economic difficulties invoked by the Benelux countries were real and due, at least in part, to imports of textile products originating in non-member countries.

4. The Community may incur liability under the second paragraph of Article 215 of the Treaty only if the institutions have acted unlawfully, actual damage has been sustained and a causal link exists between the action complained of and the alleged damage. Where the institution's action which allegedly caused the damage suffered is not unlawful in any respect, a claim for damages must be dismissed, without it being necessary to consider whether the other conditions are met.

5. An intervener which has not made any claim as to costs must bear its own costs even if it intervened in support of the successful party.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 2 October 1985 *

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Mr President,
Members of the Court,

1. Introduction

The two cases with which I am to deal today arise from closely interrelated measures of national and Community law: the refusal on 20 December 1983 of the Dutch Minister for Economic Affairs to grant Tezi Textiel BV (hereinafter referred to as 'Tezi') licences to import into the Netherlands men's and boys' cotton trousers originating in Macao but in free circulation in the other Member States and the Commission's Decisions of 12 April 1983 (Official Journal 1983, C 102, p. 3) and 14 December 1983 (Official Journal 1983, C 340, p. 2) authorizing the exclusion from Community treatment of a more extensive group of textile products originating in Macao. Those decisions were based on Article 115 of the EEC Treaty. The refusal of 6 May 1983 of the Minister for Economic Affairs, following upon the Commission's decision of 12 April 1983, was the immediate cause of the proceedings in Case 242/84 but is only of indirect interest to the Court.

To a large extent the facts, the provisions in question and the substantive arguments put forward by Tezi in the two cases, as well as the counter-arguments of the Commission and the Netherlands Government and of the Governments of France, Italy and the United Kingdom, which have submitted observations in one case or in both, are best considered together. They are in fact mainly concerned with the same points of law and these were considered together at the hearing.

However, the two cases are different procedurally and could not therefore be joined. Case 59/84 concerns an action brought by Tezi against the Commission's decision of 14 December 1983 in which Tezi, besides seeking a declaration that the decision is void, also asks for an award of damages. The Commission has raised an objection and doubts about the admissibility of both claims. Case 242/84, on the other hand, consists of a reference for a preliminary ruling from the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry]. It

has been made in proceedings pending before that court between Tezi and the Netherlands Minister for Economic Affairs relating to the Minister's refusal to grant an import licence which was itself based on the Commission's decision of 12 April 1983.

I shall take those similarities and differences into account by first summarizing (in Part 2) the relevant facts and provisions in the two cases and then (in Part 3) the points of substantive law raised and the positions adopted by the parties on those issues. I have taken the given facts and issues from the two Reports for the Hearing, although I have arranged them differently as I shall explain presently.

I shall then deal with the general problems of the interpretation of Articles 113 and 115, on which the main emphasis falls in both cases, in my Opinion on Case 242/84. Owing to the nature of proceedings for a preliminary ruling, the Court may also take account of other pertinent arguments raised in another relevant case, here Case 59/84. Finally (in Part 5) I shall then formulate my Opinion in Case 59/84. In doing so I shall naturally devote attention to the specific procedural and substantive aspects of that case.

2. The facts and the relevant provisions in the two cases

2.1. *The facts*

The Commission's decision of 14 December 1983 against which Tezi brought an action on 6 March 1984 authorized the Benelux countries not to apply Community treatment to men's and boys' cotton breeches, shorts and woven trousers (including slacks) or to women's, girls' and infants' woven woollen trousers and slacks falling within subheadings ex 61.01 B V and ex 61.02 B II of the Common Customs Tariff (category 6), originating in Macao and in free circulation in the other Member States (Official Journal 1983, C 340, p. 2). Tezi also sought compensation for the injury suffered as a result of that decision.

On 1 December 1983 Tezi applied to the competent Dutch authorities for licences to import from Italy 287 749 pairs of men's or boys' cotton trousers originating in Macao and falling within subheading 61.01 B V (e) 3 of the Common Customs Tariff.

The licences were refused pursuant to the aforementioned Commission decision of 14 December 1983, by which the Commission, acting at the request of the Netherlands Government and with the other Benelux countries' agreement, authorized the Benelux countries to exclude from Community treatment from 1 to 31 December 1983 all trousers falling within subheadings ex 61.01 B V and ex 61.02 B II of the Common Customs Tariff, originating in Macao and in free circulation in the other Member States, and for which applications for import documents were lodged after 30 November 1983.

According to the order for reference of the College van Beroep voor het Bedrijfsleven (pp. 2 and 3), the decision of 6 May 1983 of the Minister for Economic Affairs refusing to grant import licences contested before that court concerned textile products of the same kind and origin as the products which were referred to in the Commission's decision of 14 December 1983 and which were also in free circulation in the other Member States. However, the refusal was based in this case on the Commission's earlier authorizing decision of 12 April 1983

which related to the same types of goods. That decision was valid until 30 November 1983.

2.2. *The relevant provisions*

At the material time, trade in textile products between Macao and the European Community was governed by the second Multi-Fibre Arrangement, concluded pursuant to the GATT in 1982. Although that arrangement has not yet been officially approved by the Community, it is provisionally applicable between the Community and Macao, amongst other countries, by virtue of Council Regulation No 3059/78 of 21 December 1978 (Official Journal 1978, L 365, p. 1), which has since been replaced by Council Regulation (EEC) No 3589/82 of 23 December 1982 on common rules for imports of certain textile products originating in third countries (Official Journal 1982, L 374, p. 106).

Regulation No 3589/82, which applies to the facts of this case, provides that imports into the Community of textile products falling within the categories listed in Annex I are to be subject to the quantitative limits set out in Annex III. The quantitative limit for products in category 6 originating in Macao was fixed at 10 114 000 items for 1983. That quantitative limit was divided between the Member States pursuant to Article 3 (2) and Annex IV, the Benelux countries being treated as a single unit.

As regards trade in those products between the Benelux countries and the rest of the Community, the Commission, acting under Article 115 of the EEC Treaty and Commission Decision No 80/47/EEC of 20 December 1979 (Official Journal 1979, L 16, p. 14), had authorized the Benelux countries in two successive decisions to exercise intra-Community surveillance of imports by making them subject to the grant of a licence. At the time of the facts in question in both cases, the system of intra-Community surveillance was in operation. Where necessary I shall come back to other relevant provisions.

3. The points of substantive law arising in both cases and the parties' positions on those points

3.1. *The questions put by the national court and their relevance to the two cases*

In Case 242/84 the College van Beroep voor het Bedrijfsleven has referred the following two questions to the Court for a preliminary ruling:

(1) Must Articles 113 and 115 of the EEC Treaty, taken together, be interpreted as meaning that the Commission may still apply Article 115 in relation to international trade in textiles after the conclusion to the Arrangement regarding international trade in textiles ('the Multi-Fibre Arrangement') and the adoption of Council Regulation (EEC) No 3589/82?

(2) If the answer to Question 1 is in the affirmative, must the phrase 'measures of commercial policy taken in accordance with this Treaty by any Member State' contained in Article 115 of the Treaty be interpreted as including a breakdown of Community quantitative limits between the Member States, such as is provided for in Annex IV to Council Regulation (EEC) No 3589/82?

It appears from those questions, the rest of the order for reference and the submissions to the Court in both cases that the following fundamental questions are at the centre of both cases:

(a) The interpretation of the phrase 'after the transitional period has ended, the

common commercial policy shall be based on uniform principles' appearing in Article 113 (1) of the EEC Treaty; it is not entirely without relevance that the words in the French text are 'est fondé' and in the English text 'shall be based'. As regards the application of Article 115 of the Treaty, which is at issue in both cases, the following questions are particularly relevant:

(i) Are the Multi-Fibre Arrangement and the 'common rules for imports of certain textile products originating in third countries' introduced by Council Regulation No 3589/82 on the basis of that arrangement measures of common commercial policy?

(ii) Do Article 113 in general and Regulation No 3589/82 in particular still leave scope for national measures of commercial policy or for measures to implement a measure of common commercial policy which differ from Member State to Member State?

(b) The interpretation of Article 115 of the EEC Treaty, particularly with regard to the following points of law:

(i) whether Article 115 may be applied in general after the expiry of the transitional period;

(ii) whether it may be so applied particularly after the conclusion of the Multi-Fibre Arrangement and the enactment of Council Regulation No 3589/82;

(iii) the interpretation of the phrase 'measures of commercial policy taken in accordance with this Treaty by any Member State' at the beginning of Article 115 with reference to the facts of Case 242/82; in particular the national court wishes to know from the Court whether that phrase must be interpreted 'as including a breakdown of Community quantitative limits between the Member States, such as is provided for in Annex IV to Council Regulation (EEC) No 3589/82'. However, further aspects of point (iii) arose in the proceedings before the Court.

I shall now summarize the key arguments submitted to the Court in the two cases in the written procedure. Once again I have used the two Reports for the Hearing as my basis.

3.2. *The interpretation of Article 113 (1) of the EEC Treaty*

(a) *Tezi's* position on this point is most clearly set out in Case 242/84.

In the first place, Tezi observes with regard to point (a) (ii) above that in matters of commercial policy the Treaty has transferred power completely and irreversibly to the Community. However, owing to the delay in implementing that policy, the Court has recognized in its decisions that it is possible for the Commission to authorize the Member States, even after the expiry of the transitional period, to maintain, that is to say to continue to apply, national measures of commercial policy.

In Tezi's view that possibility ends as soon as the Community, acting under Article 113, exercises its powers in matters of common commercial policy. The way in which it exercises those powers is irrelevant: in order for a common commercial policy to exist it is not necessary that all commercial policy measures should be uniform and take no

account of differences between the Member States. Even in the case of measures which are adapted to the needs of a Member State but which emanated from the Community it is still possible to speak of a common commercial policy and recourse to Article 115 is therefore ruled out.

That conclusion is confirmed, in Tezi's view, by the wording of Article 115, the first paragraph of which refers to 'measures of commercial policy taken in accordance with this Treaty by any Member State', from which it deduces that only national measures of commercial policy may be protected by recourse to Article 115. On the other hand, measures which the Member States must take in order to implement Community regulations are not covered by Article 115 (1).

As far as point (a) (i) above is concerned, Tezi considers that the arrangements introduced by Regulation No 3589/82 constitute a Community measure which suggests that the Community has exercised its powers in full in the matter of the common commercial policy. The fact that those arrangements provide for the division of the Community quota into national subquotas does not shake that conclusion. In particular, the regulation cannot be regarded as the continuation of a previous national commercial policy, especially since there were no import restrictions of any kind in the Netherlands on the goods in question before the expiry of the transitional period.

Tezi further points out that Regulation No 3589/82 itself provides a remedy for the serious difficulties which might arise as a result of trade being deflected to one or more Member States.

Tezi refers to Article 7 (2), which provides for a procedure for adapting national subquotas 'where this proves necessary, particularly in view of trends in patterns of trade'. That provision applies not only to direct imports from non-member countries but also to cases in which difficulties arise because of trade flows within the Community.

Should the procedure provided for in Article 7 (2) provide no relief, Article 5 enables the Community quantitative limit to be amended.

Tezi concludes that the Court should answer the national court's questions as follows:

(1) Articles 113 and 115 of the EEC Treaty must be interpreted as meaning that the Commission has no power under Article 115 to authorize a Member State to take protective measures against imports of goods which are in free circulation in another Member State under the operation of the Multi-Fibre Arrangement and Council Regulation No 3589/82.

(2) In so far as the second question needs to be answered, Article 115 of the EEC Treaty must be interpreted as meaning that 'measures of commercial policy taken in accordance with this Treaty by any Member State' do not include a breakdown of Community quantitative limits between the Member States, such as is provided for in Annex IV to Council Regulation No 3589/82.

It therefore appears that Tezi based its arguments in the written procedure in particular on its own interpretation of Article 113 of the Treaty. The only point worth mentioning in this connection about its less elaborate arguments in Case 59/84 is that Tezi regards the division of the Community quota into national subquotas in Regulation No 3589/82 as part of the common commercial policy. In view of the ninth recital of the preamble to that regu-

lation, Tezi maintains that the quota was subdivided for purely administrative reasons. In its written reply to a question put by the Court Tezi explained that in using the words 'administrative reasons' it was referring to the ninth recital of the preamble to Regulation No 3589/82 in which it is stated that, in order to apply Community quantitative limits, 'it is necessary to establish a special management procedure', and that such a common management system should be decentralized by allocating the quantitative limits among the Member States.

Since the Community itself did not have the necessary administrative machinery to apply the Community quantitative limits, Tezi argues that the Community had to rely on the administrations of the Member States for the issuing of licences, the deduction of authorized imports from the Community quantitative limits, the carrying-over to the following year of quantities not utilized, guarding against fraud as regards the origin of goods, adaptations to meet changing requirements and so forth.

Tezi contends that in order to have an efficient, decentralized management procedure, the Community quota had to be broken down into national subquotas. Without such a breakdown, it would be impossible promptly to subtract authorized imports from the quantitative limits for the Community as a whole, which could trigger an abrupt rise in import demand in one or a number of Member States with the result that other Member States' needs could not be satisfied, at any rate not by direct imports.

Tezi concedes that, as is clear from the 10th recital of the preamble, account is also taken in the allocation of national subquotas of the situation existing at the time when the relevant regulation was adopted, both as regards relations between the Community and supplier countries and between the Member States. However, in Tezi's opinion, that fact does not affect the Community character of Regulation No 3589/82.

(b) The position adopted by the *Commission* in both cases during the written procedure was primarily based on its interpretation of Article 115. However, as regards the interpretation of Article 113 (1), it took the view in Case 242/84 that the Community's powers in matters of commercial policy may extend to measures to liberalize or restrict trade with non-member countries. Where it is necessary to restrict imports from non-member countries the Commission may authorize the Member States to take national measures; yet it may also seek to achieve by means of a gradual process a system of parallel harmonized measures which are based on information about the state of the industries and markets of the Member States and which thus form a Community body of measures on which the Commission can negotiate at international level with non-member countries.

The Commission considers that, even in the latter case, it is entitled to rely on Article 115. The first paragraph of Article 115 does not relate only to measures taken by the Member States for purely national reasons but also to measures implemented by the Member States in order to comply with Community obligations. In both cases the object of the measures is the same.

In its answer to written questions put by the Court, the Commission states first of all that it regards the system introduced by Regulation No 3589/82 as covered by the common commercial policy but that it is not uniform in character. However, in the Commission's view, it is precisely the

absence of uniformity which determines the applicability of Article 115 of the EEC Treaty.

It argues that Article 113 does not require the Community system to consist of uniform measures in all cases and that as long as goods imported from non-member countries are not subjected to the same conditions irrespective of the country into which they are not imported Article 115 remains in application.

In the Commission's view, there is a uniform system where there is no Community quota divided between the Member States, no regional protection measures and no authorization for Member States to maintain quantitative restrictions initially adopted at the national level.

In certain cases, a system whereby a Community quota is divided into national subquotas may still be uniform if this is done for purely administrative reasons. However, this is not the case with the system introduced by Regulation No 3589/82, as is clear from the 10th recital of its preamble.

As examples of sectors in which such uniformity has been accomplished, the Commission mentions the Common Customs Tariff, Council Regulation (EEC) No 288/82 on common rules for imports (Official Journal 1982, L 35, p. 1) and the free-trade agreements concluded with various non-member countries, except where that regulation and those agreements permit regional protective measures.

In my opinion on Case 242/84 I shall return to important points made by the Commission at the hearing.

(c) When defining their views in one or both cases the *Netherlands, United Kingdom, French* and *Italian Governments* emphasize in different words that the common commercial policy in the textile sector is incomplete and indeed not uniform. They maintain that Article 115 may continue to be applied as long as the common commercial policy in the textile sector is not complete (France and Italy) or still not uniform (Netherlands and the United Kingdom).

The *French Government* further points out that, according to the Court's judgment of 15 December 1976 in Case 41/76 *Donckerwolcke* v *Procureur de la République* ([1976] ECR 1921), the Member States are at liberty to adopt national measures of commercial policy 'by virtue of specific authorization by the Community' where the Community's commercial policy remains incomplete.

In its written observations on Case 242/84, the *United Kingdom* also points out that Regulation No 3589/82 does not establish a uniform commercial policy because it provides for the division of the Community quota into national subquotas, allocated on the basis of national markets and not on the basis of the needs of the Community market as such. As long as that system subsists there will be differences between the commercial policy measures applied by the Member States which will need protection under Article 115. In addition, in its answers to the questions put by the Court the United Kingdom Government defined its position on the basis of the Court's judgment in *Donckerwolcke* (cited above) as being that a common commercial policy based on uniform principles can exist only when goods are subject to the same conditions of importation both with regard to customs and commercial considerations, irrespective

of the State in which they were put in free circulation. In its view, that will be 'where both the tariffs (and other conditions of entry to the Community) are the same in each Member State and there is one Community market' in the goods concerned. The United Kingdom Government considers that to be the case for most industrial products.

On the other hand, there is no uniform policy with respect to those goods for which there are specific rules providing for quotas which are based upon the existence of separate markets within the Community. Those quotas result from a Community enactment of prior national policy or from regional safeguard measures taken at the Community level. An example of the former case is the measures marked with an asterisk in Annex I to Regulation No 288/82. An example of the latter is the restriction on imports into France of quartz watches from Hong Kong introduced in 1984. It is only where there are rules of the former or the latter type that recourse may be had to Article 115 of the Treaty to prevent the measures from being frustrated.

The *Netherlands Government* answered the Court's questions in the same way.

The *Italian Government* takes the view that it appears from the preamble to Regulation No 3589/82, in particular the 10th recital, that in adopting that regulation the Council was fully aware of the specific situation on the Community textile market and therefore decided to implement common commercial policy in that sector step by step.

The Italian Government takes the view that the division into national subquotas was not adopted for administrative purposes alone but in view of the economic requirements of the various Member States, the particular sensitivity of the Community textile industry and the differences between the various Member States in conditions of importation.

Finally, the Governments of the *Netherlands* and the *United Kingdom* explained why they, unlike Tezi, consider that Article 5 and Article 7 (2) of Regulation No 3589/82 do not offer workable alternatives to Article 115 and do not therefore render the application of that article superfluous.

(d) *The questions put by the Court*

For the sake of completeness I shall set out the questions which the Court put to the Commission and the Member States concerned on 26 March 1985, the answers to which I have summarized above:

In your observations it is stated that the system introduced by Regulation No 3589/82 cannot be described as a common commercial policy. Please state:

(a) what, in your view, comprises a regime which qualifies as a common commercial policy under the terms of Article 113 of the EEC Treaty;

(b) whether a regime having such characteristics exists in sectors other than that of textile products, and, if so, please state which are the sectors;

(c) in what circumstances there would be a uniformity of commercial policy measures applied in the territory of the different Member States such that recourse to Article 115 of the EEC Treaty became unnecessary.

3.3 *The interpretation of Article 115 of the EEC Treaty*

(a) *Tezi's* interpretation of Article 115 of the EEC Treaty stems entirely from its view that, if the Community has exercised its exclusive powers under Article 113 of the Treaty in a particular sector of the common commercial policy, recourse may no longer be had in that sector to Article 115 of the Treaty and the Commission may therefore no longer authorize the Member States to take protective measures under that article. So, in Tezi's view, its interpretation of Article 113 and of Regulation No 3589/82, given above, is decisive in both cases. However, following the submission of the Commission's defence in Case 59/84, Tezi added in its reply that it disagreed with the view that the mere fact that the Community quota has been divided into national subquotas sufficed to make Article 115 applicable. It argued that measures taken by Member States in order to implement the national subquotas fixed by the Community could by no means be regarded as 'measures of commercial policy taken in accordance with this Treaty by a Member State' as referred to in Article 115. National measures to implement national subquotas fixed by the Community did not produce differences which could lead to economic difficulties justifying recourse to Article 115.

In Case 59/84, Tezi alternatively submits that in this specific case the Commission failed in several respects to comply with the conditions laid down in Article 115 when adopting the authorizing decision.

In the first place, it contends that the Commission authorized the Benelux countries to take protective measures for a very wide category of products (category 6 in Annex IV to Regulation No 3589/82): in view of the particulars which the applicant Member State must provide to the Commission under Decision No 80/47/EEC of 20 December 1979, it should have asked the Netherlands Government for a more precise description of the products in respect of which protective measures were sought. Tezi also points out that the import licences which it sought from the Netherlands authorities concerned a much smaller group of products than category 6 as a whole, in respect of which the Commission authorized protective measures to be taken.

In the second place, Tezi disputes that there were any economic difficulties justifying the authorization of protective measures. It points out that the decline in employment in the textile industry in the sector of men's and women's outer clothing to which the Netherlands Government referred in its application does not necessarily extend to manufacturers of men's and boys' cotton trousers, which are among the garments which Tezi planned to import into the Netherlands.

(b) On the other hand, as already stated, the *Commission* takes the view that recourse may be had to Article 115 even where there exists a system of parallel harmonized measures (which, being based on information about the state of the industry and the markets in the Member States, form a Community body of measures on which the Commission can negotiate at international level with non-member countries). It considers Article 115 inapplicable only once goods originating in non-member countries are subject to the same conditions of importation both with regard to customs and commercial considerations, irrespective of the State in which they were put in free circulation. That is not the case with a

system based on the division of a Community quota into national quotas and consequently involving a disparity between the measures to be applied in the various Member States. In the Commission's view, that disparity may justify the application of Article 115.

The system introduced in the textile sector by Regulation No 3589/82 is not, in the Commission's view, such as to rule out the applicability of Article 115. Indeed, imports of the products in question are not subject to a uniform system, since the Community quota is divided between the Member States. In its opinion, the 10th recital in the preamble to the regulation confirms that the common commercial policy in the sector in question is not yet complete.

The application of Article 115 is not excluded by the fact that Article 7 of Regulation No 3589/82 makes provision for the allocation of the national quotas to be adapted to take account of trends in patterns of trade. That provision applies solely to direct imports and cannot apply where, as in this case, the whole of the national quota has already been utilized.

The Commission considers that the questions referred to the Court in Case 242/84 should therefore be answered as follows:

(1) Article 115 of the EEC Treaty must be interpreted as applying to trade in textiles in so far as the system established by the Community in that sector leads to differences between the measures of commercial policy to be applied by the Member States.

(2) Such differences result from the breakdown between the Member States of Community quantitative limits, such as is provided for in Annex IV to Council Regulation No 3589/82.

In its rejoinder in Case 59/84 the Commission argues that it may authorize protective measures, as provided for in Article 115, both where the measure of commercial policy, whose obstruction by deflection of trade is to be prevented, was taken by the Member States on their own account and where such a measure was adopted by the Community and then implemented by a Member State. The Commission contends that the distinction which Tezi seeks to draw between those two cases is unfounded, since the measures are substantially the same.

As regards Tezi's alternative argument, set forth above, that the range of goods covered by the authorization at issue in Case 59/84 is too wide, the Commission points out that it does not follow from either Article 115 or Decision No 80/47/EEC that the scope of a decision taken pursuant to Article 115 should be restricted to the situation of those products listed in the applications for import documents. There is nothing to prevent it from examining the case of a whole category of products with reference to the requirements of Article 115; the fact that a number of applications have been made for import licences simply constitutes one of a number of factors to be taken into account.

As regards the economic difficulties warranting the adoption of the authorizing decision, the Commission points out that production in the Benelux countries was falling, imports from non-member countries were increasing, the Benelux quota for products from Macao was virtually exhausted and imports of goods in free circulation in other Member States exceeded

the Benelux quota by 43%. Furthermore, the prices of the products in question originating in Macao were 50% lower than those of similar Benelux products and since 1980, in the Netherlands alone, the industry concerned had recorded very extensive job losses.

Consequently, the Commission considers that the preconditions for the application of Article 115 were fulfilled.

(c) The *Governments* of the *Netherlands*, the *United Kingdom*, *France* and *Italy* express the view in varying terms that a measure of common commercial policy like Regulation No 3589/82 does not preclude the application of Article 115 because it does not apply uniformly to all the Member States.

However, the identical answers proposed by the Italian and United Kingdom Governments to the questions referred by the national court provide an interesting clarification of, in particular, their interpretation of Article 115. They read as follows:

(1) Articles 113 and 115 of the EEC Treaty, taken together, must be interpreted as meaning that the Commission may still apply Article 115 in relation to international trade in textiles after the conclusion of the Arrangement regarding international trade in textiles ('the Multi-Fibre Arrangement') and the adoption of Council Regulation (EEC) No 3589/82.

(2) The phrase 'measures of commercial policy taken in accordance with this Treaty by any Member State' contained in Article 115 of the EEC Treaty must be interpreted as including a breakdown of Community quantitative limits between the Member States, such as is provided for in Annex IV to Council Regulation (EEC) No 3589/82.

4. Opinion in Case 242/84

4.1. *The questions referred by the national court and their relevance in general*

I will remind the Court that the questions referred to it by the national court in Case 242/84 read as follows:

(1) Must Articles 113 and 115 of the EEC Treaty, taken together, be interpreted as meaning that the Commission may still apply Article 115 in relation to international trade in textiles after the conclusion of the Arrangement regarding international trade in textiles ('the Multi-Fibre Arrangement') and the adoption of Council Regulation (EEC) No 3589/82?

(2) If the answer to Question 1 is in the affirmative must the phrase 'measures of commercial policy taken in accordance with this Treaty by any Member State' contained in Article 115 of the Treaty be interpreted as including a breakdown of Community quantitative limits between the Member States, such as is provided for in Annex IV to Council Regulation (EEC) No 3589/82?

Those questions, which are also decisive in Case 59/84, are very general in nature. Although concerned with the textile industry, they require in particular, as explained earlier, an interpretation of Articles 113 and 115 of the EEC Treaty which may also be relevant to the application of those articles in other cases inside and outside the textile sector. This also emerges in all the written observations

which I summarized earlier. The importance of the two cases which I am considering today is of course underscored by the fact that, besides the Netherlands Government, which is directly concerned by the cases, the Governments of three of the big Member States have also presented their views in one or both of these cases on the more general problems of interpretation.

Before considering the specific problems of interpretation in the two cases I shall therefore first examine the more general questions of interpretation of Articles 113 and 115 contained in the questions referred by the national court.

I shall first consider the light cast on those articles by previous decisions of the Court and then, having considered the written and oral arguments put to the Court, give some of my own conclusions on the interpretation of Articles 113 and 115. Only then shall I examine the specific problems arising out of the Multi-Fibre Arrangement and Council Regulation No 3589/82.

4.2. *The Court's decisions on Articles 113 and 115*

4.2.1. Donckerwolcke judgment

First of all, frequent reference is made in both cases to the Court's judgment in Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921. Tezi has correctly pointed out that it is clear from that case that at the time the Community had still not exercised the power conferred on it by Article 113 to apply specific commercial policy measures to the sector in question (see paragraphs 5, 6 and 10 of the decision). Although that fact must to some extent qualify the relevance of that judgment to the present case, it nevertheless contains a number of relevant dicta. In *Donckerwolcke* the national court asked in fact whether 'monitoring measures introduced unilaterally by the importing Member State before obtaining a derogation, pursuant to the second sentence of the first paragraph of Article 115, from the rules of free circulation within the Community' were compatible with the Treaty (paragraph 11 of the decision). The nature of the monitoring measures is explained in paragraph 12 of the decision.

The court went on to state in paragraph 13 that 'the answer to these questions must be derived from the provisions of the Treaty concerning the customs union and from the closely related provisions concerning the common commercial policy.' How that paragraph and the following paragraphs 14 to 23 of the judgment are relevant to the present cases is a matter to which I shall return later.

However, paragraph 24 states that the application of the Community system for goods from non-member countries described in the aforementioned paragraphs is conditional upon the establishment of a common commercial policy. Since those passages from the judgment in *Donckerwolcke* featured prominently in these two cases and, in my view, are highly relevant, I shall quote the following eight paragraphs in full.

'25. The assimilation to products originating within the Member States of goods in "free circulation" may only take full effect if these goods are subject to the same conditions of importation both with regard to

customs and commercial considerations, irrespective of the State in which they were put in free circulation.

26. Under Article 113 of the Treaty this unification should have been achieved by the expiry of the transitional period and supplanted by the establishment of a common commercial policy based on uniform principles.

27. The fact that at the expiry of the transitional period the Community commercial policy was not fully achieved is one of a number of circumstances calculated to maintain in being between the Member States differences in commercial policy capable of bringing about deflections of trade or of causing economic difficulties in certain Member States.

28. Article 115 allows difficulties of this kind to be avoided by giving to the Commission the power to authorize Member States to take protective measures particularly in the form of derogation from the principle of free circulation within the Community of products which originated in third countries and which were put into free circulation in one of the Member States.

29. Because they constitute not only an exception to the provisions of Articles 9 and 30 of the Treaty which are fundamental to the operation of the Common Market, but also an obstacle to the implementation of the common commercial policy provided for by Article 113, the derogations allowed under Article 115 must be strictly interpreted and applied.

30. It is in the light of this interpretation that the compatibility of the "monitoring measures' described above with the rules concerning the free circulation of goods within the Community should be considered.

31. First of all it should be stressed with regard to the scope of such provisions, that under Article 115 limitations may only be placed on the free movement within the Community of goods enjoying the right to free circulation by virtue of measures of commercial policy adopted by the importing Member State in accordance with the Treaty.

32. As full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113 (1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community.'

From those passages I infer the following views of the Court as regards the cases now under consideration.

(a) Paragraph 24 states that the application of the principles of a customs union (also to products coming from third countries which are in free circulation in one of the Member States), which, according to paragraphs 14 to 23, result from the Treaty, are conditional upon the establishment of a common commercial policy. Paragraph 25 explains why this is so. This means that, as a result of Article 8 (7) of the Treaty, the common commercial policy should have been implemented at the end of the transitional period. That conclusion is also confirmed by paragraph 26 and Article 113 quoted in that paragraph.

(b) It further follows from paragraphs 25 and 26 that the common commercial policy should, in particular, serve to unify conditions of importation with regard to customs and commercial matters. By its nature, a common commercial policy cannot

assist in the unification of private commercial conditions and even less in the unification of economic conditions of importation, such as differences between import prices and prices charged by national producers. I conclude that 'commercial' conditions of importation in paragraph 25 means only import conditions laid down by the Community: for instance, uniform conditions regarding quantities, quality, prices and credit conditions.

(c) In paragraph 27 the Court recognized that the fact that the common commercial policy was not fully achieved at the end of the transitional period is a reality which may have legal consequences. However, it appears from the rest of the judgment that in that case the Court only had in mind the legal consequences of the continuing existence of national, unilaterally adopted measures of commercial policy. In *Donckerwolcke* the Court did not need to consider the legal consequences of non-uniform measures of commercial policy such as those at issue in this case.

(d) Contrary to what the Commission argued at the hearing, Tezi is right to suggest that, to judge by paragraph 29, the Court also regards derogations from the principle of free trade which are possible under Article 115 as an obstacle to the implementation of the common commercial policy as referred to in Article 113. In the context of the facts in *Donckerwolcke* the Court was perhaps thinking in particular of authorizations to take protective measures in connection with differences in pre-existing measures of commercial policy adopted by the Member States themselves. However, the wording of paragraph 29 is more general. Furthermore, I have already inferred from paragraphs 25 and 26 that — contrary to the Commission's submission at the hearing — the Court does in fact infer from Article 113 and the system of the Treaty an obligation to establish a uniform common commercial policy and thus not only, as the Commission believes, a commercial policy which, although based on uniform principles, can be implemented by the various Member States in different ways.

(e) The view expressed by the Court in paragraph 32 to the effect that full responsibility in the matter of commercial policy has been transferred to the Community and that national measures of commercial policy are in fact only permissible after the end of the transitional period by virtue of specific authorization of the Community, had — as far as concerns the exclusive character of the Community's responsibility — already been stated in the Opinion delivered by the Court in Case 1/75 ([1975] ECR 1355, at p. 1360). The ground given for that view in the last paragraph on p. 1363 of that Opinion and the first two paragraphs on p. 1364 is that those exclusive powers exist 'in the context of the operation of the Common Market' and are 'quite clearly . . . incompatible' with the existence of concurrent powers of the Member States. The second complete paragraph on p. 1364 confirms my earlier conclusion that the Court considers that, in order to prevent distortion of competition, strict uniformity of commercial conditions (in that case, credit conditions) granted to Community undertakings is necessary.

4.2.2. Other relevant judgments

Unlike *Donckerwolcke*, Case 52/77, *Cayrol* v *Rivoira & Figli*, [1977] ECR 2261, did in fact concern a Community import system pursuant to a commercial agreement concluded with a non-member country (paragraph 8 of the judgment) and the question was raised whether the existence of such an agreement precluded the application of Article 115. However, since the relevant

Community rules and the trade agreement on which they were based clearly left scope in certain circumstances for supplementary independent national measures to be taken, the Court did not need to consider that question. The Court merely held in that regard that 'it follows from the foregoing that during the part of the year between 1 July and 31 December table grapes were not covered by a Community import system such as to make Article 115 inapplicable to the case' (paragraph 25 of the decision). In my view it still cannot be inferred from that paragraph that if table grapes had in fact been covered by a Community import system in the period in question, Article 115 would *ipso facto* no longer have been applicable. In my opinion, that point was left open in that judgment.

The interlocutory order of the President of the Court in Case 1/84 R, *Ilford SpA* v *Commission* [1984] ECR 423, also concerned a situation not covered by measures of common commercial policy except for the Council decisions authorizing Member States to continue provisions of trade agreements previously concluded with non-member countries. A decisive point in the *Ilford* case was that the Commission could not clearly show that Italy had taken an independent national measure of commercial policy in accordance with the Treaty (paragraphs 11 to 15 of the decision).

4.3. *Further general remarks*

Following my review of the Court's previous decisions and my comments on them I will now make some general remarks before examining the specific issues arising in these cases from the Multi-Fibre Arrangement and Council Regulation No 3589/82.

First of all, it follows from my earlier comments that, contrary to what the United Kingdom argued at the hearing, I do not regard the attainment of a genuinely uniform commercial policy pursuant to Article 113 and the Court's decisions cited above merely as an ultimate ideal and an objective for the future but as a legal duty which ought to have been fulfilled by the end of the transitional period. As the Commission agreed in answer to a question which I asked at the hearing, it also follows from Article 111 of the Treaty that the purpose of the transitional period was to make a common commercial policy possible after the expiry of that period. However, contrary to what the Commission maintains, a common policy with common principles but whose implementation varies from Member State to Member State is not sufficient for that purpose. The Community is not a free-trade area but a customs union with a common market, comparable to an internal market, free from trade barriers and different conditions of competition, even in the case of goods from non-member countries but which are in free circulation in one of the Member States. Measures of commercial policy taken by the Member States themselves or measures discriminating between them which are intended to provide the industries of individual Member States with different degrees of protection may engender distortions of competition which, according to the Court's Opinion in Case 1/75, are not acceptable, even in such secondary matters as credit conditions.

That conclusion, however, does not alter the fact that, in my view, the incompletion of the common commercial policy recognized as reality in paragraph 27 of the

Court's judgment in *Donckerwolcke* with regard to the continuing existence of independent national measures must also be accepted in the case of the measures of common commercial policy themselves. Indeed, in my view, it is still not possible to infer from the mere fact that the policy is incomplete any direct legal consequences which may be invoked before the national courts; whether such legal consequences may flow from specific measures of commercial policy must be inferred from the wording of the measures themselves. In this regard I see some similarity with the Court's judgment of 22 May 1985 in Case 13/84 on the common transport policy (*European Parliament* v *Council* [1985] ECR 1556). I also see some parallel with the Court's judgments on the provisions in the EEC Treaty governing the free movement of goods. For instance, the fact that obstacles to trade ensuing from differences in national legislation have not yet been eliminated, as required by Article 8 (7) of the Treaty, by the approximation of national legislation pursuant to Article 100 has never induced the Court to consider Article 36 no longer applicable. What happened was that after the expiry of the transitional period the Court's interpretation of that article became stricter.

I disagree, however, with the French Government, which argued at the hearing that deficiencies in the common commercial policy of the kind now in question should automatically make the application of the first and second paragraphs of Article 115 possible; the application of that safeguard provision has direct effects on intra-Community trade, which is still not the case with a measure of common commercial policy distinguishing between the Member States and implemented by them. Article 115 must therefore be interpreted in the light of its wording and place in the system of the Treaty.

As far as the wording of Article 115 is concerned, I share the Commission's view that it follows from its second paragraph that it allows for the possibility that in certain cases the article must be applied even after the transitional period, for instance where Member States have entered into bilateral trade agreements with State-trading countries which refuse to conclude a trade agreement with the Community itself. Yet the *Ilford* judgment makes it clear that such bilateral trade agreements still exist with other non-member countries (Japan in that case). Since such bilateral agreements may by their nature contain differences notwithstanding the existence of Community monitoring arrangements, differences of the kind referred to in the first paragraph of Article 115 may result. Even if a strict interpretation is placed on the first paragraph of Article 115, as required by paragraph 29 of the Court's judgment in *Donckerwolcke*, this may in certain circumstances justify the authorization of protective measures.

On the other hand, I have great difficulty with the argument put forward by the Commission and national Governments in these cases to the effect that disparities in commercial policies brought about by the Community itself might also justify the application of Article 115. The Community would thus be at liberty to enable new departures to be made from what are correctly called in paragraph 29 of the decision in *Donckerwolcke* (quoted above) the fundamental provisions of Articles 9 and 30 of the EEC Treaty. In my view, the strict interpretation required of Article 115 by

paragraph 29 of the decision in *Donckerwolcke* does not allow the first two lines to be read as referring not only to 'the execution of measures of commercial policy taken in accordance with this Treaty by any Member State' but also to 'measures of commercial policy taken in execution of this Treaty by each Member State and even measures taken by the Community *itself*'. In my opinion such a teleological interpretation of Article 115 would be incompatible with the strict interpretation required by the Court. I also consider that it would be incompatible with the system of the Treaty, especially its 'standstill' provisions — here I am thinking in particular of Articles 31 and 32 — for the Community to make it possible in that way for the Member States to introduce new obstacles to trade (with the Commission's authorization). Only the chapter of the Treaty on agriculture (Article 38 (2)) enables derogations to be made from those and other provisions relating to the free movement of goods.

Accordingly, I consider that the argument put forward by the Commission at the hearing to the effect that if Article 115 is considered inapplicable in such cases the Council itself might feel compelled to allow such obstructions to trade itself must also be dismissed. As already stated, Article 113, unlike Article 38 (2), affords no basis for derogations from Treaty provisions which are fundamental to the operation of the common market.

4.4. *Aspects specific to Case 242/84*

Case 242/84 involves, in particular, the question whether the Community may still apply Article 115 in relation to international trade in textiles after the conclusion of the Multi-Fibre Arrangement and the adoption of Council Regulation No 3589/82 and, if so, whether the phrase 'measures of commercial policy taken in accordance with this Treaty by any Member State' in Article 115 of the Treaty must be interpreted as including a breakdown of Community quantitative limits between the Member States such as is provided for in Annex IV to Council Regulation No 3589/82.

For the reasons given by the Netherlands and United Kingdom Governments in particular and in view of my earlier general remarks I consider that the division by the Community into national quotas of a Community quota agreed with a non-member country is in principle acceptable. In its judgment of 13 December 1983 in Case 218/82, [1983] ECR 4063 (the 'rum quota case') the Court held that a similar division of a global tariff quota into national quotas was not contrary *per se* to Community law. However, in paragraph 13 the Court pointed out that if the provision in question 'did contain a prohibition on exportation from the United Kingdom to the other Member States, it would indeed be contrary to the Treaty provisions on the free movement of goods; while, therefore, as the Court has confirmed, division of a global tariff quota into national quotas may, in certain circumstances, be compatible with the Treaty, that is subject to the express condition that it does not hinder the free movement of the goods forming part of the quota after they have been admitted to free circulation in the territory of one of the Member States'. In my view, the qualification set out in that paragraph must apply *a fortiori* to a division of a global quanti-

tative quota into national quotas. However, I do not think that such a division is in principle contrary to Community law.

In the discussion I had with the Commission on this point at the hearing, the Commission eventually agreed that the extensive 'disparities existing in the conditions for importation of these products into the Member States' referred to in the 10th recital of the preamble to Council Regulation No 3589/82 could refer only to disparities in existing national measures. That is logical. A regulation such as that in question, which differentiates on the basis of supply requirements, can scarcely justify the need for only gradual standardization of import conditions by referring to the differences which it itself brings into being. United Kingdom rules still in existence were mentioned at the hearing as one example of divergent national rules. I consider this point also relevant to the interpretation of Article 115 because it emphasizes that, even if Article 115 is interpreted strictly as I argue it should, its application in the sector in question must not be regarded as ruled out *ab initio*. Its application is in fact precluded in the Netherlands since, according to the answer given by the Netherlands Government to a question asked at the hearing, the In- en Uitvoerwet [Law on imports and exports] in force in that country must not be regarded as an independent measure of commercial policy for the purposes of Article 115 but as a measure enabling the common commercial policy to be implemented.

4.5. *Opinion in Case 242/84*

In view of the foregoing analysis of the Court's previous decisions I consider it unnecessary to reconsider the economic arguments with which the various governments have supported the view they have taken in these proceedings that it must be possible for a differentiated commercial policy to be supported by the application of Article 115 too. The argument put forward in particular by the French Government that, if that were not so, the full Community quota could be utilized for imports into the Benelux countries disregards the fact that the national quotas are based on each Member State's needs. In view of the higher transport costs for exports there is therefore no reason to expect that goods imported into particular Member States (in this case Italy) will all be re-exported to other Member States, especially since it must now be expected, 15 years after the expiry of the transitional period, that the prices of the national textile products in question are no longer very different. In so far as such price differences do in fact subsist in the case of goods of the same quality, the application of Article 115 will not help to eliminate difficulties experienced by the textile industry in a particular Member State on account of intra-Community price differences. It will be seen in Case 59/84 that in the Netherlands imports of the relevant products from other Member States have in fact increased more sharply than imports from non-member countries. Lastly, the application of Article 115 will naturally not assist the industry in the Member State concerned to export to other Member States.

On the basis of my analysis of the Court's previous decisions I therefore propose that the questions put by the national court should be answered as follows:

(1) Articles 113 and 115 of the Treaty, read together in the light of the general scheme of the Treaty, must be interpreted as meaning that the Commission may not still apply Article 115 in relation to international trade in textiles after the conclusion of the Arrangement regarding international trade in textiles ('the Multi-Fibre Arrangement') and the adoption of Council Regulation (EEC) No 3589/82 if the Member State concerned has not taken any 'measures of commercial policy . . . in accordance with this Treaty' as referred to in Article 115.

(2) The phrase 'measures of commercial policy taken in accordance with this Treaty by any Member State' in Article 115 may not be interpreted as including a breakdown of Community quantitative limits between the Member States, such as is provided for in Annex IV to Council Regulation No 3589/82, or a national measure implementing that regulation.

5. Opinion in Case 59/84

5.1. *The claims in Case 59/84*

I now come to Case 59/84. I would first remind the Court that, besides the claim that its application should be declared admissible, Tezi's application comprises a principal claim, an alternative claim and a claim in the further alternative as regards the substance (in fact they are a principal submission and alternative submissions in support of its claim that the Commission's authorizing decision of 14 December 1983 should be declared void). Besides those claims, the application contains a claim that the Commission should be ordered to compensate the applicant for the damage which it has suffered. At the hearing that claim for damages was reduced to a request that the Court should declare the Community liable in the matter of the grant of the authorization contested in the principal claim.

The principal claim (principal submission) is essentially that the Commission's authorizing decision of 14 December 1983 (Official Journal L 340, p. 2) should be declared void on the ground that it is contrary to the Treaty, in particular Articles 113, 9 and 30.

The alternative claim (alternative submission) is that the Commission's decision of 14 December 1983 should be declared void on the ground that it is contrary to Article 115 of the Treaty.

The claim in the further alternative is that the Commission's decision should be declared void on the ground that it is contrary to Article 190 of the Treaty. However, since the applicant abandoned that argument in its reply I shall not consider it.

I shall now consider in turn the objection of inadmissibility raised by the Commission with respect to the substance (in part 5.2), the principal claim and the alternative claim as regards the substance (part 5.3) and the claim for damages (part 5.4). Finally, in part 5.5 I shall summarize my opinion.

5.2. *The admissibility of the principal claim*

Tezi contends that the contested decision is of direct and individual concern to it within the meaning of the second paragraph of Article 173 of the EEC Treaty. This is not contested by the other parties. Since it is sufficiently clear from the papers before the Court that the authorization to exclude goods from Community treatment was sought and granted in consequence of Tezi's application for import licences, I think that in view of the Court's previous decisions it is sufficiently established that the application for a declaration that the authorizing decision is void cannot raise problems of admissibility in that respect.

However, in the *Commission's* view, the application was out of time and is inadmissible on that ground. I would observe in that regard that the contested decision came to Tezi's knowledge for the purposes of the third paragraph of Article 173 of the EEC Treaty either on 15 December 1983, the day on which the Dutch authorities notified it by telephone that its applications for import licences had been refused, or no later than 21 December 1983, when Tezi must have received the letter of 20 December 1983 in which the Dutch authorities confirmed the notification given by telephone. The Commission contends that Tezi should have lodged its application no later than 28 February 1984 whereas it did not do so until 6 March 1984.

In my view, that objection must be rejected. It is clear from the papers before the Court and was confirmed at the hearing in an answer given by the Netherlands Government that Tezi was correct in arguing that neither the telephone call which it received on 15 December 1983 nor the letter of 20 December 1983 enabled it to acquire knowledge of the contested authorizing decision and, in particular, of the reasons on which it was based.

According to established case-law the purpose of the obligation to state the reasons on which decisions are based is 'to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty' (this was stated by the Court as long ago as 4 July 1963 in its judgment in Case 24/62, *Germany* v *Commission*, [1963] ECR 63, at p. 69). Tezi then rightly argues that in such a situation the period laid down in the third paragraph of Article 173 for the institution of proceedings must start to run, in accordance with Article 81 of the Rules of Procedure, from the 15th day after the notification of the decision in the Official Journal (which in this case was on 17 December 1983). The Commission argued in its rejoinder and at the hearing that that time-limit should not apply if the person concerned was informed of the decision earlier. In view of the wording of Article 81 of the Rules of Procedure and the passage quoted above from Case 24/62 in which the Court stressed the importance for the purposes of legal protection of the obligation to state reasons I consider the Commission's argument tenable only if the previous notification included the complete text of the decision, including the reasons on which it was based. However, as observed, that was clearly not so in this case. According to what Tezi told the Court in its reply — and this point was not contested by the Commission — Tezi did not receive the complete text of the decision, which was essential in order for it to exercise its right of appeal, until February 1984 in response to its request. Although it might well have been able to have obtained

the full text earlier, I consider that in those circumstances Tezi was right to rely on Article 81 of the Rules of Procedure. Furthermore, unlike the Commission, I think that the extra two weeks which Tezi thus had in which to lodge its application are absolutely reasonable, since the notification in the Official Journal still did not set out the reasons for the decision. The applicant therefore unquestionably needed the two weeks in order to obtain the complete text of the decision and to examine it before preparing its application.

Accordingly, in my view the objection of inadmissibility raised by the Commission should be dismissed. Since the reasons which I have set out suffice in themselves to support that conclusion, it is therefore unnecessary to consider in addition the Court's decisions which Tezi cited in its reply and at the hearing in order to support its case (these were the decisions in Case 88/76, *Société pour l'Exportation des Sucres SA* v *Commission*, [1977] ECR 709, Case 76/79, *Karl Könecke Fleischwarenfabrik GmbH & Co. KG* v *Commission*, [1980] ECR 665 and Case 730/79, *Philip Morris Holland BV* v *Commission*, [1980] ECR 2671, and the Opinions delivered in those cases by Mr Advocate General Reischl and Mr Advocate General Capotorti).

5.3. *The principal submission and the alternative submission supporting the principal claim*

5.3.1. The *applicant's principal submission* is, as I have stated, that the contested decision conflicts with Articles 113, 9 and 30 of the Treaty. Tezi's supporting arguments are essentially the same as those which it later put forward in Case 242/84: since the Community had exercised in the sector concerned its powers under Article 113 regarding the common commercial policy, the Commission was no longer empowered to authorize Member States under Article 115 to take protective measures.

However, in view of my arguments in Case 242/84, I do not think that that conclusion can be reached solely on the basis of the articles of the Treaty mentioned in this submission, the Multi-Fibre Arrangement and Regulation No 3589/82. The applicant's alternative submission that the decision is in breach of Article 115 must also be considered. To be brief, I refer in this regard to my analyses in Case 242/84.

5.3.2. In view of my earlier analyses I consider the applicant's *alternative submission* well founded. In this regard I think that I need only remind the Court that in my analyses of Case 242/84 neither a division between the Member States of Community quantitative limits, such as is provided for in Annex IV to Council Regulation No 3589/82, nor a national measure implementing such a Community measure can be regarded as 'measures of commercial policy taken in accordance with this Treaty' within the meaning of the first condition for the application of Article 115 of the Treaty. If a different interpretation were adopted, the Council could open the way indefinitely to new breaches of the principles of the customs union through the application of Article 115; this would be contrary to the requirement that Article 115 should be interpreted strictly, laid down in the Court's previous decisions cited above, and to the fundamental principles of Articles 8 (7), 9 and 30 of the Treaty. The first condition for the application of Article 115 can therefore only refer to the Member States' own

measures of commercial policy which, with the authorization of the Community, are temporarily applied after the expiry of the transitional period pending a complete system of Community measures of commercial policy. Even if it were considered that, by virtue of the wording of Article 115 and the judgment in *Donckerwolcke*, the Council has the power to authorize the Member States to take new commercial policy measures of their own, that view cannot, for the reasons already mentioned, justify extending the plain wording of the first condition for the application of Article 115 to cover commercial policy measures of the Community itself which distinguish between the Member States (or national measures implementing such measures).

Even if the Court decides to follow the views expressed on this point by the Commission and the Governments of the Netherlands and the United Kingdom which have intervened in Case 59/84, I consider that the contested decision conflicts with the Court's aforementioned case-law requiring Article 115 to be interpreted and applied restrictively.

According to the preamble to the contested decision of 14 December 1983 (which is annexed to Tezi's application), it is based principally on the following very general considerations:

(a) an application, dated 6 September 1983, made by the Benelux Governments for authorization to exclude from Community treatment men's and boys' woven breeches, shorts and trousers and women's, girls' and infants' woven trousers and slacks falling within subheadings ex 61.01 B V and ex 61.02 B II of the Common Customs Tariff (category 6), originating in Macao and in free circulation in the other Member States (first recital);

(b) a number of recitals deal with the type and content of the measures of commercial policy taken by the Commission itself and distinguishing between Member States as a result of which 'disparities subsist in the conditions at present applying to the importation of the products in question into the various Member States and those importation conditions may be standardized only gradually' (second, third and fourth recitals);

(c) a recital stating 'that those disparities with regard to the measures of commercial policy applied by the Member States have resulted in deflections of trade and since 1 January 1983 the Benelux countries have admitted into free circulation a quantity of the products concerned from the non-member country in question amounting to approximately 43% of the direct quota' (sixth recital);

(d) recitals stating that the total amount of the products concerned imported from non-member countries has increased from 22 503 000 pairs in 1981 to 23 497 000 pairs in 1982, with 14 105 000 pairs being imported in the first six months of 1983 (seventh recital), whilst the prices of the products in question from Macao are around 50% lower than prices of similar products in the Benelux countries (eighth recital) where production of such products has fallen from 30 486 000 pairs in 1980 to 29 455 000 pairs in 1982 (estimated figures) and the share of the domestic market has declined from 54% in 1981 to 53% in 1982 (estimated figures) (ninth recital)

and that 'staff have had to be made redundant, the number of persons employed in the sector in question in the Netherlands having fallen from 8 600 in 1980 to 6 300 in 1982' (10th recital);

(e) a recital stating that 'if other indirect imports should take place in addition to those which have already occurred, those difficulties may increase even more and may jeopardize the attainment of the objectives pursued by the measures of commercial policy referred to above' (11th recital);

(f) a recital stating that 'it is not feasible in the short term to introduce methods by which the other Member States can implement the necessary cooperation' (12th recital, repeated in the 13th recital of the text produced to the Court);

(g) a final recital which states that 'applications for import licences relating to 329 559 pairs are duly pending before the authorities of the Member State which has submitted the request and, in view of that large quantity, there are reasons for treating those applications as covered by the Commission's authorization' (15th recital); according to the 14th recital that authorization is considered justified by the considerations quoted above.

Those recitals disregard the conditions for the application of Article 115, namely that 'differences between such measures lead to economic difficulties in one or more of the Member States' and that the Commission may only authorize Member States to 'take the necessary protective measures'. In the first place, the finding in the fourth recital that 'disparities subsist in the conditions at present applying to the importation of the products in question into the various Member States' is incorrect. The point is that such disparities are not 'subsisting' disparities but were introduced by the Community rules. In particular, however, I consider that the causal connection between the alleged disparities and the economic difficulties assumed to exist in the Netherlands for the reasons stated is by no means proved and improbable in any event. First of all it has not been contended, let alone proved, that when the authorization was granted in 1983 indirect imports of the products concerned from Macao had in fact increased. The figures given in the seventh recital relate only to the first six months of 1983 and do not even show any increase over 1982. The increase in imports of such products from all non-member countries was less than 5% between 1981 and 1982. That such an increase or the unproven increase in 1983 was the cause of the fall in employment of more than 25% between 1980 and 1982 has not been demonstrated and seems extremely improbable. The impact which the increase in imports of the products in question manufactured in other Member States had on the very slight fall in production in the Netherlands (of the order of 3%) is not examined at all in the decision. However, according to the application made by the Netherlands Ministry for Economic Affairs, which was also produced to the Court by the applicant, the increase in imports from other Member States between 1980 and June 1983 was considerably more each year than the increase in imports from all non-member countries (which also increased considerably, at any rate until 1982). It also emerges from the application that Dutch imports by way of free trade from Macao have declined considerably since 1981. In 1981 such imports still amounted to about

63% of the Netherlands share of the Community quota; in 1982 they had fallen to 49% and in 1983 (at the time of the application) to 42% of the Netherlands quota. As pointed out, according to the Netherlands Ministry of Economic Affairs even direct and indirect imports from other non-member countries fell considerably between 1981 and 1 August 1983.

In view of those considerations my opinion is that, even apart from the fact that the first condition for the application of Article 115 of the EEC Treaty is not fulfilled, the applicant's alternative submission that the contested decision is contrary to that article must be considered well founded when examined with reference to the wording of that article and the relevant case-law of the Court dealt with above.

5.4. *The claim for damages as defined at the hearing*

As I have pointed out, at the hearing the applicant reduced its claim for damages to a request that the Community be declared liable in the matter of the grant of the authorization contested in the principal claim.

Although in its rejoinder the Commission expressed doubt about the admissibility of the claim for damages (it referred to the Court's judgment of 12 April 1984 in Case 281/82, *Unifrex SARL* v *Commission*, [1984] ECR 1969), it has not raised a formal objection of inadmissibility. Since I have not found, either in the *Unifrex* case or in other decisions of the Court, any reasons for doubting the admissibility of this claim in the circumstances of this particular case, I see no reason for suggesting that the Court should of its own motion take up the issue of the admissibility of this claim. Like the applicant I consider it uncertain whether the bringing of an action for damages before the national court based on the illegality of the contested Commission decision and the national decision based thereon would afford it effective judicial protection (which, according to the last sentance of paragraph 11 of the Court's judgment in *Unifrex*, is a condition for a declaration of inadmissibility). I would refer in this connection to the applicant's argument at the hearing, which, moreover, was not contested by the Commission. I also think that the applicant was right in referring at the hearing to the requirements concerning the proper administration of justice and procedural efficiency which the Court laid down in its judgment in Case 43/72, *Merkur* v *Commission* ([1973] ECR 1055, at p. 1069).

Tezi's claim for damages is for the reimbursement of lost income and warehousing costs incurred between 1 December 1983 and 1 January 1984. The Commission contends that the amount of damages claimed should be reduced in order to take account of the fact that, according to a telex sent by Tezi to the Commission on 12 December 1983, it had in the meantime resold 20 000 pairs in Germany. In its reply the applicant admitted that it had resold that quantity but for HFL 2 per pair less than it would have obtained in the Netherlands. As I have already pointed out, the determination of the exact amount of the damages is now irrelevant in this case since the applicant now asks the Court merely to declare that the Community is liable.

In the Commission's view, Tezi's claim for damages is unfounded in any event since Articles 113 and 115 — assuming that the Commission has infringed them — do not constitute superior rules of law for the protection of the individual. In its reply the applicant contested that view by referring to

the Court's judgment of 14 July 1967 in Joined Cases 5, 7 and 13 to 24/66 (*Kampffmeyer* v *Commission* [1967] ECR 245). The applicant also rightly points out in its reply that (because it could not be based on Article 115) the authorizing decision was also incompatible with Articles 9 and 30 of the Treaty which, according to the decisions of the Court, protect individuals in any event. In Tezi's view, it is clear from Commission Decision No 80/47 (Official Journal, L 16, p. 14), in particular Article 3 (3) and Article 3 (5), that the Commission itself does in fact recognize that Article 115 serves to protect the interests of applicants for import licences.

In my view, the question whether or not the contested decision must be regarded as a legislative measure to which the restrictions laid down in the Court's case-law on non-contractual liability apply can possibly be disregarded. The Commission considers that that question must be answered in the affirmative. However, precisely because of the system laid down in Decision No 80/47 I consider that view highly questionable. In my view, it is clear from Article 3 (2) (b) and Article 3 (5) that authorizations of the kind now at issue may be issued only in connection with one or more actual applications for import licences. At the hearing the Commission, in answer to my questions, maintained that those provisions must be interpreted broadly and should not preclude a request for authorization within the meaning of Article 3 if no applications have been lodged. However, in view of the Court's case-law concerning the need to interpret and apply Article 115 restrictively I consider such broad interpretation of Decision No 80/47 unacceptable. I also consider the Commission's view to be incompatible with its own admission that the contested decision was of direct and individual concern to the applicant as required by Article 173 of the Treaty. However, as I have pointed out, I do not consider it strictly necessary for the Court to express its view on that point. Even if the contested decision were a legislative measure, I believe that there has been a sufficiently flagrant violation of a superior rule of law for the protection of the individual, as defined by the Court since its judgment in Case 5/71, *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 11 at p. 984 and further clarified in its fourth 'milk powder' judgment of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and Others* v *Council and Commission* [1978] ECR 1209, paragraph 6 at p. 1224). For the reasons already mentioned, I consider that in this case the Commission manifestly and seriously exceeded its powers under Article 115 and, as a result, acted in breach of Articles 9 and 30 of the Treaty, which are fundamental provisions which also serve to protect individuals.

Consequently, I consider that the applicant's claim that the Community should be declared liable under the second paragraph of Article 215 of the EEC Treaty for the damage it suffered as a result of the contested decision is also well founded.

5.5. *Opinion in Case 59/84*

In conclusion I propose that the Court should:

(a) declare void the Commission's decision of 14 December 1983 authorizing the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands to exclude from Community treatment men's and boys' woven breeches, shorts and trousers and women's, girls' and infants' woven trousers and slacks originating in Macao;

(b) declare the Community liable under the second paragraph of Article 215 of the EEC Treaty for the damage caused to the applicant by the said decision; in this case the Court need not decide the quantum of the damages to be paid to the applicant pursuant to that declaration;

(c) order the Commission to pay the costs of the parties to the proceedings;

(d) order the Governments of the Kingdom of the Netherlands and of the United Kingdom, which intervened in support of the Commission, to pay their own costs since they have not claimed costs against the unsuccessful party.