THE COURT

in answer to the question referred to it, for a preliminary ruling, by the Tariefcommissie on 19 September 1962, hereby rules:

1. **There is no ground for giving a new interpretation of Article 12 of the EEC Treaty;**

2. **It is for the Tariefcommissie to decide as to the costs of the present proceedings.**

Donner Delvaux Rossi

Hammes Trabucchi Lecourt Strauß

Delivered in open court in Luxembourg on 27 March 1963.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL M. LAGRANGE DELIVERED ON 13 MARCH 1963[1]

Mr President,
Members of the Court,

I

As you know, the three cases, Nos 28, 29 and 30/62, of which I have to give my analysis today, came before us in exactly the same circumstances as Case 26/62, which led to your judgment of 5 February 1963. Now, as then, the Tariefcommissie is referring to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions relating to the interpretation of Article 12 of the Treaty. The questions posed are in the same terms; the written observations presented both by the parties to the main actions and by the Governments and the Commission are the same; finally, no new circumstance has occurred since the judgment, and no new argument has been presented. The only difference from the procedural point of view is that reference was made to the Court by the Tariefcommissie on different dates: 16 August 1962 in Case 26/62 and 19 September 1962 in the three other cases—those which are at present before you. Thus it would seem that you have merely to reply as you did on 5 February last, and to the same effect, for there exists no apparent reason to hold differently.

However, such an approach would imply that the effect of *res judicata* resulting from your judgment of 5 February 1963 does not extend to the present actions; for otherwise you would be required, if not to dismiss the requests of the Tariefcommissie as inadmissible (since they are prior to your judgment), at least to declare them as unfounded by dismissing the cases for lack of grounds. A matter of principle is involved here which is not without importance to the future application of Article 177 and the relationships between the Court of Justice and the national courts which flow from it.

I think that this problem should be resolved by a normal application of the

1 — Translated from the French.

principles which govern *res judicata,* on the one hand, and the system of references for preliminary rulings, on the other. I do not think that I should go at length into these principles, which are common to the six Member States, at least in essence; I shall confine myself to recalling them briefly.

1. As regards *res judicata,* the principle is that its binding effect is only relative and exists only in so far as there is identity of parties, cause and object. (The Court applied these principles strictly in the Chasse and Meroni judgments of 14 December 1962). Apart from the special case of the annulment of administrative measures (and also, according to some, the 'declaration of illegality' of such measures), which applies *erga omnes,* there are no exceptions to the rule unless the law provides otherwise. I know of one such exception in France: Article 7 of the Law of 6 May 1919, as amended by the Law of 22 July 1927, gives to the civil courts the power to settle disputes concerning designation of origin ('appellations d'origine') in relation to wine, by providing that 'final awards and judgments shall be binding against all the inhabitants and proprietors of the same region', thus allowing a judgment to determine the conditions of designation ('appellation'), and to delimit the region in which it is to apply, just as a regulation would. That is a very characteristic exception to the rule of *res judicata,* which is traditionally considered in France as the legal expression of the French Revolution's condemnation of the 'regulatory judgments' given by the Parlements of the *ancien régime.* In Germany there is an exception relating to the scope of the judgments given by the Bundesverfassungsgericht at Karlsruhe, which bind all the courts and authorities of the Federation and of the Länder, and sometimes even have the authority of statute. In the Treaty of Rome I find no special provision derogating from the principle that *res judicata* binds only the case in question, when the Court is called upon to interpret the provisions of the Treaty, whether by way of preliminary ruling or otherwise.

2. As regards the principles which govern the *system of references for preliminary rulings,* they depend essentially on absolute respect by each of the two judicial systems for the jurisdiction of the other. Thus the court before which the main action is pending is required to defer to the judgment given by the court to which the case has been referred, as regards the point of law on which the latter court has given a decision: within this limit, the judgment given on reference has binding effect. But the court before which the main action is pending remains free to draw from the preliminary judgment the relevant legal conclusions for a definitive settlement of the case, even to the extent of not drawing any conclusions at all if, for example, it afterwards discovers that the consultation was not necessary and that it can give a decision on other grounds.

As for the court referred to for the preliminary ruling, it has but one power —which is also a duty—and that is to confirm its own jurisdiction: once it has recognized this, it is required to give a decision without having to confirm whether the reference was justified, whether it was really necessary for the adjudication of the main action, etc. As Waline says ('Manuel de droit administratif', 4th Edition, p. 133), envisaging a case where an administrative court gives a decision on reference from a court in the civil system; 'the administrative court is not to read a lesson to the civil court and hold that the latter misconstrued its own jurisdiction'.

These were the principles which the Court applied in its judgment in Case 26/62 where we read this:

'In order to confer jurisdiction on the Court in the present case, it is necessary only that the question raised should

clearly be concerned with the interpretation of the Treaty. The considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it, are excluded from review by the Court.'

II

If we apply simultaneously the two principles just described, we reach the conclusion that the Court's judgment of 5 February 1963, given in Case 26/62, does not have binding effect in the three other disputes. I say 'the three other disputes' advisedly, meaning that for each of them it is necessary to regard all the proceedings *as a whole*, which includes the reference ordered by the Dutch court and the consequences which this reference entails before the Court of Justice. The whole of these proceedings, including the stage which is taking place now here in Luxembourg, has in the last resort but one purpose: to allow a judgment to be delivered, as far as the respective jurisdictions extend, in the cases properly brought before a national court—that is, in this instance, the three cases between importers and the Nederlandse Belastingadministratie. Although the legal issue (*causa petendi*) may be the same in the four cases, the subject matter (*petitum*) is different, and furthermore there is no identity of parties; therefore, the binding effect of your judgment of 5 February does not extend to the three other cases which are the subject of separate requests by the Tariefcommissie, on which you have not yet given judgment.

Doubtless it could be argued, in support of the contrary view, that the aspect of 'public policy' in the system provided for in Article 177 (obligation to refer in the case of the third paragraph of Article 177, direct reference to the Court of Justice by the national court) is emphasized, the aim clearly being to ensure a unified interpretation of the Treaty as far as possible. But I think that care should be taken not to confuse the *ratio legis* (which is in fact to be sought in such interpretation) and the *process* by which it may be affected. This process is embodied in the system of reference for a preliminary ruling, which is based, as I have mentioned, on respect by the courts of each of the two legal systems for the limits of their respective jurisdictions. It is thus a collaboration between the Court of Justice and the national courts which ought to result, by way of case law, in that unity of interpretation which is so desirable: through decisions and not through regulations. In other words, the Court of Justice should, in this as in all other matters, remain free when giving its future judgments. However important the judgment which it is led to give on some point may be, whatever may be the *abstract* character which the interpretation of some provision of the Treaty may present—or appear to present—, the golden rule of *res judicata* should be preserved: it is from the *moral* authority of its decisions, and not from the legal authority of *res judicata*, that a jurisdiction like ours should derive its force. Clearly no one will expect that, having given a leading judgment, such as the judgment in Case 26/62, the Court will depart from it in another action without strong reasons, but it should retain the legal right to do so. The rule that *res judicata* binds only the particular case is a wise rule; rather than enabling the court to shelter formally behind a previous judgment, as one shelters behind a law or regulation, it obliges it unceasingly to retain awareness of its responsibility, that is, to confront the realities of the situation with the legal rule in each action, which can lead it in appropriate cases to recognize its errors in the light of new facts, of new arguments or even of a spontaneous rethinking, or more frequently to alter its point of view *subtly*

without changing it fundamentally, thus being party in the light of experience and the evolution of legal theories and economic, social or other phenomena, to what is called the evolution of case law. The rule that *res judicata* binds only the particular case is the weapon which permits courts to do this. Of course, they should in their wisdom only use this weapon prudently, on pain of destroying legal certainty, but it is necessary for them and they should not abandon it.

Could one then envisage making a distinction between the binding effect of a judgment by the Court of Justice with regard to itself—an effect which would only be relative—and the binding effect with regard to national courts —which would on the contrary be absolute? In other words, so long as the Court did not overrule itself—which it would always have the right to do—national courts would be required to conform to the judgment in every case which comes before them, as is the case with judgments given by the Karlsruhe Court. I do not think so. This would be, in effect, to recognize a jurisdiction of a truly constitutional nature in the Court. Although our Court, in certain respects, plays the role of a constitutional court within the Communities, the Treaties have not given it all the prerogatives of a court of that nature. Above all, the the Treaties themselves may only with prudence and only in part or under certain aspects be considered as true constitutions for each of the Communities which they institute. One should beware of analogies which are stretched too far. In any case, even if these analogies are relevant with regard to the Community legal system, they are invalid with regard to the internal legal system of each Member State, which exists by its side: from this last point of view, it is clear that the Treaties are international agreements, the provisions of which, through ratification, are incorporated into the internal legislation of the Member States. Their provisions are thus applied normally *as laws,* and not as a constitution; it is the same, *a fortiori,* with regulations adopted by the executive bodies of the Community, subject to a review of their legality. So, in the absence of an express provision to the contrary (lacking in the Treaty), the respective powers of the Court when it gives a preliminary ruling and of the national courts should be considered according to the customary rules of internal law when we are faced with an exclusive jurisdiction exercised parallel with normal jurisdictions. Except when a provision expressly declares otherwise, this in no way implies a form of subordination of one jurisdictional system to the other and, in particular, does not justify derogation from the normal rules governing *res judicata.*

It should be added that the argument which I am seeking to refute would also risk involving serious disadvantages. It would result in giving a *contentious* character to the scope of the Court's judgments in the matter. Does this or that later action pose exactly the same question of interpretation as that already settled, or does it involve new elements which justify a new request for interpretation? The Court, rather than having to settle (in the same terms or, if necessary, by supplementing its previous judgment) a question relating to the interpretation of the Treaty, which is its normal rôle, would first have to ask whether the question posed had or had not already been previously settled by it, which in many cases would lead to interpreting the judgment instead of the Treaty. I find here the disadvantage of giving up the freedom which the rule that *res judicata* binds only the particular case gives to the court: it is better to repeat a leading judgment several times, apart from slight alterations in the text in accordance with new elements or arguments, than to refuse to reply and have to give reasons for

the refusal. Once again, better for a court to interpret the law (the purpose for which it is set up) than to interpret its own decisions.

But—and this would mark a retreat—could one not, whilst observing the principle that *res judicata* binds only the particular case, more or less extend its field of application? For example, could one not consider that *res judicata* is binding when the request for a preliminary ruling not only bears upon the same question, but comes from the same court which put the original question previously settled by the Court? This would, in my opinion, be dangerous. The case may appear in a different light, new arguments may be raised, and so on. And what is the 'same court'? A superior court may comprise several divisions, each having a different jurisdiction: take the Civil Chamber and the Criminal Chamber of the Cour de Cessation, or the various Senates of the German Courts. Again, can one consider taking into account the length of the period which has passed since a judgment was given by the Court? The criterion is certainly much too subjective and arbitrary. I consider, in short, that if the rule that *res judicata* binds only the particular case is admitted as applicable, it should be applied strictly according to the simple and well-known criteria by which it is already governed.

III

But then—and this is the last question I wish to consider—does not the Court run the risk of being encumbered with unnecessary actions, because they concern matters which have already been settled? This problem has two aspects —one of fact, the other of law.

In fact, I believe that national courts will in general refrain from referring to the Court questions which are really unnecessary. The natural tendency of a court is to exercise its jurisdiction to the full rather than to abdicate it in favour of another; the parties, for their part, in so far as they can influence this procedure which is regarded as a matter of public policy, will not in general have any interest in prolonging it unnecessarily, with the extra costs and delays involved. In particular the assumption that the very court which has already made a reference to this Court and received a reply will make a further reference is, in the absence of relevant reasons, unlikely to be fulfilled.

But—and this is the legal aspect of the problem—does not the third paragraph of Article 177 *compel* the national courts or tribunals to which it refers (those 'against whose decisions there is no judicial remedy under national law') to refer to the Court as soon as a 'question' on the interpretation of the Treaty '*is raised* in a case pending before' one of them, since, according to the same provision, the court or tribunal in question in such a case '*shall* bring the matter before the Court of Justice'? Does this obligation to refer to the Court exist even when the question of interpretation which has arisen has already led to a judgment of the Court, or even been the subject of a whole line of decisions?

This is a question which you do not have to decide, for it comes within the jurisdiction of the national courts. You could decide it only if a request were referred to you for an interpretation of Article 177 itself, which is not the case here.

I merely say that this problem—which is not the only one raised by the interpretation of Article 177—seems capable of settlement by the national courts without great difficulty if they follow one of the rules which govern the matter of preliminary rulings. This rule is very simple: before the procedure of referring a question for a preliminary ruling on interpretation can be set in motion, there must clearly be a *question,* and that question must be

relative to the *interpretation* of the provision involved; otherwise, if the provision is perfectly clear, there is no longer any need for interpretation but only for application, which belongs to the jurisdiction of the national court whose very task it is to apply the law. This is what is sometimes described, not perhaps very accurately and in a way which is often misunderstood, as the theory of the 'acte clair' (a measure whose meaning is self-evident): really, it is simply a question of a demarcation line between the two jurisdictions. Of course, as always in such a case, there can be doubtful cases or borderline cases. When in doubt, obviously, the court should make the reference.

If a national court is faced with a question of interpretation of the Treaty, but this question has been applied by the competent court as a matter of what may be considered as established case law, it must be accepted that there is no longer really any 'question' requiring a reference, the case being comparable with the preceding one: a provision which is obscure in itself, but the meaning of which has consistently been interpreted in the same way by the competent court, is equivalent to a provision which has no need of interpretation. This is a rule of good sense and wisdom, which happily combines respect for jurisdictional limits with the need to avoid multiplying reference proceedings unnecessarily. It is in this way that the machinery of preliminary rulings is understood in France, a country in which, as you know, this machinery plays an important rôle by reason of the strictness with which the principle of separation of powers is applied there.

Analogous concepts apply moreover in certain related matters, both in private and in public international law: I am referring here to the case of a national court's being led to apply foreign law, as well as of an international court's being led to apply national law. Clearly, in these two examples, there is an essential difference from Article 177 of the EEC Treaty, since the court in such cases does not have a reference procedure available: it must apply the foreign or the internal law. But the analogy is nonetheless interesting, in that in these two cases it is generally accepted that the court has no power to substitute itself for the organs which are normally competent to *interpret* the law, that is, the courts of the country where that law is in force; but it should conform to the *state of law* as it appears, in the country in question, from the manner in which the law is actually applied, taking into account the national decisions to which the application has led. This is the same idea of a distinction between interpretation and application of a law: interpretation of a law resulting from consistent decisions of the competent courts should be accepted by a foreign court and an international court, which would allow them to give a decision as if it were simply a matter of application.

On the whole question of the application of foreign law by a national court, there should be mentioned a very interesting study by Professor Dölle ('Revue critique du droit international privé, 1955) and the following decisions by French courts: Cass. civ., 10 May 1960 (Fondation Potocki) ('Journal du droit international', 1961, p. 762); Cour d'Appel de Paris, 1 July 1959 ('Revue critique de droit international privé', 1960, p. 192); Tribunal civil de la Seine, 29 September 1959 (same review, 1960, p. 591). In the second case, the application of national law by an international court, two judgments of the Permanent Court of International Justice of 12 July 1929, published in 'Dalloz périodique et critique 1930', second part, pp. 45 et seq. (Government of the French Republic v Government of the Kingdom of Serbs, Croats and Slovenes and Government of the French Republic v Government of the

United States of Brazil) may be cited. It must be remembered however that there is in Italy the theory of the 'reception of the rule of foreign law' by the national law, which results in conferring on the Italian court a wider discretion as to the application of foreign law; but it simply results in the Italian courts' having even fewer scruples than those of other Member States in refraining from making unnecessary references.

In short, I consider that if the national courts of Member States follow the principle which I have just outlined—and I have every hope that they will, since these principles are generally recognized in both national and international law—a satisfactory system of collaboration between these courts and the Court of Justice can be created on the basis of Article 177.

In this system it is to be expected that the Court should sometimes have to give a decision on questions of interpretation of the Treaty or Community regulations, which it may already have settled before, but for the reasons which I have given I do not think that this risk will be very great. However that may be, it is infinitely less serious to have several judgments of the Court reproducing previous judgments than to be faced with refusals to accept references from national courts, refusals based on a perhaps questionable interpretation of the scope of a previous judgment which would be the source of conflicts for which the Treaty provides no solution.

I propose that the Court, in giving judgment on the requests by the Tariefcommissie for a preliminary ruling by its decisions of 19 September 1962, should rule that:

1. Article 12 of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.

2. In order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in Article 12 of the Treaty, regard must be had to the duties and charges actually applied by the Member State in question at the date of the entry into force of the Treaty. Such an increase can arise both from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an increase in the rate of customs duty applied.

3. The decision as to costs in these preceedings is a matter for the Tariefcommissie.