. the [US] practice of applying withdrawal of concessions selectively against some but not all the Member States (selective sanctioning). In fact, the investigation did not provide any evidence of the fact that making the suspension of concessions also applicable to the United Kingdom would result in greater export opportunities for the complainant for prepared mustard to the [US] market. Therefore, no adverse trade effect, as defined in the Regulation, can be attributed to the obstacle to trade claimed by the complaint, other than the trade effects resulting from the suspension of concessions which are authorised and lawfully applied by the United States of America under the WTO Agreement. Therefore, in accordance with Article 11 [of Regulation No 3286/94], the examination procedure has demonstrated that the interests of the Community do not require that a specific action be taken against the alleged obstacle to trade under the Regulation.'

32 In the sole article of the contested decision, the Commission accordingly decided to terminate the examination procedure initiated on 1 August 2001.

Procedure and forms of order sought

33 By application lodged at the Court Registry on 16 October 2002, the FICF, the Confédération générale des producteurs de lait de brebis et des industriels de

Roquefort, the Comité national interprofessionnel des palmipèdes à foie gras and the Comité économique agricole régional 'fruits et légumes de la région Bretagne' ('the applicants') brought the present action.

34 Pursuant to Article 14 of the Rules of Procedure of the Court of First Instance, and on the proposal of the First Chamber, the Court decided, after hearing the parties in accordance with Article 51 of those Rules, to refer the case to a Chamber sitting in extended composition.

35 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to reply to certain questions and to produce certain documents.

36 The parties presented oral argument and their replies to the Court's questions at the hearing on 14 September 2004.

37 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

38 The Commission claims that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Admissibility

39 Without raising a plea of inadmissibility in relation to the present action, the Commission has nevertheless restricted its written pleadings to the position of the FICF, which is the only organisation to have lodged a complaint with the Commission under Article 4 of Regulation No 3286/94, to the exclusion of the other trade organisations which intervened in the examination procedure as interested parties.

40 It must be observed in that regard that the applicants have brought one and the same action, and that it is settled case-law that, where one and the same application is involved, a finding of admissibility in relation to one applicant means that there is no need to consider whether the other applicants are entitled to bring proceedings, since it is sufficient that at least one of the applicants fulfils the conditions laid down in Article 230 EC (see, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31; Case T-12/93 *CCE de Vittel and Others* v *Commission* [1995] ECR II-1247, paragraph 44; and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 61).

41 Article 4 of Regulation No 3286/94 is intended to permit, in particular, any association acting in the name of one or more Community undertakings ('enterprises'), such as, in the present case, the FICF acting in the name of French producers of prepared mustard, to rely on the right to avail itself of international trade rules laid down in a multilateral or plurilateral trade agreement in the complaint which it lodges with the Commission, subject to the conditions laid down in the regulation, and to avail itself of the procedural safeguards laid down in the regulation. Seen together, those safeguards show that a complainant under Article 4 of Regulation No 3286/94 has the right to submit for review by the Court any decision of the Commission terminating an examination procedure initiated as a result of his complaint.

42 It follows that the FICF, which lodged a complaint with the Commission under Article 4 of Regulation No 3286/94, may bring proceedings to challenge the contested decision before the Court and accordingly that, as one and the same action is involved, there is no need to consider whether the other applicants are entitled to bring proceedings.

Substance

43 The applicants raise eight pleas in law in support of their application. The first plea alleges breach of Article 2(1) of Regulation No 3286/94; the second plea is based on breach of Article 2(4) of Regulation No 3286/94; the third plea alleges breach of Article 10(5) of Regulation No 3286/94; the fourth plea alleges breach of Article 11(1) of Regulation No 3286/94; the fifth plea alleges failure to state reasons in the contested decision; the sixth plea alleges manifest errors of assessment of the facts and breach of Article 2(4) and Article 11(1) of Regulation No 3286/94; the seventh plea alleges breach of the right to a fair hearing; lastly, the eight plea is based on breach of Article 8(8) of Regulation No 3286/94 and of the Commission's duty to exercise due diligence.

The first plea, alleging breach of Article 2(1) of Regulation No 3286/94

Arguments of the parties

44 According to the applicants, the definition of an 'obstacle to trade' under Article 2(1) of Regulation No 3286/94 is based on two clearly identifiable and indissociable elements, namely a substantive element ('any trade practice adopted or maintained

by a third country') and an 'illegality element' ('a right of action' conferred on the European Community). In the applicants' opinion, the contested decision has restricted that definition to the illegality element alone, that is to say the 'selective' application by the United States of the suspension of tariff concessions. According to the applicants, the Commission's approach not only contravenes Article 2(1) of Regulation No 3286/94, but also misinterprets the scope of the complaint lodged by the FICF and the notice of initiation of the examination procedure. Contrary to what the Commission appears to maintain, the measures suspending the tariff concessions taken by the United States cannot be divided between the measures authorised by the DSB and applied by the United States, on the one hand, and, on the other, the obstacle to trade alleged by the complainant, namely the selective application of those measures. According to the applicants, it is not because the WTO has authorised the adoption of retaliatory measures that the application of those measures is 'lawful', as the Commission considers it to be.

45 The Commission notes, first, that the object of Regulation No 3286/94 is to establish Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under the WTO rules. It is with that in mind that Article 2(1) of Regulation No 3286/94 defines an obstacle to trade as being any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action.

46 The Commission next disputes the interpretation of Article 2(1) of Regulation No 3286/94 adopted by the applicants. According to the Commission, it is not sufficient that an obstacle to trade exist for a dispute settlement procedure to be initiated. It is necessary above all that the existence of adverse trade effects be established. For the purposes of the application of Regulation No 3286/94, the concept of an obstacle to trade cannot therefore be separated from that of 'adverse trade effects'. In other words, in the Commission's opinion, for there to be an 'obstacle to trade' within the meaning of Regulation No 3286/94, it is necessary for undertakings to show that

they are suffering 'adverse trade effects' within the meaning of Article 2(4) of Regulation No 3286/94. A contrary interpretation would have the effect of conferring on Community undertakings a real *actio popularis*.

47 According to the Commission, it is that approach to the concept of 'obstacle to trade' which was applied in the present case, both in the examination report and at the time of the adoption of the contested decision. Such an approach is thus not unfamiliar to the applicants. The Commission refers in that regard to the contested decision, which provides that the investigation was not able to show that the complainant had suffered adverse trade effects as a result of the decision of the United States to apply the suspension of trade concessions selectively, other than the trade effects resulting from that suspension which were 'authorised and lawfully applied by the United States of America under the WTO Agreement'. The Commission concludes, first, that the US measures were adopted in compliance with the principles laid down by the WTO and, secondly, that, as the complainant was unable to show any adverse trade effect, there is, contrary to what the applicants claim, no 'obstacle to trade' within the meaning of Regulation No 3286/94.

Findings of the Court

48 It must be observed as a preliminary point that, under Regulation No 3286/94, exercise of the right of action by the Community under international trade rules against an obstacle to trade adopted or maintained by a third country and having an effect on the market of that country requires as a minimum that three cumulative conditions be satisfied, namely the existence of an obstacle to trade, as defined in the regulation, the presence of adverse trade effects which result from that obstacle and the need to take action in the interests of the Community. Where, upon the conclusion of an examination procedure initiated under Regulation No 3286/94, the Commission finds that one of those conditions is not satisfied, the Community institutions are entitled to form the view that such an action should not be proceeded with.

49 As regards the concept of an obstacle to trade, it should be noted that Article 2(1) of Regulation No 3286/94 provides:

'For the purposes of this Regulation, "obstacles to trade" shall be any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question.'

50 In the present case, it is not disputed that the Commission formed the view, in the contested decision, that the FICF was objecting to an obstacle to trade constituted by the suspension of tariff concessions by the United States against exporters of prepared mustard in the Member States of the Community, other than those in the United Kingdom, a sanction which the contested decision termed 'selective'.

51 The applicants maintain that in adopting that approach the Commission failed to have regard to the definition of obstacle to trade in Article 2(1) of Regulation No 3286/94, in so far as it had regard in the present case only to the 'illegality' element of that definition.

52 That argument cannot be accepted.

53 First of all, the elements of the definition of an obstacle to trade within the meaning of Regulation No 3286/94 cannot be artificially separated, as the applicants suggest. For there to be an obstacle to trade which may be relied upon for the purposes of the application of Regulation No 3286/94, there must be a right of action under

international trade rules. That interpretation arises in particular from the reference in the first paragraph of Article 1 of the regulation to 'compliance with existing international obligations and procedures'. It is supported by the seventh recital in the preamble to Regulation No 3286/94, which states that '[the] mechanism [instituted by the regulation] aims to provide procedural means to request that the Community institutions react to obstacles to trade adopted or maintained by third countries ..., provided that a right of action exists, in respect of such obstacles, under applicable international trade rules'. A different interpretation would mean that any trade practice adopted or maintained by a third country could be considered to be an obstacle to trade, even where no right of action existed under international trade rules.

54 As regards, next, the applicants' argument that the Commission's interpretation fails to have regard to the scope of the complaint lodged by the FICF with the Commission, contrary to what the applicants maintained before the Court, the complainant did not allege that the US measures suspending the tariff concessions, to the extent of USD 116.8 million, in relation to certain products from the Community fell within the definition of 'obstacle to trade'. The complaint accepted that those measures had been authorised by the WTO on 26 July 1999. By contrast, in its arguments in relation to whether the measures adopted by the United States constituted an 'obstacle to trade' within the meaning of Regulation No 3286/94 (point IV of the complaint), the complainant took the view that there was a breach of the rules of the WTO in that 'the United States could not lawfully choose to apply retaliatory measures to certain members of the European Union and not to others' (point IV.1, p. 8 of the complaint) and that 'the selective application of retaliatory measures by the United States call[ed] into question the fixing by the arbitrators of a level of suspension of the concessions' (point IV.2, p. 11 of the complaint). Furthermore, it accepted that 'the conclusions and recommendations of the panel and the Appellate Body referred to the "European Communities" [and that] the United States were accordingly obliged to apply their measures to the "European Communities" and were not entitled to make any distinction between the Member States, all of which applied the contested Community measures' (p. 13 of the complaint). Lastly, it stated that 'the attitude of the United States had the effect of distorting the Community element of the trade policy provided for under the Treaty' in that the retaliatory measures related only to 14 of the 15 Member States (p. 14 of the complaint).

55 It follows that the obstacle to trade which the complaint attacks consisted only in the selective application of the US measures suspending the tariff concessions, and that the Commission did not misinterpret the scope of the complaint. Furthermore, in the present case, having regard to the definition of an obstacle to trade set out in paragraph 53 above, the obstacle to trade under Regulation No 3286/94 could consist only in the selective application of the US measures suspending the tariff concessions. As it is only obstacles to trade in relation to which a right of action under international trade rules exists which fall within the scope of Regulation No 3286/94, a procedure under that regulation could not be initiated in relation to the US measures suspending tariff concessions which had been authorised by the WTO, in that, as a matter of principle, no Community right of action under international trade rules existed in relation to those measures. That is why point 4 of the notice of initiation of the examination procedure, referred to at paragraph 20 above, stated that the obstacle to trade alleged in the complaint was constituted by the maintaining of 'trade measures ... against several Member States rather than the whole of the Community' and the FICF considered, without the correctness of that view being challenged before the Court, that 'the practice of seeking measures against all the Member States, which are subsequently applied only in relation to some of them, failed to reflect the predictability which the dispute settlement system requires'. Moreover, it should also be noted that point 1.4 of the examination report drawn up by the Commission, headed 'The obstacle to trade', stated:

'... it is important to note that the obstacle to trade at issue in this investigation does not consist in the US suspension of the concessions following the Hormones case, but in the way in which this suspension has been enforced by the United States. Accordingly, the complainant does not question the US right under the WTO DSU to suspend the above-mentioned concessions, but only its right to suspend them with regard to only several Community Member States, by excluding others.'

56 Contrary to what the applicants maintain, in stating that the obstacle to trade identified in the complaint consisted in the selective application of the US measures

to Member States of the Community recitals (3) and (6) to the contested decision are consistent both with the definition of 'obstacle to trade' set out in Article 2(1) of Regulation No 3286/94 and with the definition arising from the complaint in the present case, which was followed in the notice of initiation of the procedure and the examination report.

57 It follows from all the above considerations that, contrary to what the applicants maintain, the Commission did not restrict itself in the present case only to the 'illegality' element of the definition of an obstacle to trade, but took account of all the essential and indissociable elements of the concept of an obstacle to trade, as defined in Article 2(1) of Regulation No 3286/94.

58 In those circumstances, the first plea is rejected.

The second plea, alleging breach of Article 2(4) of Regulation No 3286/94

Arguments of the parties

59 The applicants consider that the restrictive approach to the concept of an obstacle to trade adopted in the contested decision also and necessarily entails an incorrect analysis of the 'adverse trade effects' under Article 2(4) of Regulation No 3286/94, which contravenes that provision. According to the applicants, the Commission should have analysed the adverse trade effects of the unlawful imposition, from July 1999, of additional customs duties of 100% *ad valorem*, contested by the applicants, and not solely the effects of the factor which rendered the measures unlawful, namely the selective application of those measures.

60 The applicants consider, moreover, that the contested decision is also vitiated by a manifest error in the assessment of the data contained in the examination report. The finding of the Commission in the contested decision that that report 'did not provide any evidence of the fact that making the suspension of [tariff] concessions also applicable to the United Kingdom would result in greater export opportunities for the complainant for prepared mustard to the [US] market' is contradicted by a reading of the statistics relating to the reduction in imports of mustard from the Member States other than the United Kingdom in conjunction with the statistics relating to the increase in imports from the latter Member State, which are set out in the examination report.

61 The Commission replies that it correctly assessed the nature of the trade effects resulting from the suspension of the tariff concessions adopted by the United States in relation to prepared mustard.

62 The Commission argues that the conclusions of the examination report did not show any relationship of 'communicating vessels' between the reduction in exports by the complainant to the United States, on the one hand, and a substantial and long-term increase in exports from the United Kingdom, on the other. According to the Commission, the statistics contained in the examination report show that the decision of the United States to exclude products from the United Kingdom from the suspension of tariff concessions did not benefit exports of mustard from the United Kingdom to the United States and did not produce adverse trade effects in relation to the complainant. Only if the examination procedure had been able to show that the selective nature of the measures gave rise to lasting and material consequences in the European market for prepared mustard would adverse trade effects, within the meaning of Regulation No 3286/94, have arisen in relation to the complainant. However, the Commission also points out that Article 2(4) of Regulation No 3286/94 sets out a precise definition of 'adverse trade effects' when it refers to the effects of obstacles to trade which have a material impact on the economy of the Community or of a region of the Community, or a sector of economic activity therein. According to the Commission, the fact that the 'complainant suffered adverse trade effects is not considered to be sufficient to justify, on its own, that the Community institutions proceed with any action'.

63 Ultimately, according to the Commission, the contested decision did indeed show that the examination had been unable to prove that the selective nature of the US retaliatory measures resulted in adverse trade effects meeting the criteria laid down in Regulation No 3286/94.

Findings of the Court

64 As a preliminary point, it should be noted that Article 2(4) of Regulation No 3286/94 states:

'"adverse trade effects" shall be those which an obstacle to trade causes or threatens to cause, in respect of a product or service, to Community enterprises on the market of any third country, and which have a material impact on the economy of the Community or of a region of the Community, or on a sector of economic activity therein. The fact that the complainant suffers from such adverse effects shall not be considered sufficient to justify, on its own, that the Community institutions proceed with any action.'

65 That definition shows that Regulation No 3286/94 sought to retain a causal link between the actual ('causes') or potential ('threatens to cause') adverse trade effects and the obstacle to trade, as identified in the particular circumstances of each case, within the meaning of Regulation No 3286/94. That interpretation is supported by the seventh recital in the preamble to Regulation No 3286/94, which states that the mechanism established by the regulation aims to allow Community institutions to react to obstacles to trade adopted or maintained by third countries 'which cause' adverse trade effects, and by Article 4(2) of the regulation, relating to the content of a complaint, which states that the latter must contain sufficient evidence of the

existence of the obstacles to trade 'resulting therefrom'. In addition, for the purposes of Regulation No 3286/94 the adverse trade consequences must also have a material impact on the economy of the Community or of a region of the Community, or on a sector of economic activity therein.

66 In that regard, with respect to the applicants' argument that the Commission should not have restricted its analysis of the adverse trade effects to those resulting from the selective application of the suspension of tariff concessions, the Court considers that, having regard to the reply to the first plea above and the causal link there must be between an 'obstacle to trade' and 'adverse trade effects' within the meaning of Regulation No 3286/94, it must be rejected. As the 'obstacle to trade', within the meaning of Regulation No 3286/94, which is the subject of the complaint in the present case is constituted by the selective application of the suspension of tariff concessions in relation to exports of prepared mustard to the United States, the Commission was obliged to restrict its analysis of the 'adverse trade effects' to those having a causal link with that obstacle.

67 That being so, it must be established whether, as the applicants contend, the Commission made a manifest error in its assessment of the statistics set out in the examination report when it concluded in recital (6) to the contested decision that 'the investigation did not provide any evidence of the fact that making the application of the suspension of [tariff] concessions also applicable to the United Kingdom would result in greater export opportunities for the complainant for prepared mustard to the [US] market'.

68 In that regard, it should be pointed out first of all that there is a difference between the wording of the French version of the passage quoted above from recital (6) to the contested decision and that of the great majority of the other language versions of that text. Unlike the French text, which uses the adverb 'davantage' (more), the great majority of the other language versions refer to 'greater' or 'greater opportunities for export'. That applies for example to the versions of the passage in English ('... would result in greater export opportunities ...'), German ('... für den Antragsteller zu

besseren Ausfuhrmöglichkeiten ...'), Danish ('... at klageren ville få større muligheder for at eksportere ...'), Spanish ('... traería consigo majores oportunidades para el denunciante de exportar ...'), Finnish ('... valituksen tekijän ... viennin mahdollisuuksien laajenemiseen ...'), Italian ('... comporterebbe per il denunziante maggiori opportunità di esportazione ...'), Portuguese ('... se traduziria, par o autor da denúncia, em maiores oportunidades de exportação ...') and Swedish ('... bättre utsiker för den klagande att exportera ...').

69 The idea which the different language versions of the passage quoted seek to express, which is relevant to the consideration of the alleged manifest error of assessment, reflects, first, a less direct correlation than that suggested by the French version through the use of the word 'davantage' between the reduction in exports of prepared mustard to the United States from 14 Member States of the Community and the increase in exports of that product to the United States from the United Kingdom and, secondly, an impact over a period of time on the level of exports of prepared mustard to the United States.

70 Next, the applicants do not dispute the statistics set out in the examination report relating to exports of prepared mustard to the United States from either the Member States of the Community other than the United Kingdom, or the latter Member State alone. Nor do they challenge the methods used in the report to determine the adverse trade effects caused by the obstacle to trade, such as that identified in point 1.4 of the examination report and referred to in paragraph 55 above.

71 That being so, it follows both from the statistics recorded in the examination report and from the analysis made there that the conclusion reached by the Commission in recital (6) to the contested decision is not manifestly erroneous.

72 Between the average level of exports for the period from 1996 to 1998 and for the year 2000, the increase in exports of prepared mustard to the United States from the United Kingdom, in terms of both value and volume, was extremely small in size and proportion in comparison with exports from other Member States of the Community. Therefore, even if exporters from Member States other than the United Kingdom would themselves have benefited from that increase if the retaliatory measures taken by the United States extended to prepared mustard from the United Kingdom — which the applicants have failed to show — those exporters would not have been able to enjoy greater export opportunities.

73 Furthermore, it is clear from the information used by the Commission during the examination procedure that the US importers of prepared mustard sought out alternative suppliers established outside the Community, and that those suppliers benefited considerably from the suspension of the tariff concessions by the authorities to the detriment of prepared mustard from the Member States.

74 Consequently, the second plea must be rejected.

The third plea, alleging breach of Article 10(5) of Regulation No 3286/94

Arguments of the parties

75 The applicants claim as a preliminary point that the French version of Article 10(5) of Regulation No 3286/94 contains a punctuation error. Referring to the 'corrected version' [French text only] of that provision, the applicants are of the view that

Article 10(5) of Regulation No 3286/94 requires that the Commission take account, in its examination of the adverse trade effects, of provisions, principles or practices which govern the right of action under relevant international trade rules. According to the applicants, although the Commission assessed the compatibility of the US measures with respect to the WTO rules when the examination report was prepared, it did not carry out a similar analysis in the contested decision, thereby contravening Article 10(5) of Regulation No 3286/94 in the present case. Furthermore, in the applicants' opinion, the contested decision is also vitiated by a failure to state reasons, inasmuch as the Commission has not explained why the legal analysis of the obstacle to trade complained of, which it undertook in the examination report, does not appear in the contested decision.

76 Without denying that the French version of Article 10(5) of Regulation No 3286/94 contains the error highlighted by the applicants, the Commission submits that this plea is not well founded.

Findings of the Court

77 The French version of Article 10(5) of Regulation No 3286/94 provides that 'la Commission tient compte aussi, dans son examen, des éléments de preuve concernant les effets commerciaux défavorables, des dispositions, principes ou pratiques qui régissent le droit d'engager une action au titre des règles de commerce internationales applicables évoquées à l'article 2, paragraphe 1'.

78 In that regard, as the applicants rightly submit in their written pleadings, without being challenged on the point by the Commission, that version contains an error of syntax in that it includes a comma after the word 'examen'. Both the structure of Article 10(5) of Regulation No 3286/94, which would require the insertion of the coordinating conjunction 'et' after the adjective 'défavorables' if that comma were

correct, and the position of that paragraph within the article in question, which relates to the 'examen des éléments de preuve', lead to the conclusion that the comma which appears after the word 'examen' should not be there. Furthermore, the other language versions of Article 10(5) of Regulation No 3286/94, adopting that line of reasoning, refer to 'examining evidence of adverse trade effects'.

79 Article 10(5) of Regulation No 3286/94 should therefore be read as follows: 'the Commission shall also, in examining evidence of adverse trade effects, have regard to the provisions, principles or practice which govern the right of action under relevant international rules referred to in Article 2(1)'.

80 However, the applicants are misinterpreting Article 10(5) of Regulation No 3286/94 when they maintain that it required the Commission to assess in the contested decision the compatibility of the obstacle to trade complained of with the provisions of agreements adopted in relation to the WTO.

81 In the light of what was stated by way of a preliminary point in paragraph 48 above, in so far as the Commission rightly held in the present case that the quantitative evidence analysed in its examination report did not warrant a conclusion that there were adverse trade effects within the meaning of Regulation No 3286/94, it was not obliged to take into account the provisions, principles or practices which govern the right of action under international trade rules.

82 As regards the claim that the contested decision was vitiated by a failure to state reasons, the Commission rightly held that there were no adverse trade effects within the meaning of Regulation No 3286/94, so it was not required either to examine the additional factors mentioned at Article 10(5) of the regulation, or to include reasons in the contested decision in that regard.

83 The third plea is accordingly rejected.

The fourth plea, alleging breach of Article 11(1) of Regulation No 3286/94

Arguments of the parties

84 The applicants submit that the contested decision confused the 'interests of the Community', referred to in Article 11(1) of Regulation No 3286/94, with the interests of the complainant. In the applicants' opinion, such an approach not only contravenes that provision, but in this case also disregards the fact that other parties intervened during the examination procedure and that when the initiation of that procedure was announced on 1 August 2001 the Commission recognised the interest of the Community in 'tackling the US practices which can represent a systemic threat to the role of the Community in the WTO and severely affect the cohesion and solidarity of the [Community], since any exclusion of a Member State from suspension of trade concessions inevitably implies an increased burden for the others'.

85 In addition, the applicants take the view that the remarks made by the Commission in the procedure before the Court to the effect that an analysis of the interests of the complainant is a condition precedent to an analysis of the interests of the Community are not compatible with the contested decision inasmuch as, in order to

terminate the examination procedure, the Commission relied on the absence of any Community interest and not the absence of any interest on the complainant's part. In any event, the applicants consider that the recognition by the Commission in the written procedure of the distinction between the interests of the complainant and those of the Community supports their claim that in this case the contested decision infringed Article 11(4) of Regulation No 3286/94.

86 The Commission maintains that Regulation No 3286/94 does not define the concept of 'interests of the Community' and that it has a wide discretion in that regard. Nevertheless, it claims, having regard to the general scheme of Regulation No 3286/94 that concept has a very precise role to play, which is to prevent an action being proceeded with on principle or *in abstracto*. In other words, the Commission considers that a complainant cannot rely on Regulation No 3286/94 to urge the Community to take action on principle in defence of the general interests of the Community, if it has not itself suffered adverse trade effects. As, in the present case, the complainant has not suffered such effects other than those which the retaliatory measures could (lawfully) give rise to, the condition precedent to the examination of the Community interest in taking action was not satisfied. Furthermore, the conclusions of the examination report clearly show that the applicants had no interest in the measures being uniformly applied in relation to all the Member States of the Community.

87 In its rejoinder, the Commission also states that it took account of all the interests at issue, including those of the undertakings which intervened during the examination procedure, as is shown by the examination report, the conclusions of which were fully taken account of in the contested decision. In any event, the selective nature of the US measures principally affect prepared mustard, since, in the present case, only that product was exported by the United Kingdom, with Roquefort, foie gras and shallots accordingly being excluded.

88 In short, the Commission considers that it correctly took the view that, in the light of the conclusions of the examination report, it was not in the interests of the Community to continue the procedure.

Findings of the Court

— Preliminary remarks

89 Regulation No 3286/94 provides no definition of the 'interests of the Community', any more than it states the rules governing the examination of those interests. However, a number of provisions of Regulation No 3286/94 refer to that expression.

90 Article 8(1) of Regulation No 3286/94 thus states that the Commission is to initiate an examination procedure 'where, after consultation, it is apparent to [it] that there is sufficient evidence to justify initiating an examination procedure and that it is necessary in the interest of the Community'.

91 In addition, Article 11(1) of Regulation No 3286/94 provides that 'when it is found as a result of the examination procedure that the interests of the Community do not require any action to be taken, the procedure shall be terminated in accordance with Article 14'.

92 Moreover, Article 12(1) of Regulation No 3286/94 states that 'where it is found (as a result of the examination procedure, unless the factual and legal situation is such that an examination procedure may not be required) that action is necessary in the interests of the Community in order to ensure the exercise of the Community's rights under international trade rules, with a view to removing ... the adverse trade effects resulting from obstacles to trade adopted or maintained by third countries, the appropriate measures shall be determined'.

93 Those provisions must be read in the light of the 15th recital in the preamble to Regulation No 3286/94, which states that 'it is incumbent on the Commission ... to act in respect of obstacles to trade adopted or maintained by third countries, within the framework of the Community's international rights and obligations, only when the interests of the Community call for intervention, and ... when assessing such interests, the Commission ... should give due consideration to the views [of] all interested parties in the proceedings'.

94 The question whether the interests of the Community require that action be taken involves appraisal of complex economic situations and judicial review of such an appraisal must be limited to verifying that the relevant procedural rules have been complied with, that the facts on which the choice is based have been accurately stated and that there has not been a manifest error of assessment of those facts or a misuse of powers (see, to that effect, Case C-179/87 *Sharp Corporation* v *Council* [1992] ECR I-1635, paragraph 58, and Case T-2/95 *Industrie des poudres sphériques* v *Council* [1998] ECR II-3939, paragraph 292). Where proceedings are brought before the Community judicature for the annulment of a Commission decision terminating an examination procedure relating to obstacles to trade for reasons relating to the absence of a Community interest under Regulation No 3286/94, the scope of judicial review includes verifying the absence of errors of law (see, by way of analogy, Case T-132/01 *Euroalliages and Others* v *Commission* [2003] ECR II-2359, paragraph 49). That restriction on judicial review in the context of the examination of anti-dumping measures applies a fortiori to proceedings having a much wider scope and which may, depending on the circumstances, result in an international complaint being brought.

95 It is in the light of those considerations that it should be determined whether, as the applicants maintain, first, the interest of the Community in taking action against an obstacle to trade which is the subject of a complaint has already been definitively examined and determined when the notice of initiation of the examination procedure is published and, secondly, whether the Commission has assimilated or reduced the interests of the Community to the individual interests of the complainant, without taking account of the interests of the other interested parties.

— The assessment of the interests of the Community when the notice of initiation of the examination procedure is published

96 At point 6 of the notice of initiation of the examination procedure, the Commission stated:

'There is a Community interest in tackling the US practices which can represent a systemic threat to the role of the Community in the WTO and severely affect the cohesion and solidarity of the [Community], since any exclusion of a Member State from suspension of trade concessions inevitably implies an increased burden for the others. Therefore, it is considered to be in the Community's interest to initiate an examination procedure.'

97 Generally speaking, it may be considered that the assessment of the interests of the Community carried out when the examination procedure is initiated, is, by definition, of a preparatory nature. It cannot therefore be compared with the assessment which must be carried out subsequently, that is to say on termination of the examination procedure, when deciding whether action is necessary in the interests of the Community.

98 A different interpretation would mean that, when the Commission decides to initiate an examination procedure, it is automatically obliged, when the decision as to whether the Community should act is taken, to assume that such action is necessary, provided that the other legal conditions for the application of Regulation No 3286/94, namely the existence of an obstacle to trade and the existence of adverse trade effects arising from it, are satisfied, thereby depriving the Commission of its power of discretion.

99 In the present case, the general terms in which point 6 of the notice of initiation of the examination procedure is expressed could not be interpreted as meaning that

the Commission had abandoned all right to decide, on termination of the examination procedure, whether or not the interests of the Community required that action be taken in the case in question. It is sufficient to hold that point 6 of the notice of initiation merely found that it was in the interests of the Community to 'initiate an examination procedure'.

100 The applicants' first argument must accordingly be rejected.

— The assimilation or reduction of the Community's interests to the individual interests of the complainant and the failure to take account of the interests of the other interested parties

101 The argument in question is based essentially on the following two complaints, namely, first, failure to take account of the interests of the interested parties other than the complainant and, secondly, the assimilation or reduction by the Commission of the interests of the Community to those of the complainant.

102 With respect to the first complaint, the contested decision does not refer in any way whatsoever to those parties.

103 However, that does not constitute a breach of Article 11(1) of Regulation No 3286/94 in the present case.

104 As a reading of paragraph 91 in conjunction with paragraph 93 above makes clear, Article 11(1) of Regulation No 3286/94, interpreted in the light of the 15th recital in the preamble to the regulation, ensures that when the interests of the Community

are assessed under the examination procedure the opinions expressed by all the interested parties in the procedure are taken into account. It follows that the assessment of the interests of the Community requires an evaluation of the interests of the various interested parties and of the general interest, in particular at the stage of the examination procedure (see, by way of analogy, *Euroalliages and Others* v *Commission*).

105 It is common ground in the present case that, following the publication of the notice of initiation of the examination procedure, the interested parties informed the Commission of their interest in being associated with the procedure initiated by the complainant against the obstacle to trade complained of, as regards their respective products. As with the analysis carried out in relation to exports of prepared mustard to the United States, the examination report assessed in relation to the products of the interested parties whether the obstacle to trade complained of resulted in adverse trade effects. Following that assessment, as with the conclusions drawn by the examination report in relation to the complainant's position, the report stated that the selective measures imposed by the United States did not give rise to the trade effects suffered by the interested parties, which, moreover, were not subject to competition on the US market by exports of products from the United Kingdom. Lastly, when analysing the interests of the Community, the examination report stated at point 4, in particular, that 'as noted above, a WTO dispute is not likely to eliminate or reduce the economic problems faced by the complainants'. Although this passage from point 4 of the examination report erroneously refers to all the parties as the complainants, it shows that the interest of the interested parties in the procedure was taken into account when the Community's interests were considered at the stage of the examination report.

106 Furthermore, at no stage of the written procedure did the applicants suggest that the interested parties had interests different from those of the complainant which were not taken into account by the Commission in the examination procedure.

107 When questioned by the Court on this point at the hearing, the applicants stated that the interested parties had no interest in seeking to have the US retaliatory measures extended to the United Kingdom, since it was clear that Roquefort, foie gras and shallots were not produced by the United Kingdom, but that, by contrast, they had an interest in the selective application of those measures being the subject of a complaint by the Community before the tribunals of the WTO, which, were the United States to be found in breach of its obligations, would, the applicants claim, mean that their products would be removed from the list approved by the WTO. However, even on the assumption that such an interest was different to that of the complainant, the Commission took such arguments into account in its examination, by noting the hypothetical nature of the possibility raised by the applicants, particularly as it is the United States authorities alone that have the power to draw up the list of products subject to suspension of the tariff concessions. That interest was thus indeed taken into account by the Commission.

108 Accordingly, the fact that the contested decision does not mention the interested parties which are applicants in the present case, other than the complainant, cannot, on its own, be interpreted as a failure to have regard to Article 11(1) of Regulation No 3286/94, read in the light of the 15th recital in the preamble to the regulation.

109 The complaint relative to the failure to take account of the interests of the interested parties other than the complainant must accordingly be rejected.

110 As regards the complaint relating to the alleged assimilation of the interests of the Community to those of the complainant, reference should first be made to recitals (6) and (7) to the contested decision.

111 In recital (6), the Commission, having stated that 'in fact, the investigation did not provide any evidence of the fact that making the suspension of [tariff] concessions also applicable to the United Kingdom would result in greater export opportunities

for the complainant for prepared mustard to the [US] market' and then that 'therefore, no adverse trade effect, as defined in the regulation, can be attributed to the obstacle to trade claimed by the complaint', concluded that 'therefore, in accordance with Article 11 [of Regulation No 3286/94], the examination procedure has demonstrated that the interests of the Community do not require that a specific action be taken against the alleged obstacle to trade'.

112 In recital (7), the Commission concluded that 'the examination procedure did not provide sufficient evidence that the interests of the Community require a specific action to be taken under the Regulation' and that 'the examination procedure should therefore be terminated'.

113 The use of the conjunction 'therefore' in the last sentence of recital (6) shows that, in the Commission's opinion, the fact that the interests of the Community did not require that action be taken is, at least indirectly, the result of the finding that the complainant had no interest in the suspension of the tariff concessions being extended to the United Kingdom, inasmuch as it suffered no adverse trade effects as a result of the selective application of the US measures.

114 The requirement that the interest of the complainant should first be established before a Community interest may itself exist was, moreover, confirmed by the Commission in its written pleadings. It defended the idea that Regulation No 3286/94 cannot be used by a complainant to urge the Community to take action on principle in defence of the general interest of the Community, without itself having suffered adverse trade effects.

115 Accordingly, contrary to what the applicants claim, the arguments set out by the Commission in the written pleadings before the Court are not incompatible with the reasons for the contested decision.

116 Reference should next be made to the relevant passages of the examination report. At point 4 of the examination report (headed 'Community Interest'), the Commission stated:

'The findings of the investigation have demonstrated that there are no adverse trade effects to the applicant that are caused by the alleged obstacle to trade in this case. This finding already deprives the procedure of one basic condition for pursuing this action further under the [regulation]. None the less, the Commission has evaluated whether there are other courses of action that the Community could take to address the potential violations and trade effects identified in this report.'

117 It went on to observe:

'... a WTO dispute is not likely to eliminate or reduce the economic problems faced by the complainants. On the other hand, the legal and political significance of the US practice could hardly be underestimated. Indeed, the US appear to have adopted the practice of "selective sanctioning" as a trade "weapon" in order to undermine the internal cohesion of the EC and thus influence its relations with its major trade partner. In sum, the Commission is of the view that the broader and long-term Community interests would require an action aimed at avoiding that the US practice of suspending concessions only to some EC Member States and not to others (i.e. "selective sanctioning") takes place in the future. In this perspective, the Commission will pursue the discussions for a mutually satisfactory solution on the Hormones case and will discuss with the US authorities the systemic issues raised in this report.'

118 At point 6 of the examination report, headed 'Envisaged course of action', the Commission, having noted the three conditions required for Community action to be proceeded with (that is to say (a) that a Community right exist under international trade rules, (b) that there be adverse trade effects caused by the alleged obstacle to trade and (c) that the action be necessary in the interests of the Community), stated that 'on the basis of the above analysis and conclusions, notably as regards the absence of adverse trade effects, it is suggested to terminate the [examination] procedure in this case' and that 'the most appropriate way to deal with the problems faced by the complainant would be to continue the talks with the US authorities aimed at finding a mutually satisfactory solution in the Hormones case'.

119 The examination procedure did not exclude the possibility of a long-term Community interest in taking action in the future against the potential breaches analysed in the examination report; by contrast, inasmuch as WTO proceedings could not eliminate or reduce the economic problems faced by the complainants, it was proposed to terminate the examination procedure, in particular because of the absence of adverse trade effects within the meaning of Regulation No 3286/94.

120 The Commission does not fail to have regard to Article 11(1) of Regulation No 3286/94 by requiring that any action by the Community be linked to the facts and legal bases underlying the examination procedure and, though faced with a general and long-term interest in acting in the future against potential breaches which might result from the practice of 'selective sanctions' adopted by the United States, such as those identified in the examination report, by deciding to terminate the examination procedure.

121 Article 11(1) of Regulation No 3286/94 must be read in the light of the sixth recital in the preamble to the regulation, which states that the legal mechanism established by Regulation No 3286/94 should 'ensure that the decision to invoke the Community's rights under international trade rules is taken on the basis of accurate

factual information and legal analysis'. Accordingly, if the outcome of an examination procedure is that the matters of fact and law which gave rise to that procedure do not suffice to form the basis of any decision to invoke the rights of the Community, in particular because of the absence of one of the legal conditions precedent to the application of Regulation No 3286/94, in the present case that of the absence of adverse trade effects resulting from the alleged obstacle to trade, the Commission is entitled to hold that the conditions required by Regulation No 3286/94 have not been satisfied.

122 That interpretation is also supported by Article 12(1) of Regulation No 3286/94, which states that 'where it is found (as a result of the examination procedure, unless the factual and legal situation is such that an examination procedure may not be required) that action is necessary in the interests of the Community in order to ensure the exercise of the Community's rights under international trade rules, with a view to removing the ... adverse trade effects resulting from obstacles to trade adopted or maintained by third countries, the appropriate measures shall be determined'. It is clear from the wording of Article 12(1) of Regulation No 3286/94 that the Community action must seek the cessation of adverse trade effects caused by an obstacle to trade and, accordingly, that that action cannot be initiated if it does not allow that objective to be addressed. In other words, Article 12(1) of Regulation No 3286/94 does not enable the regulation to be relied on by a complainant to urge the Community to take action in defence of the general interests of the Community, if the complainant has not itself suffered adverse trade effects. In any event, even if it has, it is not sufficient to hold that such an adverse trade effect exists for the Community to be required to act under Regulation No 3286/94, as the Commission has a wide discretion when assessing the commercial interests of the Community, seen as a whole.

123 In the present case, the fact that the Commission considered it to be relevant, for the sake of completeness, to assess in the examination procedure whether a more general and long-term Community interest might exist cannot mean that the Commission was obliged to conclude that the examination procedure should result in action in the interests of the Community. Such an approach may be appropriate

in particular because of the need to respond to all the arguments raised by the complainant and/or the interested parties and reflects compliance with the principle of sound administration. It cannot, however, be used against the Commission in order to show that it infringed Article 11(1) of Regulation No 3286/94.

124 Accordingly, contrary to what the applicants maintain, the Commission did not restrict the interests of the Community to those of the complainant, nor did it fail to have regard to Article 11(1) of Regulation No 3286/94.

125 For all those reasons, the fourth plea must be rejected in its entirety.

The fifth plea, alleging failure to state reasons in the contested decision

126 This plea is divided into two parts, the first alleging failure to state reasons as regards the analysis of the obstacle to trade and the second failure to state reasons as regards the Community interest in proceeding to act.

The first part of the fifth plea, based on failure to state reasons as regards the analysis of the obstacle to trade

— Arguments of the parties

127 The applicants consider that the Commission contravened the obligation to state reasons under Article 253 EC by failing to undertake in the contested decision a legal analysis of the obstacle to trade complained of.

128 The Commission notes the principles established by the case-law as regards the giving of reasons for the acts of Community institutions. It argues that in the present case the statement of reasons in the decision satisfied all the requirements laid down by that case-law. In summarising the essential elements of the conclusions of the examination report, expressly referred to in recital (6) to the contested decision, the Commission fully satisfied the obligation to state reasons incumbent upon it, particularly as the examination report was prepared at the end of an adversarial procedure during which the applicants had the opportunity to state their position. The applicants were thus able to be aware of the justifications for the measure adopted and the Community judicature is in a position to exercise its power of review.

— Findings of the Court

129 According to settled case-law, the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights and to enable the Community Court to exercise its power of review (Case 203/85 *Nicolet Instrument* [1986] ECR 2049, paragraph 10; Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 31; Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 39; and Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 81). Furthermore, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; and *Petrotub and Republica* v *Council*, paragraph 81). Consequently, if the contested measure clearly discloses the essential objective pursued by the institution, it would be pointless to require a specific statement of reasons for each of the technical choices made by the institution (Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 29).

130 In the present case, it must be held that the Commission identified in the contested decision, first, the obstacle to trade complained of, which 'was constituted by the [US] decision to apply the suspension of trade concessions imposed on prepared mustard, following the Hormones Case, only to exports originating in certain Community Member States (the United Kingdom is excluded)' (recital (3) to the contested decision). Secondly, in recital (6) to the contested decision, the Commission stated that 'the examination procedure led to the conclusion that the alleged adverse trade effects do not appear to stem from the obstacle to trade claimed in the complaint, i.e. the [US] practice of applying withdrawal of concessions selectively against some but not all the Member States (selective sanctioning)'.

131 In the circumstances of the present case, such statements satisfy the requirements of Article 253 EC.

132 First of all, Article 11(1) of Regulation No 3286/94 provides that 'when it is found as a result of the examination procedure that the interests of the Community do not require any action to be taken, the procedure shall be terminated'. It follows from that provision that the statement of reasons in a decision terminating an examination procedure may be restricted to a note of the principal findings set out in the examination report, referring to that report, and that it is not necessary, given the circumstances in which that decision is taken, that it record the whole of the factual and legal background to that report.

133 Next, it is to be noted that the examination report is, in its non-confidential version, a public document and that in this case it was sent to the applicants before the contested decision was adopted. The applicants were thus in a position to be sufficiently aware of the reasons for the contested decision and, in particular, the reason why, although the examination report had highlighted certain areas in which the obstacle to trade complained of was incompatible with the rules of the WTO

agreements, a legal analysis of the obstacle to trade in the contested decision was unnecessary, given the absence of a causal link between that obstacle and the adverse trade effects under Regulation No 3286/94.

134 Lastly, the consideration of the first and second pleas undertaken by the Court in paragraphs 48 to 58 and 64 to 74 above has shown that exercise of the power of judicial review was not obstructed.

135 The first part of the fifth plea must accordingly be rejected.

The second part of the fifth plea, based on failure to state reasons as regards the Community interest in proceeding to act

— Arguments of the parties

136 The applicants maintain, first, that, as the Commission adopted its position in relation to the interests of the Community by reference only to the interests of the complainant, the contested decision neither allows the interested parties which intervened during the examination procedure, which are themselves applicants in the present case, to know the reasons underlying the contested decision, nor allows the Court to exercise its power of review.

137 Secondly, the applicants maintain that the Commission failed to respond to all the arguments raised in the complaint relating to the Community interest in proceeding to act. First, the applicants point out that the contested decision is silent as regards

the interest of the Community, referred to in the examination report, in not having the United States damage the unity of the common commercial policy by practising 'selective' sanctions, applying only to a certain number of Member States. Secondly, the applicants point out that the complaint stated that the possibility could not be excluded that, as a result of action taken by the Community, the United States would, at the same time as extending their retaliatory measures to all Member States of the Community, remove prepared mustard from the list of products subject to those measures. According to the applicants, since the suspension of tariff concessions could not exceed USD 116.8 million per year, the United States would have been obliged to remove certain products from the list, including, possibly, prepared mustard. While the applicants accept that that point was addressed in the examination report, they nevertheless maintain that the contested decision makes no reference to it, which represents, in their opinion, a failure to state reasons. Thirdly, the applicants criticise the Commission for failing to respond in the contested decision to the argument raised in the complaint that the Community had just as much an interest in initiating a procedure in the present case as it had in entering into discussions with the United States pursuant to Article 306 of the United States Trade Act 1974. Fourthly and lastly, the applicants criticise the Commission for failing to respond in the contested decision to the argument which was none the less addressed in the examination report, that a finding of breach against the United States before the WTO would enable them to seek recovery of the customs duties that had been wrongly imposed.

138 The Commission refers to its arguments set out in relation to the first part of this plea for all of the above complaints.

— Findings of the Court

139 As mentioned at paragraph 129 above, it is not necessary for the statement of reasons in a decision to go into all the relevant facts and points of law, provided that

the persons concerned are able to ascertain the reasons for the measure to enable them to defend their rights and to enable the Community Court to exercise its power of review, having regard in particular to the legal and factual background to that decision.

140 As regards the applicants' first argument, that the contested decision did not allow the interested parties which intervened during the examination procedure to know the reasons underlying the contested decision, the Court considers that it must be rejected.

141 It is true that the Commission only referred to prepared mustard in adopting the contested decision.

142 Nevertheless, in the context of the contested decision that did not prevent all the applicants from knowing the reasons underlying the Commission's decision to terminate the examination procedure, in which all the interested parties had been involved. It is clear from the examination report, which was sent to the applicants prior to the adoption of the contested decision, that the findings in the report applied at least as much to their products as to those of the complainant. Furthermore, the examination highlighted the fact that the products of the interested parties were not subject to any competition from identical products from the United Kingdom on the US market, as those products were not exported there and, as a result, that the obstacle to trade complained of caused them no adverse trade effects under Regulation No 3286/94.

143 Lastly, even if the Commission should, in order to comply with the principle of sound administration, have provided clearer information as regards the status of the organisations other than the complainant which intervened during the examination procedure, the lack of any reference to the products of those organisations in the statement of reasons for the contested decision does not hinder the exercise of the Court's power of judicial review when regard is had to the circumstances in which that decision was taken.

144 With respect to the second argument and the last three complaints referred to in paragraph 137 above, the applicants accept that the examination report analysed and rejected all the complaints they rely on. As regards stating reasons, the Commission was not required to address in the statement of reasons for the decision all the matters of fact and law raised by the applicants, any more than it was required to record all the technical choices made by it, so long as the fundamental elements of the institution's approach are clearly recorded in the contested decision. The failure of the contested decision to refer to the last three complaints relied on by the applicants could, therefore, be understood in the context of the present case as confirming the position set out in the examination report, which was sent to the applicants prior to the adoption of the contested decision and to which the latter expressly referred. Moreover, the absence of any reference in the statement of reasons for the contested decision to hypothetical points underlying the three complaints raised by the applicants does not prevent review of the lawfulness of the contested decision. Those three complaints must therefore be rejected.

145 As regards the complaint alleging the absence of reasoning in the contested decision in relation to the systemic interest which the Community has in defending the unity of the common commercial policy, this too must be rejected. It is clear from the examination report, as was noted in relation to the fourth plea above, that while the unity of the common commercial policy was indeed considered to be a general and long-term Community interest, Community action was not, in the present case, considered necessary on that ground, particularly in the light of the absence of one of the legal conditions precedent to the application of Regulation No 3286/94. Accordingly, in the circumstances of the present case, the applicants were in a position to know why the Community was not minded to act in the present case and the statement of reasons for the contested decision, albeit laconic, also satisfies the requirement that the Court be able to exercise its power of review.

146 In those circumstances, the second part of this plea must be rejected, as must the fifth plea in its entirety.

The sixth plea, alleging manifest errors in the assessment of the facts and breach of Article 2(4) and Article 11(1) of Regulation No 3286/94

147 This plea is divided into two parts. The first part is based on a manifest error of assessment on the Commission's part in relation to the possibility of removal of the applicants' products from the list of goods subject to the US customs surcharge. The second part is based on a manifest error of assessment in relation to the restitution of the customs surcharge that was wrongly paid.

The first part of the sixth plea, based on a manifest error of assessment on the Commission's part in relation to the possibility of removal of the applicants' products from the list of goods subject to the US customs surcharge

— Arguments of the parties

148 The applicants state that, should the Court reject their second complaint raised under the second part of the fifth plea, alleging failure to state reasons, it would in any event be appropriate to hold that in its examination report the Commission made a manifest error in the assessment of the facts and contravened Article 2(4) and Article 11(1) of Regulation No 3286/94.

149 According to the applicants, it is clear that, had the United Kingdom been included in the list of States subject to the suspension of the US tariff concessions, 'minor' products from the other Member States, such as those of the applicants, might have been excluded from the scope of the US measures, by reason of the maximum limit on the tariff concessions that could be suspended, set by the arbitral award of the WTO tribunals. The relevance of such an approach was, moreover, recognised by the Commission in its notice of initiation of the examination procedure. The

Commission should accordingly have given greater consideration to the possibility that the applicants' products might be excluded from the list drawn up by the US authorities. The applicants maintain that uncertainty as to the success of a dispute settlement procedure should not have prevented Community action when it was possible. That was the position in the present case.

150 While the Commission takes the view that it has already replied to that plea in its observations relative to the preceding pleas, it nevertheless maintains that the contested decision at no time exceeded the limits on the exercise of its discretionary powers, as established by the case-law, as to the choice of the methods necessary for the realisation of the common commercial policy and the examination of complex economic situations.

151 In the present case, the Commission considers that there was no manifest error in its assessment of the facts, as described in the examination report, either as regards the absence of adverse trade effects or as regards the absence of a Community interest in pursuing the procedure. That applies in particular to the applicants' speculations as to the removal of prepared mustard from the list of US measures.

— Findings of the Court

152 It should be pointed out first of all that, having concluded that there was no causal link between the obstacle to trade which was the subject of the FICF's complaint and the adverse trade effects, the Commission considered in the examination report the argument raised in the complaint that, were the Community to be successful before the WTO tribunals, the suspension of tariff concessions by the United States would

have to be extended to the United Kingdom, thereby inevitably causing the United States to amend the list of relevant products, since otherwise the total amount of the suspension would exceed the amount authorised by the WTO (USD 116.8 million). According to the applicants, prepared mustard and the other products covered by the examination procedure might therefore be removed from the list of products submitted by the US authorities to the DSB.

153 Next, it should be noted that the Commission gave the following reply to that argument in the examination report (point 2.5, p. 32):

'However, first of all, the outcome of a WTO case would be far from certain, given the lack of precedents on the questions at issue. Moreover, the composition of the list with products on which the 100% duty is applicable is the responsibility of the US authorities. There is no guarantee (it could even be considered as highly improbable) that the US authorities would remove the complainant's products from the list. Besides, extending the measure to Roquefort, foie gras or shallots originating in the UK would not have any effect at all on the status quo as those products are not exported by the UK.'

154 The Court considers that the analysis set out in the examination report in order to reply to the argument raised by the complainant and the interested parties is not vitiated by a manifest error of assessment.

155 First of all, as was highlighted in the examination report and as the Commission stated at the hearing, even were the Commission to have brought successful proceedings before the WTO tribunals, any resulting amendment to the list of products subject to the suspension of tariff concessions by the United States would be a matter for the US authorities. In that regard, it should be noted that in the arbitral award of 12 July 1999 (WT/DS26/ARB), referred to at paragraph 17 above

and confirmed by the DSB, the arbitrators clearly stated that, by reason of Article 22 of the Understanding, they had no power to determine the definitive list of products which could be subject to the suspension of tariff concessions. The applicants have neither claimed, nor, more fundamentally, demonstrated that a power of that nature could be available to the Community.

156 The Court notes next that the inclusion of products from the United Kingdom in the US list does not in any way mean that the applicants' products would have been removed from that list. It is equally possible and reasonable to imagine that other products or sub-categories of products of the tariff nomenclature could be removed from the list, while at the same time complying with the maximum amount of USD 116.8 million authorised by the DSB.

157 Lastly, the applicants provide no evidence to support the existence of a manifest error of assessment, but simply criticise the Commission for failing to envisage the possibility that their products would be removed. Apart from the fact that that claim is not correct, since the examination report replied to the objection raised in the FICF's complaint, while rejecting it at the same time, the analysis carried out in the examination report cannot, on any basis, constitute a manifest error of assessment on the Commission's part, having regard to the hypothetical nature of the situation envisaged by the applicants.

158 The first part of this plea must therefore be rejected.

The second part of the sixth plea, based on manifest error of assessment in relation to the restitution of the customs surcharge that was wrongly paid

— Arguments of the parties

159 As regards the possibility of claiming restitution of the customs duties charged by the US authorities pending the possibility of a finding of fault against the United

States at the WTO, the applicants first of all express surprise that in rejecting that argument, which was raised in the complaint, on the ground that the US legislation did not give direct effect to the WTO agreements and thus excluded actions brought by individuals on the basis of those agreements, the Commission expressed a view on the interpretation of foreign legislation, thereby exceeding its powers. Next, the applicants contend that the US legislation does not preclude individuals from bringing administrative claims for the repayment of customs duties that have been wrongly charged. The applicants rely in that regard on the panel report of 15 July 2002 on Article 129(C)(1) of the United States Uruguay Round Agreements Act, which confirms that the US authorities may take account of recommendations issued by the WTO tribunals. Accordingly, the applicants consider that, contrary to what the Commission concluded in its examination report, reimbursement of the customs duties charged by the US authorities would be possible.

160 The Commission essentially refers to the position it set out in relation to the first part of this plea.

— Findings of the Court

161 The premiss on which this part relies is based on the assumption that, following a decision which might be reached by the WTO tribunals in favour of the Community, the United States would extend the suspension of the tariff concessions to all the Member States, with the result that the applicants' products were removed from the US list, with that removal itself meaning that the applicants could seek restitution of the customs surcharges paid to the US authorities until that point.

162 To the extent that that assumption is founded on matters rejected by the Court in the first part of this plea, it is without foundation.

163 Furthermore, without it being necessary to decide the question of the interpretation of the US legislation and practices adopted by the Commission, it should be noted that the examination report also rejected the approach of the complainant and the interested parties on the ground that the WTO dispute settlement procedure is based on the principle enshrined in Article 19(1) of the Understanding that the GATT rules of 1994 will be complied with in the future. As that approach was not disputed by the applicants, it must be held that, even if there was an error of assessment as to the possibility of seeking reimbursement of the customs duties that were wrongly charged, that error did not, in any event, affect the legality of the contested decision. First, the error did not alter the absence of any causal link between the obstacle to trade complained of and the adverse trade effects recorded in the contested decision; secondly, it did not affect the assessment of such interest as the Community might have in proceeding with an action before the WTO, as the object of such an action would not be, and could not be, the retroactive reimbursement of customs duties paid to the authorities of a non-Member State by Community undertakings the products of which are subject to a measure suspending tariff concessions by that State.

164 The second part of the sixth plea must accordingly be rejected, as must the sixth plea in its entirety.

The seventh plea, alleging breach of the right to a fair hearing

Arguments of the parties

165 Under this plea, the applicants complain that the Commission failed to allow them to state prior to adoption of the contested decision their position in relation to the factual and legal matters contained in the examination report.

166 They note that, at the same time as the Commission sent them the examination report, it stated that the contested decision would shortly be adopted. According to the applicants, that shows that the contested decision was already taken at the time the examination report was sent, and, accordingly, that the Commission would give them no opportunity to state their position in relation to the matters contained in that report. That was confirmed by the Commission in its letter of 4 June 2002, addressed to the applicants' advisers. Although, as the applicants accept, the complainant was informed of the outcome of the examination procedure and there is no provision of Regulation No 3286/94 which requires the provision of information to the other interested parties before the end of the examination procedure, they consider that the fundamental principle of the right to a fair hearing, as established in particular in anti-dumping cases, required the Commission to permit them to reply to the arguments set out in the examination report. The fact that the applicants had maintained 'contact' with the Commission services does not affect that conclusion, as the applicants maintain that at no time before the adoption of the contested decision could they have been aware of the precise legal and factual position of the Commission.

167 The Commission replies that all of those arguments are irrelevant. It argues that the obligations arising under Article 8 of Regulation No 3286/94 were fully complied with in the present case. If the applicants had the opportunity to submit their observations during the examination procedure, the fact that, as the applicants mention, they were unable to avail themselves of a 'right of reply' before the contested decision was adopted arises from the application of Article 8 of Regulation No 3286/94.

168 Moreover, citing the case-law which has been developed on anti-dumping, the Commission explains that it is necessary for the undertakings affected to be able to make known their views on the accuracy and relevance of the facts and circumstances alleged and on the evidence presented. Applying that case-law to the present case, the Commission considers that it has respected the applicants' right to a fair hearing. Furthermore, contrary to what the applicants claim, the

complainant would have had ample time to communicate its observations between the date on which the examination report was sent to it, namely 23 April 2002, and the date on which the contested decision was adopted, namely 9 July 2002.

169 In addition, the Commission states that the applicants have not sought to plead the illegality of Article 8 of Regulation No 3286/94 on the ground of breach of the fundamental principle of the right to a fair hearing.

Findings of the Court

170 It must be noted first of all that it is a fundamental principle of Community law that the right to a fair hearing must be respected (see, inter alia, Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 25; Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187, paragraph 15; and Joined Cases T-159/94 and T-160/94 *Ajinomoto and NutraSweet* v *Council* [1997] ECR II-2461, paragraph 81).

171 Furthermore, the general scheme of Regulation No 3286/94 indicates that an examination procedure and any action in the interests of the Community that may be adopted at the end of it are directed only at a non-Member State which has adopted or maintained an obstacle to trade. An undertaking which is a complainant under Regulation No 3286/94 can thus rely on the right to a fair hearing only under the conditions set out in the regulation, unless those conditions are themselves considered to be contrary to the general principle which they intend to express.

172 It should be noted in that regard that Article 8(4)(a) of Regulation No 3286/94 states that 'the complainants and the exporters and importers concerned, as well as the representatives of the country or countries concerned, may inspect all information made available to the Commission except for internal documents for the use of the Commission and the administrations, provided that such information is relevant to the protection of their interests and not confidential within the meaning of Article 9 and that it is used by the Commission in its examination procedure' and that 'the persons concerned shall address a reasoned request in writing to the Commission, indicating the information required'. In addition, Article 8(4)(b) provides that 'the complainants and the exporters and importers concerned and the representatives of the country or countries concerned may ask to be informed of the principal facts and considerations resulting from the examination procedure'. Article 8(8) of Regulation No 3286/94 requires the Commission to report to the committee referred to in Article 7 of the regulation once it has concluded its examination.

173 It follows from those provisions that Regulation No 3286/94 provides the complainants and the exporters and importers concerned, as well as the representatives of the country or countries concerned, with a right to information, subject to the conditions laid down in Article 8(4)(a) and (b), which must reflect, inter alia, the requirements of commercial confidentiality. Those persons may ask to be kept informed of the principal facts and considerations resulting from the examination procedure.

174 It is common ground in this case that the non-confidential version of the examination report was sent to the applicants after the opinion of the Advisory Committee was obtained and before the contested decision was adopted. The applicants could have stated their position at that time. However, they considered that, inasmuch as the Commission informed them at the same time that the contested decision would be adopted shortly, the Commission's position was already decided upon when the report was sent. They therefore inferred that any

observations that they might have to make would have no influence on the Commission's position. The applicants are thus essentially maintaining that the Commission should have sent them the examination report in draft so as to enable them properly to formulate observations before it was sent to the Advisory Committee, or at the very least should have informed them on its own initiative of the principal facts and considerations resulting from the examination procedure.

175 However, there is no provision of Regulation No 3286/94 requiring the Commission to send the examination report in draft to the persons referred to in Article 8(4) of Regulation No 3286/94 before its submission to the Advisory Committee so as to enable those persons to inform the Commission of any observations they might have to make, nor to inform those persons on its own initiative of the principal facts and considerations resulting from the examination procedure.

176 On the contrary, under Article 8(4)(a) and (b) of Regulation No 3286/94 the persons referred to in that provision are required to make an application for information to the Commission. As regards the information used in the examination procedure (referred to in subparagraph (a)) that request must be made in writing to the Commission and must be reasoned and indicate the information required. Where the request relates to the principal facts and considerations resulting from the examination procedure (referred to in subparagraph (b)), the regulation lays down no form and no special conditions with which that request must comply.

177 In the present case, the applicants have never claimed to have sent the Commission a request for information under Article 8(4) of Regulation No 3286/94 before the adoption of the examination report. Furthermore, as the Commission has rightly pointed out, the applicants have not sought to plead the illegality of the provisions of Article 8(4) of Regulation No 3286/94.

178 The applicants have also accepted in their written pleadings that they were kept informed of the evolution and policy of the examination procedure, that they were able to state their position orally as to what they considered its outcome should be and that they were informed, before the adoption of the examination report, that the Commission considered that in the circumstances there was no adverse trade effect under Regulation No 3286/94. It is thus clear that the applicants were given the opportunity to state their position on the evolution and policy of the examination procedure and, at the very least, on one of its principal components and to defend their interests. It is true that the applicants have submitted in their application that that information was too general to represent observance of their procedural rights. However, the documents before the Court do not show that the applicants had requested the Commission prior to the end of the examination procedure to provide that information, in writing where appropriate, particularly as regards the principal facts and considerations, including legal ones, resulting from the examination procedure, as Article 8(4) of Regulation No 3286/94 required. It was at that point that, the Commission being under a duty to respond diligently to the request for information, the applicants would have been in a position properly to state their position in relation to the material contained in the Commission's reply. Inasmuch as the applicants have never claimed to have submitted such a request, they cannot criticise the Commission in the present action for failing to allow them to present their observations on the factual and legal considerations resulting from the examination procedure. Moreover, the fact that the right to be informed of the principal facts and considerations resulting from the examination procedure is subject to the — sole — condition that the applicants submit their request to the Commission does not, on its own, prejudice the defence of their interests, particularly as that request is not required to comply with any particular formalities.

179 Furthermore, it is clear from the examination report that the Commission considered the various arguments set out in the complaint and replied to them. It also considered the position of products other than prepared mustard allegedly affected by the US measures in a similar way, in response to the participation of the

interested parties in the examination procedure, which, as is clear from the examination report, and is not disputed by the applicants, cooperated in that procedure.

180 For all those reasons, the seventh plea must be rejected.

The eighth plea, alleging breach of Article 8(8) of Regulation No 3286/94 and failure of the Commission to comply with the duty to exercise due diligence

181 This plea is in two parts. The first alleges failure to observe the time-limit laid down by Article 8(8) of Regulation No 3286/94. The second alleges failure by the Commission to exercise due diligence as regards the period between the end of the period of consultation with the committee referred to in Article 7 of Regulation No 3286/94 and the adoption of the contested decision.

The first part of the eighth plea, alleging failure to observe the time-limit laid down by Article 8(8) of Regulation No 3286/94

— Arguments of the parties

182 The applicants note that, under Article 8(8) of Regulation No 3286/94, the Commission is normally to submit the examination report to the committee referred to in Article 7 of the regulation within five months of the notice of initiation

of the procedure, unless the complexity of the examination is such that the Commission extends the period to seven months. According to the applicants, the period of seven months cannot be extended and the provision is there to ensure that the complainants are given a swift reply as regards the outcome of the application to the Commission. In so far as, in the present case, the Commission in fact considered that the complexity of the examination required the period to be extended to seven months and the Committee did not receive the examination report until 27 March 2002, or seven months and 27 days after the initiation of the procedure, the applicants are of the view that the Commission contravened Article 8(8) of Regulation No 3286/94.

183 The Commission considers that the time taken to complete the procedure is not unreasonable, having regard to the complexity of the subject-matter of the contested decision and to its concern to consider all the arguments of the various interveners before terminating the procedure. The Commission also states that it undertook the procedure at issue in a spirit of good faith and kept all the parties concerned informed.

— Findings of the Court

184 It should be remembered as a preliminary point that Article 8(8) of Regulation No 3286/94 states:

'When it has concluded its examination the Commission shall report to the Committee. The report should normally be presented within five months of the announcement of initiation of the procedure, unless the complexity of the examination is such that the Commission extends the period to seven months.'

185 In the present case, the applicants do not deny that the examination undertaken by the Commission was complex and required that the period be extended to seven months. It is also common ground that the examination report was sent to the committee referred to in Article 7 of Regulation No 3286/94 seven months and 27 days after the initiation of the examination procedure. The time-limit of seven months laid down in Article 8(8) of Regulation No 3286/94 was thus exceeded.

186 However, it must be determined whether such a failure to comply with the time-limit laid down in Article 8(8) of Regulation No 3286/94 can have the result that the contested decision should be annulled.

187 While failure to comply with a mandatory time-limit will result in the nullity of every act adopted after the expiry of the time-limit, failure to comply with a time-limit that is purely indicative does not, as a matter of principle, mean that an act adopted after its expiry falls to be annulled (see, by way of analogy, Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraph 119, and the case-law cited there).

188 Next, as regards the nature of the period referred to in Article 8(8) of Regulation No 3286/94, it must be held that the use of the conditional and of the adverb 'normally' in the second sentence of that provision supports the view that the period of five months allowed for the submission of the examination report is indicative (see, by way of analogy, *NTN Corporation and Koyo Seiko* v *Council*, paragraph 119).

189 The Court is of the view that the fact that the Commission considers that the complexity of the examination required that the period for the submission of the examination report be extended to seven months has no effect on nature of the period. The period of seven months which Article 8(8) of Regulation No 3286/94 refers to merely represents, in the case of a 'complex' examination, the extension of the initial period of five months laid down for an examination which is 'straightforward or normal'. The end of the second sentence of Article 8(8) of Regulation No 3286/94 indicates that it is a question of 'extend[ing] the period to seven months'. That wording is also used in the other language versions of Regulation No 3286/94. It follows that, inasmuch as the period for sending the examination report is purely indicative in the case of an examination which is 'straightforward or normal', the position should not differ in the case of an examination which is 'complex', since all that is involved is an extension of the initial period.

190 That point made, the Court is of the view that the Commission ought not to delay the submission of the examination report beyond a period which is reasonable (see, by way of analogy, *NTN Corporation and Koyo Seiko* v *Council*), as that might delay the adoption of the decision to terminate the examination procedure.

191 However, in the present case, the fact that the indicative time-limit of seven months provided for in Article 8(8) of Regulation No 3286/94 was exceeded by 27 days does not amount to failure to comply with a reasonable time-limit.

192 The first part of the eighth plea must accordingly be rejected.

The second part of the eighth plea, alleging failure by the Commission to exercise due diligence as regards the period between the end of the period of consultation with the committee referred to in Article 7 of Regulation No 3286/94 and the adoption of the contested decision

— Arguments of the parties

193 The applicants submit that the Commission failed in its duty to exercise due diligence, which required it to adopt the contested decision more quickly than was the case, following consultation with the committee referred to in Article 7 of Regulation No 3286/94. According to the applicants, the contested decision was not adopted until three months after the end of the consultation period. Having regard to the importance of the procedure laid down in Regulation No 3286/94 for the undertakings concerned and the already very long period that had elapsed between the announcement of the initiation of the examination procedure and the submission of the examination report to the Committee, the applicants consider that the Commission failed in its duty of diligence.

194 The Commission replies that it acted with all possible diligence in a case having important consequences.

— Findings of the Court

195 By virtue of Article 7(4) of Regulation No 3286/94, the Advisory Committee has eight working days within which to respond to the examination report submitted by the Commission under Article 8(8) of the regulation.

196 Article 11(1) of Regulation No 3286/94 states that a Commission decision terminating an examination procedure must be adopted in accordance with the procedure laid down in Article 14 of the regulation. Article 14(2) provides that 'the Commission representative shall submit to the Committee a draft of the decision to be taken' and that 'the Committee shall discuss the matter within a period to be fixed by the chairman, depending on the urgency of the matter'. Article 14(3) of Regulation No 3286/94 states that 'the Commission shall adopt a decision which it shall communicate to the Member States and which shall apply after a period of ten days if during this period no Member State has referred the matter to the Council'.

197 It follows that Regulation No 3286/94 does not specify any time-limit for the Commission's submission of a draft decision to the Advisory Committee following the period of consultation on the examination report, nor does it specify the period which is to elapse between the point when the Advisory Committee has considered the draft decision and the time the Commission reaches a decision. Accordingly, the regulation does not lay down any period within which a decision to terminate an examination procedure, such as the contested decision in this case, must ensue following the consultation with the committee referred to in Article 7 of Regulation No 3286/94.

198 The silence of Regulation No 3286/94 on that point can be interpreted as reflecting the desire of the Community legislature to provide the Commission with a certain discretion as regards the date on which a decision terminating an examination procedure needs to be adopted, having regard to all the circumstances of each case, in particular any steps which the Commission envisages may be taken against the authorities of the non-Member State in question before an examination procedure is terminated.

199 Nevertheless, the recognition of such a discretion does not mean that the Commission may delay the adoption of a decision taken under Article 11(1) of Regulation No 3286/94 beyond a reasonable time, which falls to be assessed with regard to the particular circumstances of each case. Such a limit aims to ensure, as

the applicants have submitted, compliance with the duty of diligence and the principle of sound administration which are binding on the Commission.

200 In the present case, two months and 24 days elapsed between the end of the procedure for consultation with the Committee, on 15 April 2002, and the adoption of the contested decision on 9 July 2002. Such a period is not unreasonable, having regard in particular to the obligation imposed on the Commission to undertake internal consultation with its various services on the draft decision, the duty imposed by Article 14 of Regulation No 3286/94 to consult with Member States with regard to the decision, and the duty to allow sufficient time for the decision to be translated into all the official languages of the Community.

201 It follows that the second part of this plea must be rejected, as must the eighth plea in its entirety.

202 In those circumstances, the action must be dismissed in its entirety.

Costs

203 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders the applicants to pay the costs.

Vesterdorf Mengozzi Martins Ribeiro

Dehousse Labucka

Delivered in open court in Luxembourg on 14 December 2004.

H. Jung

Registrar

B. Vesterdorf

President

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