OPINION OF ADVOCATE GENERAL TRSTENJAK
delivered on 24 June 2010 [1]

1. The question asked by the Finanzgericht Hamburg ('the referring court') in this reference for a preliminary ruling under Article 234 EC [2] is whether it is consistent with the principle of proportionality for a specific duty of EUR 222 per 100 kg drained net weight to be charged on preserved mushrooms of the genus *Agaricus* (preserved mushrooms), which were imported into the Community from the People's Republic of China outside a fixed quota.

2. The Court has had occasion in the past to give rulings on the compatibility with the principle of proportionality of additional amounts on the importation of preserved mushrooms from non-member countries. [3] However, those additional amounts were independent agricultural levies of the Community. The present reference raises the question whether the criteria applied by the Court in assessing independent agricultural levies can also be applied to a specific customs duty which has replaced the additional amounts in question and the amount of which corresponds to a maximum rate of duty negotiated and agreed on within the framework of the World Trade Organisation (WTO).

1 — Original language: German.

2 — Pursuant to the Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2007 C 306, p. 1), the preliminary-reference procedure is now regulated in Article 267 TFEU.

3 — Case 245/81 *Edeka Zentrale* [1982] ECR 2745; Case 345/82 *Wünsche* [1984] ECR 1995; Case C-24/90 *Werner Faust* [1991] ECR I-4905; Case C-25/90 *Wünsche* [1991] I-4939; Case C-26/90 *Wünsche* [1991] ECR I-4961; C-295/94 *Hüpeden*, [1996] I-3375; and Case C-296/94 *Pietsch* [1996] ECR I-3409.

I — Applicable law

A — *World trade law*

3. By Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay round multilateral negotiations (1986-1994) [4] the Community acceded to the WTO Agreement and to a number of multi- and plurilateral agreements. The multilateral agreements include the General Agreement on Tariffs and Trade 1994 [5] ('GATT 1994') and the Agreement on Agriculture [6] ('the Agreement on Agriculture').

4. The GATT 1994 also comprises the provisions of the General Agreement on Tariffs and Trade 1947 ('GATT 1947'), including in particular the most-favoured-nation clause in Article I(1) of GATT 1947. According to that clause, any advantage, privilege, favour or immunity granted by any contracting party to any product originating in or destined for any other country is to be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

5. Article II of GATT 1947 regulates the schedules of concessions granted by WTO members. Article II(1)(a) provides as follows:

'Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.'

6. Article 4 of the Agreement on Agriculture regulates market access and provides as follows:

'1. Market access concessions contained in Schedules relate to bindings and reductions

4 — OJ 1994 L 336, p. 1.
5 — Ibid., p. 20.
6 — Ibid., p. 22.

of tariffs, and to other market access commitments as specified therein.

2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, [1] except as otherwise provided for in Article 5 and Annex 5.'

7. Footnote 1, concerning the term 'measures' in Article 4(2) of the Agreement on Agriculture, states as follows:

'These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through State-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties…'

8. Article 5 of the Agreement on Agriculture sets out special safeguard provisions in connection with the importation of agricultural products. Those specific safeguard provisions may be invoked only if the products in question are designated in the Schedule of Commitments with the symbol 'SSG'. In the Community's schedule of commitments the goods of customs code CN 2003 10 30 are not designated with that symbol.

9. In the framework of the Uruguay Round the Community undertook to levy a maximum *ad valorem* duty of 23 % on products within CN code 2003 10 30 on the basis of a quota of 62 660 tonnes. The Community also undertook, outside that quota, to levy a maximum *ad valorem* duty of 18.4 % and a specific duty of EUR 222 per 100 kg drained net weight. Those commitments are set out in the schedule of the Community's commitments to the WTO. The People's Republic of China has been a member of the WTO

since 1 December 2001. The Community raised the quota for products within CN code 2003 10 30 from the People's Republic of China to 23 750 tonnes with effect from 1 January 2007. [7]

B — *Community law* [8]

10. Under Article 33(1) EC the objectives of the common agricultural policy are:

'(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.'

11. Under Article 1(1) of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, [9] as amended by Council

7 — See Council Decision 2006/398/EC of 20 March 2006 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and the People's Republic of China pursuant to Article XXIV:6 and Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions in the schedules of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic in the course of their accession to the European Union (OJ 2006 L 154, p. 22).

8 — In this Opinion the term 'Community law' is used in so far as Community law, and not European Union law, still applies *ratione temporis*.

9 — OJ 1987 L 256, p. 1.

Regulation (EC) No 254/2000 of 31 January 2000 amending Regulation No 2658/87 [10] (Regulation No 2658/87, as amended) the Commission established a Combined Nomenclature (CN). Pursuant to Article 1(3), first sentence, of Regulation No 2658/87, as amended, the CN is reproduced in Annex I thereto. Under the second sentence of Article 1(3), the rates of duty of the Common Customs Tariff (CCT), in particular, are also laid down in Annex I.

12. Article 12(1) of Regulation No 2658/87, as amended, provides as follows:

'The Commission shall adopt each year a regulation reproducing the complete version of the Combined Nomenclature, together with the rates of duty in accordance with Article 1, as resulting from measures adopted by the Council or the Commission. The said Regulation shall be published not later than 31 October in the *Official Journal of the European Communities* and it shall apply from 1 January of the following year.'

13. Under Article 9(2), first indent, of Regulation No 2658/87, as amended, this is not to lead to amendment of the rates of customs duties.

14. Annex I to Regulation No 2658/87, as amended, was replaced by Commission Regulation (EC) No 1719/2005 of 27 October 2005 amending Annex I to Council Regulation No 2658/87 [11] with effect from 1 January 2006.

15. Part I of Annex I to Regulation No 1719/2005 contains preliminary provisions which include a list of the signs and abbreviations used. According to this, the abbreviation 'kg/net eda' means 'kilogram drained net weight'.

16. Part II of Annex I contains the CCT applicable at the material time to the present case. Chapter 20 of the CCT relates to preparations of vegetables, fruit, nuts or other parts of plants and includes the following headings:

10 — OJ. 2000 L 28, p. 16.

11 — OJ 2005 L 286, p. 1.

CN Code	Description	Conventional rate of duty (%)	Supplementary unit
1	2	3	4
2003	Mushrooms and truffles, prepared or preserved otherwise than by vinegar or acetic acid:		
2003 10	- Mushrooms of the genus *Agaricus*		
2003 10 20	-- provisionally preserved, completely cooked	18,4 + 191 €/100 kg/ net eda (1)	kg/net eda
2003 10 30	-- other	18,4 + 222 €/100 kg/ net eda (1)	kg/net eda

17. Footnote 1 reads as follows:

'WTO tariff quota: see Annex 7.'

18. Commission Regulation (EC) No 1864/2004 of 26 October 2004 opening and providing for the administration of tariff quotas for preserved mushrooms imported from third countries [12] regulates the quotas within which favoured market access is granted. Recitals 1, 7 and 10 in the preamble to that Regulation, as amended by Commission Regulation (EC) No 1995/2005 of 7 December 2005 amending Regulation (EC) No 1864/2004 [13] ('Regulation No 1864/2004, as amended'), read as follows:

'(1) Following the Agreement on Agriculture … concluded during the Uruguay Round of multilateral trade negotiations, the Community undertook to open from 1 July 1995, under certain conditions,

12 — OJ 2004 L 325, p. 30.

13 — OJ 2005 L 320, p. 34.

Community tariff quotas for preserved mushrooms of the genus *Agaricus* spp. falling within CN codes 0711 90 40, 2003 10 20 and 2003 10 30.

Community producers. To this end, competition amongst importers should be encouraged to an increasing degree and administrative burdens on importers reduced.'

...

(7) Without prejudice to the outcome of the negotiations pursuant to Article XXIV.6 of the GATT (1994), and in order to preserve the traditional trade flows whilst ensuring that the Community market remains open to new supplying third countries, the quantity of preserved mushrooms of the genus *Agaricus* to be imported into the Community under the tariff quotas system should take account of preferences provided for in the Europe Agreements with Bulgaria and Romania.

...

19. Article 1(1) of that Regulation provides for, inter alia, tariff quotas in relation to imports into the Community of preserved mushrooms within CN code 2003 10 30. Under Article 1(2), first subparagraph, the rate of duty is 23 % in the case of products falling within CN code 2003 10 30.

...

(10) There should continue to be an adequate supply of the products concerned on the Community market at stable prices whilst avoiding unnecessary market disruptions in the form of severe price fluctuations and negative effects on the

20. Article 1(1) of Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences [14] provides for a scheme of generalised tariff preferences. Article 1(2) states that the Regulation provides for a general arrangement and special arrangements. Article 2 states that the beneficiary countries are listed in Annex I,

14 — OJ 2005 L 169, p. 1.

which shows China as a country to which the general arrangement applies. Article 4 states that the products to which the special arrangement applies are listed in Annex II. The latter lists Chapter 20 of the CTT, which also includes CN Code 2003 10 30.

21. Article 7(2), first sentence, and (5) of Regulation No 980/2005 provides as follows:

'(2) Common Customs Tariff *ad valorem* duties on products listed in Annex II as sensitive products shall be reduced by 3,5 percentage points

…

(5) Where Common Customs Tariff duties on products listed in Annex II as sensitive products include *ad valorem* duties and specific duties, the specific duties shall not be reduced.'

22. According to Annex II, the products covered by Chapter 20 CCT are classified as sensitive.

II — Facts

23. On 6 March 2006 the firm owned by Barsoum Chabo ('the claimant') applied for customs clearance to place in free circulation 1 000 boxes of preserved mushrooms from the People's Republic of China. The goods were described as 'mushrooms, preserved without vinegar, in brine' under CN code 2003 90 00 (mushrooms other than those of the genus *Agaricus*). Customs clearance was given in accordance with the application and *ad valorem* duty of 14.9 % was charged.

24. Prior to 6 March 2006 the claimant's firm had already imported goods in accordance with an application which was identical with regard to the nature of the goods. A customs inspection carried out in connection with a

previous importation led to a classification report which showed that the goods in question did not fall under CN code 2003 90 00 and that, rather, they were preserved mushrooms which came under CN code 2003 10 30.

25. By notice of 27 February 2007 the Hauptzollamt (Principal Customs Office) Hamburg-Hafen ('the defendant') charged the claimant *ex post* import duty totalling EUR 27 507.13 for the imports of 6 March 2006. In that notice the defendant allocated the preserved mushrooms to CN code 2003 10 30 on the basis of the classification report and applied *ad valorem* duty of 14.9% as well as a specific duty of EUR 222 per 100 kg drained net weight. The claimant lodged an objection to the notice on 5 March 2007. That objection was dismissed on 7 December 2007.

III — Proceedings before the referring court

26. On 9 January 2008 the claimant brought an action before the referring court, seeking the annulment of the notice of 21 February 2007 in the version of the decision of 7 December 2007 on the objection. He claims, *inter alia*, that the specific duty of EUR 222 per 100 kg drained net weight is disproportionate because it is tantamount to a prohibition on imports. The defendant seeks the dismissal of the action on the ground that the specific duty is not a safeguard measure but a normal customs duty, which does not amount to a prohibition on imports.

27. According to the findings of the referring court, the imported preserved mushrooms are to be classified under CN code 2003 10 30. Consequently, the rate of duty for that code applies. However, the referring court is in doubt as to whether the rate applicable to that heading is valid and questions whether a specific duty of EUR 222 per 100 kg drained net weight can be regarded as proportionate. In that connection, the referring

court refers to Cases C-26/90 *Wünsche* [15] and C-296/94 *Pietsch.* [16] In those judgments the Court of Justice found that additional amounts which were charged on preserved mushrooms from non-member countries in order to prevent distortion of the Community market were disproportionate because they were excessive.

28. According to the referring court, the question arises as to whether that case-law can be applied to the specific duty of EUR 222 per 100 kg drained net weight. The fact that the specific duty, like the additional amounts, is a protective measure in favour of Community producers suggests that that case-law may be applicable. The specific duty charged on imports of preserved mushrooms outside the quota opened under Regulation No 1864/2004 is intended to counterbalance the cost advantages of preserved mushrooms originating in China. The referring court adds that the specific duty also reaches a level that is far above the level necessary for the protective measure to be effective. Therefore, in the view of the referring court, the specific duty is equivalent to a *de facto* prohibition of imports and an economic penalty for importers. According to the referring court, that applies even if price fluctuations on the basis of qualitative differences are taken into account.

29. In that connection, the referring court states that the buying-in price paid which dealers had to pay for preserved mushrooms from China during the period at issue was around EUR 0.93 per kg. In June 2007 the price of grade 1 mushrooms from France was EUR 2.70 per kg. In June 2006 the price of grade 2 sliced preserved mushrooms from the Community was EUR 2.70 per kg. The specific duty amounts to EUR 222 per 100 kg drained net weight, which corresponds to EUR 2.22 per kg.

30. The referring court points out that the specific duty amounts to more than 200 % of the import price of preserved mushrooms from China and normally exceeds the

15 — Cited in footnote 3.
16 — Cited in footnote 3.

difference between the Community cost price and the import price from China. Finally, the specific duty does not differentiate according to different quality grades.

IV — Question referred and procedure before the Court

31. By reason of its uncertainty as to whether the specific duty is compatible with the principle of proportionality, the referring court has, by decision of 13 May 2009, received by the Court Registry on 15 June 2009, referred the following question to the Court:

'Is the additional amount, arising under the third-country and preferential customs rate, of EUR 222 per 100 kg of net weight of goods charged on imports of preserved mushrooms of the genus *Agaricus* (subheading 2003 10 30 of the Common Nomenclature) void for infringement of the principle of proportionality?'

32. Written observations were lodged by the claimant, the Council and the Commission within the period specified in Article 23 of the Statute of the Court of Justice.

33. The lawyers representing the claimant, the Italian Government, the Council and the Commission took part in the hearing held on 29 April 2010

V — Principal arguments of the parties to the main proceedings

34. The *claimant* considers that the specific duty of EUR 222 per 100 kg drained net weight for products of CN code 2003 10 30 is disproportionate.

35. First of all, a duty of that amount impedes the sale in the Community of mushrooms originating in China. From the consumer's viewpoint, the quality of Chinese mushrooms is significantly inferior to that of mushrooms from the Community. Chinese mushrooms can be sold in the Community only if the price for them is considerably less than that of Community mushrooms. That is not possible

where the specific duty of EUR 222 per 100 kg drained net weight is charged. Furthermore, it would be very costly to distinguish according to quality grades. In addition, as a more moderate measure, consideration should be given to granting subsidies to Community producers in order to reduce the price of mushrooms produced in the Community. A lower rate of duty would also conform with the aim of the Community agricultural policy of ensuring that supplies reach consumers at reasonable prices.

36. The figures provided by the Commission show that the specific duty, together with the *ad valorem* duty and the quota rate, has already achieved its purpose. Serious disruption of the market for mushrooms in the Community is no longer to be feared. Furthermore, imposition of the duty is inconsistent with the common agricultural policy aim of increasing productivity and ensuring optimum utilisation of the factors of production.

37. The *Italian Government* considers that the specific duty of EUR 222 per 100 kg drained net weight for products of CN code 2003 10 30 is compatible with the principle of proportionality.

38. The purpose of the specific duty is to protect Community producers of mushrooms. It prevents mushroom prices in the Community from falling too much on account of imports from China. Consequently, the duty is appropriate in the light of its objective and is also necessary. It is not possible to grade mushrooms according to quality. As the products at issue are, in the eyes of the consumer, preserved mushrooms, the price must be fixed according to the highest quality grade. Lower prices for lower grades would lead consumers to turn to those products. The specific duty also does not constitute a *de facto* prohibition of imports. First, it seeks to prevent excessive imports from non-member countries. Second, it must be observed in any case

that mushroom imports from China into the Community have exceeded the fixed quotas. The specific duty has thus, in factual terms, not had the effect of prohibiting imports.

39. In the *Council's* opinion, the specific duty of EUR 222 per 100 kg drained net weight for products of CN code 2003 10 30 is in line with the principle of proportionality.

40. The judgments upon which the claimant relies were, it argues, concerned with independent agricultural levies, which are unilateral protective Community measures for stabilising the prices of Community products. Because that was the aim, in the case of independent agricultural levies it had been possible, and also necessary, to set the additional amounts by deliberately taking into account prices in the non-member country and the different quality grades.

41. According to the Council, the specific duty is of a different nature, is subject to different general conditions and pursues separate aims. Therefore the case-law relating to independent protective measures cannot be applied to the specific customs duty, which has not only agriculture-policy objectives but also trade-policy objectives. With regard to agricultural policy, the duty is intended to ensure that Community producers can sell their products at prices which ensure a fair standard of living. At the same time, the availability of supplies is to be ensured in that products from non-member countries are to be given reasonable and controlled access. The Council adds that, so far as the protection of Community producers alone is concerned, more far-reaching measures could have been taken. However, by means of the specific duty the Community is also pursuing objectives of trade policy as a result of which the Community has substantially restricted its freedom of action. Variable agricultural levies have been intentionally abolished because they are not transparent. In addition, duties above the maximum rates laid down in the Community's schedules of commitments can no longer be levied.

42. According to the Council, the specific duty for preserved mushrooms was agreed at a level which was *de facto* equivalent to the *status quo* applying up to then, which had been fixed by the Council at the beginning of the 1980s. Although the level is rather high,

the specific duty is not disproportionate. First, it must be borne in mind that the Council is under no obligation to treat Community producers and producers from non-member countries equally, nor is it obliged to grant the latter access to the Community market subject to conditions under which they could compete with Community producers. Moreover, producers from non-member countries are not burdened more than is necessary for attaining the objectives of the Community's trade and agriculture policies. The amount of the specific duty must have a deterrent effect. In addition, account must be taken of the logic behind the system of negotiations within the framework of the WTO and which is imbued with the idea of *quid pro quo* in relation to the mutual granting of market access. The agreed maximum duty rates for imports from all WTO Member States for an unlimited period of time are not to be exceeded. The renegotiation of agreed duty rates would be laborious and expensive. However, prices, and therefore the difference between prices of Community products and those of products from China, fluctuated very considerably. Consequently a specific duty was negotiated at a rate which would ensure that its effect would not be neutralised by price fluctuations occurring only a short time later.

43. The Council adds that, all things considered, it must be said that the general system for the importation of preserved mushrooms has achieved its aims. It must not be forgotten that a customs quota exists on the basis of which easier access to the market is made possible. In view of the fall in Community production (although this fall has slowed down), it could even be asked whether the agreed maximum rate for the specific duty is not too low by reference to the objectives of the agricultural policy.

44. Furthermore, the specific duty is not disproportionate because it does not differentiate between different quality grades. The reason for this is that there are substitution effects as between the different grades. If a distinction were made according to quality grades, this could prejudice legal certainty and the uniform application of Community law. Such differentiation for the specific purpose of counterbalancing price differentials is likewise inconsistent with the Community's obligations in relation to the WTO. In any case, differentiating between different quality grades would impose an excessive burden on customs authorities and on those who deal with them.

45. Finally, the Council points out that a finding by the Court that the specific duty is incompatible with the principle of proportionality would weaken the Community's position within the WTO. The customs duties in the Community's schedule of commitments to the WTO are based on negotiations and, thus, on mutual multilateral concessions of the WTO Member States. If a demand were to be made of the Community to concede unilaterally more favourable conditions for the access of preserved mushrooms from non-member countries to the Community market than those agreed upon multilaterally in the negotiations, the Community would hardly succeed in negotiating an appropriate offset arrangement for the access of Community products to the markets of the respective non-member countries.

46. The *Commission* also takes the view that the specific duty of EUR 222 per 100 kg drained net weight for products of CN code 2003 10 30 is proportionate.

47. The Commission points out, first, that the case-law cited by the referring court relates to independent protective measures taken by the Community before the WTO was established and before the Agreement on Agriculture came into force. Before the latter came into force, the Community had the authority to adjust customs duties and also to adopt non-tariff measures to protect the Community industry. However, the case-law cited cannot be applied to the specific duty.

48. The specific duty is only one element in an overall system designed to regulate the importation of preserved mushrooms from non-member countries. On the one hand, the system pursues aims of agricultural policy which are connected with the relevant common organisation of the market. One of those aims is to ensure an appropriate supply of preserved mushrooms on the Community market through the opening of a quota. A further aim is to adjust supply according to market requirements in relation to supply and demand. Finally, there is the aim of preventing adverse effects on Community production which could result from imports of preserved mushrooms into the Community in excess of the fixed quota.

49. On the other hand, trade-policy objectives were also pursued. Within the framework of the Uruguay Round, agricultural levies were abolished and bound duties agreed on for agricultural products. In addition, there was the aim of reducing import levies on agricultural products. By organising that entire system the Community fulfilled those commitments also.

50. The Commission goes on to point out that the Community institutions were obliged to make political, economic and social decisions in the areas of the common agricultural policy and the common trade policy. In those areas, therefore, they had a broad discretion. That is why it is necessary, with regard to the question whether the specific duty is proportionate, to consider only whether it is manifestly inappropriate for attaining the objectives pursued. Judicial review must be limited in that way also because the Community legislature had to strike a balance between the objectives of agricultural policy and those of trade policy in order to achieve the desired objectives.

51. Imposition of the specific duty is not manifestly inappropriate for attaining the abovementioned aims. It reduces the economic incentive to import preserved mushrooms outside the fixed quota. Imports outside the quota will be commercially profitable only if the demand within the Community is so great that the importer is able to secure a sufficient profit margin in spite of the duties charged.

52. At the Uruguay Round negotiations which ultimately led to the agreed maximum rate of duty, the Commission proceeded on the basis of the amount in Council Regulation (EEC) No 1796/81 of 30 June 1981 on measures applicable to imports of preserved cultivated mushrooms. [17] That figure was converted from the reference unit net weight to the reference unit drained net weight, which resulted in EUR 278 per 100 kg drained net weight. On the basis of the agreement to reduce the existing duties by 20 % within five years, the final figure was EUR 222 per 100 kg drained net weight. When negotiating the level of the specific duty, the Commission took into account potential imports from all the WTO Member States. In that connection it must be observed, first, that the specific duty applies to imports from all WTO

17 — OJ 1981 L 183, p. 1.

Member States. In addition, the prices for preserved mushrooms fluctuate considerably. The specific duty, however, is inflexible and cannot therefore be adjusted upwards when prices fluctuate.

53. According to the Commission, a specific duty at that level is also necessary. Community production must be prevented from being smothered under the pressure of Chinese imports. The figures for the development of trade in preserved mushrooms confirm that the specific duty has had no effect comparable to a ban on imports. Imports of preserved mushrooms from China into the Community have always exceeded the quota. Consequently, the specific duty of EUR 222 per 100 kg drained net weight has not deterred traders from importing more than the fixed quota. It cannot therefore be presumed that the specific duty consistently makes their importation economically unattractive.

54. The trade figures also show that the specific duty of EUR 222 per 100 kg drained net weight, as one of the elements of the overall system for imports of preserved mushrooms, has attained the objectives of a certain degree of price stabilisation and of slowing the downward trend in Community production, without jeopardising a reasonable supply of preserved mushrooms on the Community market. There is shown to be a connection between price fluctuations and the increase in quantities imported, although there is a certain time lag because of transport routes. The fact that the specific duty is charged on imports outside the quota means that supply matches demand and leads indirectly to a degree of price stability within the Community. Finally, it was open to the claimant in the main proceedings to obtain an import licence. From 2007 the quota for imports from China was increased.

55. The Commission goes on to point out that, in order to achieve the objectives pursued, measures which led to considerable economic disadvantages for certain traders were

also justified. In principle, the Community could have used much more drastic methods such as, for example, raising the specific duty, reducing or abolishing the quota, or even imposing a ban on imports. However, the means available to the Community for regulating access to the Community market were limited by the Agreement on Agriculture to customs duties. However, if the fixed quota is exceeded, under WTO law it is permitted to charge a specific duty at a rate laid down in the Community's schedule of commitments. The reason why the duties and quotas which are applied accord with the rates in the Community's schedule of commitments to the WTO is that the development of the trade in preserved mushrooms is in harmony with the Community's intentions in agreeing on those rates of duty.

56. Finally, no differentiation may be made between quality grades within the CN code in question because of the Community's obligation under international law to adhere to a fixed rate of duty.

VI — Legal assessment

57. The referring court is uncertain whether a specific duty of EUR 222 per 100 kg drained net weight is proportionate when it is charged, in accordance with the CCT, on goods of CN code 2003 10 30, that is to say, preserved mushrooms, when these are imported into the Community outside the quota opened by Regulation No 1864/2004, as amended. As the referring court cites the case-law of the Court of Justice concerning the proportionality of agricultural levies, I shall examine these first (A). I shall then consider whether the specific duty of EUR 222 per 100 kg drained net weight can, in the light of that case-law, be regarded as consistent with the principle of proportionality (B).

A — *The case-law of the Court of Justice relating to agricultural levies*

58. The validity of Commission and Council regulations laying down short-term or permanent measures for protecting Community mushroom producers has been examined by the Court in a number of judgments. [18] Under

18 — Cases 345/82 *Wünsche*, C-24/90 *Werner Faust*, Case C-25/90 *Wünsche*, Case C-26/90 *Wünsche*, Case C-295/94 *Wünsche, Hüpeden, Pietsch*, all cited in footnote 3.

those regulations an additional amount was charged on imports of preserved mushrooms from certain non-member countries if the imports were outside a fixed quota.

59. In those judgments the Court made it clear, first, that the levy of an additional amount was in principle necessary in order to prevent disruptions to the Community market. [19] The Court added that, in view of that objective, an additional amount could be set at a level which made imports from non-member countries economically unattractive. [20]

60. However, in those cases the Court did not consider the *level of the additional amount* necessary in view of the objective pursued. The Court found that the imposition of an additional amount had the effect of a *de facto* economic penalty because of its excessive level. As it was not the aim of the protective measure to impose a ban on imports accompanied by economic penalties, the level of the additional amount was excessive. [21] The Court has previously accepted that there was a *de facto* effect of an economic penalty in a case where the additional amount levied was approximately two thirds of the Community cost price of grade 1 mushrooms. [22]

61. According to the Court's case-law, therefore, two thresholds may be distinguished when assessing whether the level of an agricultural levy is consistent with the principle of proportionality.

62. The *first threshold* is reached when the additional amount is so high that it makes the importation of preserved mushrooms outside the specified quota from non-member countries economically unattractive. Such an additional amount may be regarded as necessary in order to achieve the objective of preventing disruption of the Community market.

19 — *Werner Faust*, paragraph 19; C-25/90 *Wünsche*, paragraph 20; C-26/90 *Wünsche*, paragraph 20; *Hüpeden*, paragraph 19, and *Pietsch*, paragraph 22, all cited in footnote 3.

20 — *Pietsch*, paragraph 26 *et seq*., cited in footnote 3.

21 — *Werner Faust*, paragraphs 23 and 28; C-25/90 *Wünsche*, paragraphs 24 and 29; C-26/90 *Wünsche*, paragraphs 24 and 29; *Hüpeden*, paragraph 26, and *Pietsch*, paragraphs 29 and 34, all cited in footnote 3.

22 — *Pietsch*, paragraph 34, cited in footnote 3.

The Court allows the Community institutions a broad discretion in determining when that threshold is reached. [23]

63. However, the *second threshold* is reached when the additional amount is so high that it makes the importation of preserved mushrooms not only economically unattractive, but *de facto* has the effect of an economic penalty. The Court has found that an additional amount at that level is no longer necessary. The underlying idea is that, in order to prevent disruption of the Community market by imports from non-member countries, it is sufficient to make the imports economically unattractive. However, it is not absolutely necessary to ban imports and to penalise any breach of that import ban. The Court has presumed the existence of a penalty where an additional amount was so high that it had the *de facto* effect of an economic penalty. An excessive additional amount has the *de facto* effect of a ban on imports which is accompanied by economic sanctions.

64. Before I turn to examine the specific duty and to consider the question whether the abovementioned case-law can be applied to it, I should first like to draw attention to two important points regarding the additional amounts which were the subject of those judgments. First, the additional amounts were Community measures which had the main agriculture-policy aim of protecting Community producers by preventing disruption of the Community market caused or likely to be caused by excessive imports of preserved mushrooms from non-member countries into the Community. Secondly, the additional amounts were measures which were adopted before the establishment of the WTO, that is to say, before the Agreement on Agriculture came into force and before the People's Republic of China became a member of the WTO.

B — *The proportionality of the specific duty*

65. The question to the Court of Justice from the referring court is whether the levy of a specific duty of EUR 222 per 100 kg drained net weight on preserved mushrooms from China can be regarded as proportionate, having regard to the requirements arising from

23 — *Pietsch*, paragraph 29, cited in footnote 3.

the abovementioned case-law relating to the additional amounts.

66. It has consistently been held that measures imposing financial charges on economic operators will be proportionate only if the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. When there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued. [24]

67. As the Italian Government correctly notes, in order to determine whether the imposition of the specific duty of EUR 222 per 100 kg drained net weight is proportionate, it is first necessary to ascertain the objectives of that measure (1). As they are objectives of the common agricultural policy and the common trade policy, and as the Community institutions have broad discretion in those areas, there is also the question of what criterion is to be used where a broad discretion exists (2). Since I presume that the structure of the proportionality test is not affected even where the Community institutions have a broad discretion but, where that is the case, the depth of the examination is reduced to the level of what is manifest, I shall go on to consider whether the objectives of the specific duty are manifestly unlawful (3) and whether the imposition of that duty is manifestly inappropriate (4), manifestly unnecessary (5) or manifestly unreasonable (6) in the light of those objectives.

1. The objectives of the measure

68. The Commission correctly notes that the specific duty of EUR 222 per 100 kg drained net weight for products covered by CN code 2003 10 30 is only one element of the

24 — Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21; *Werner Faust*, cited in footnote 3, paragraph 12; C-25/90 *Wünsche*, cited in footnote 3, paragraph 13; Case C-26/90 *Wünsche*, cited in footnote 3, paragraph 13; *Hüpeden*, cited in footnote 3, paragraph 14, and *Pietsch*, cited in footnote 3, paragraph 15.

overall system regulating the importation of preserved mushrooms from non-member countries. The close connection between the specific duty and the other elements of that system must be taken into account in the examination of the objectives of the system.

69. The overall system applicable *ratione temporis* to the present case consists principally of:

— the customs duties laid down in the CCT for the importation of goods covered by CN code 2003 10 30,

— Regulation No 1864/2004, as amended, opening and providing for the administration of tariff quotas for preserved mushrooms, and

— the scheme of generalised Community tariff preferences under Regulation No 980/2005.

70. Under Regulation No 1864/2004, as amended, an *ad valorem* duty of 23% is charged on preserved mushrooms imported on the basis of the quota opened in accordance with that regulation. By contrast, in the case of preserved mushrooms imported outside the quota, the *ad valorem* duty is 18.4%, which in the present case is reduced to 14.9% in accordance with the scheme of generalised Community tariff preferences, [25] plus the specific duty of EUR 222 per 100 kg drained net weight. The objectives of that overall system relate not only to agricultural policy (a), but also to trade policy (b).

a) Agricultural-policy objectives

71. In respect of agricultural policy, the objective is to limit disruption to the Community market. The purpose of the imposition of the specific duty is to inhibit imports of preserved mushrooms from non-member countries. and, by that means, to prevent price fluctuations, to avert the collapse of prices on the Community market and to ensure an adequate income for Community producers.

25 — See points 19 to 22 of this Opinion.

However, as the objective is also to ensure a sufficient supply of preserved mushrooms on the Community market at stable prices, preserved mushrooms from non-member countries are granted market access on more advantageous conditions on the basis of the quota allowed under Regulation No 1864/2004, as amended. The specific duty of EUR 222 per 100 kg drained net weight is not charged on those imports. [26]

b) Trade-policy objectives

72. However, the overall system also pursues objectives of trade policy. The level of customs duties and the legal structure of the system go back to the requirements of world trade law and, in particular, to the Community's schedule of commitments to the WTO and the Agreement on Agriculture.

73. Before the Agreement on Agriculture was concluded, world trade in agricultural products was characterised by a large number of trade obstacles in tariff and non-tariff form. Among others, the device of variable import levies, which was used by the Community to protect Community producers, was criticised on account of its effects on world trade. From the viewpoint of exporters in non-member countries, that device involves a lack of transparency and predictability. [27]

74. The Agreement on Agriculture is designed to improve access to agricultural markets for WTO members. To achieve that aim the WTO members agreed, in Article 4(1) of the Agreement on Agriculture, to convert all non-tariff trade barriers in the agriculture sector into customs duties. The maximum rates of those duties were set out in the

26 — See recitals 7 and 10 in the preamble to Regulation No 1864/2004, as amended.

27 — Geboye Desta, M., *The Law of International Trade in Agricultural Products*, Kluwer Law International, 2002, p. 9, points out that the most significant achievements of the Agreement on Agriculture are that there is now a reasonable degree of certainty, predictability and respect for the rights of others in international relations in the agriculture sector.

members' schedules of commitments to the WTO. Under Article 4(2) of the Agreement on Agriculture WTO members may no longer adopt non-tariff measures. It is clear from footnote 1 to that provision that the prohibited measures of that kind include variable import levies.

trade-policy objectives which were *indirectly* pursued by the Community through the opening of its agricultural market. By making access to its agricultural market easier, the Community is pursuing in particular the trade-policy aim of securing for Community undertakings in return the grant by the other members of the WTO of easier access to their markets. As the Council correctly observes, that concept of *quid pro quo*, which characterises negotiations within the framework of the WTO, must be taken into account when assessing the specific duty.

2. The examination criterion applicable

75. Therefore a trade-policy objective which is *directly* pursued by means of Article 4 of the Agreement on Agriculture is the more transparent and more predictable framework for access to the agricultural markets because by that means the WTO Member States are prohibited from setting up any trade barriers other than customs duties. A further trade-policy advantage of the exclusive use of duties is that it is technically simpler to negotiate reductions in duties than to negotiate the lowering of non-tariff trade barriers. [28] However, it is also necessary to take into account the

76. The Commission considers that in the present case the proportionality test must be limited to the question of whether the specific duty is manifestly inappropriate for attaining its objectives. The Commission contends that the Community institutions have a broad discretion in matters of trade policy and

28 — See McMahon, J., *The WTO Agreement on Agriculture*, Oxford University Press, 2006, p. 33, who points out that the tariff classification of goods is probably the most important aspect of the entire Agreement on Agriculture because tariff measures are more transparent and can be negotiated more easily.

agricultural policy and that they are required to strike a balance between divergent interests.

77. First, it must be observed that, in the spheres of the common trade policy and the common agricultural policy, the Community institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. [29]

78. However, that does not mean that it is necessary only to determine whether the specific duty is manifestly inappropriate.

79. It is true that the Court has consistently, albeit not uniformly, held that, when examining the proportionality of a measure in a field in which the Community institution concerned has discretion, what must be ascertained is not whether the measure adopted by the legislature was the only measure possible or the best measure possible but whether it was manifestly inappropriate. [30]

80. As stated elsewhere, [31] I am not persuaded by that approach. Even in matters in which Community institutions have a broad discretion, the starting point for the application of the proportionality principle must be that judicial review of their measures is not precluded by a broad discretion. The fact that Community institutions have a broad discretion in certain areas does not justify reducing the test of proportionality of a measure

29 — Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40, and Case C-34/08 *Azienda Agricola Disarò Antonio and Others* [2009] ECR I-4023, paragraph 76.

30 — For the common agricultural policy, see Case C-33/08 *Agrana Zucker* [2009] ECR I-5035, paragraph 33; Case C-310/04 *Spain* v *Council*. [2006] ECR I-7285, paragraph 99; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 83. For other areas, see, in particular, Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, paragraph 52; Case C-558/07 *SPCM and Others* [2009] ECR I-5783, paragraph 42; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 52; C-434/02 *Arnold André* [2004] ECR I-11825, paragraph 46; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 48, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 123.

31 — See point 62 *et seq.* of my Opinion in *Azienda Agricola Disarò Antonio*, cited in footnote 29, and points 65 to 72 of my Opinion in Case C-365/08 *Agrana Zucker* [2010] ECR I-4341. See also Mosbrucker, A.-L., 'Contrôle du système des quotas laitiers', *Europe, Revue mensuelle NexisLexis Jurisclasseur*, July 2009, p. 16, who agrees with the proposed three-stage approach and criticises the reduction of the test to manifest inappropriateness.

to whether it is manifestly inappropriate. That approach would mean that the objective pursued by the Community institution and the rights of the individual that are affected would no longer be 'compared' and the proportionality principle would lose its element of protection for the individual. That would reduce the proportionality principle to an objective review of discretion. Neither can such an approach be justified by the argument that it is necessary by reason of the Court's respect for the margin of discretion of the Community institutions. The necessary respect can also be manifested in the framework of a three-stage analysis of proportionality. For that purpose, it is sufficient if, first, a Community institution's discretion in relation to the choice and the weighting of the objectives pursued is respected and, second, the proportionality test is reduced to determining whether the measure in question is manifestly inappropriate, manifestly unnecessary or manifestly unreasonable.

81. For the purpose of the present proceedings, it may be sufficient to observe that in any case the Court does not normally confine itself to examining the manifest inappropriateness of a measure, but also takes into account to a certain degree whether the measure is necessary and reasonable.[32] In that connection it may also be noted that, in the judgments cited above concerning agricultural levies,[33] did not confine the test criterion to the manifest inappropriateness of the independent protective measure.

32 — See *Vodafone* (cited in footnote 30, paragraph 51 et seq.), in which the Court, in paragraphs 61 to 68, examined elements of necessity and, in paragraph 69, the appropriateness of the measure, as well as *Agrana Zucker* (cited in footnote 30 above, paragraph 42), *British American Tobacco (Investments) and Imperial Tobacco* (cited in footnote 30 above, paragraph 126 *et seq.*). See also Koch, O., *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, Berlin 2003, p. 212, who stresses that almost all the judgments in which the Court appeared to reduce the test to 'inappropriateness' dealt with possible alternative measures and sometimes included extensive reasoning as to why those measures were not to be preferred. Therefore, according to that writer, the term 'manifest inappropriateness' should be understood only as a synonym for a test of reduced depth in the context of the multi-stage examination of proportionality. An argument to the same effect is found in Kischel, U., "Die Kontrolle der Verhältnismäßigkeit durch den Europäischen Gerichtshof', *Europarecht 2000*, p. 380, 398 ff., who points out that the Court's own words, according to which the proportionality test in the relevant areas should be confined to the question of manifest inappropriateness, are not given by it the meaning which they *prima facie* appear to have. On the other hand, it is clear from the judgments in question that the discretion of the Community legislature does not restrict proportionality to manifest inappropriateness, but restricts the proportionality test to manifest errors. See also Zatschler, C., Finding facts, *European Advocate*, Spring 2010, p. 11, p. 12 et seq., who points out that discretion influences only the scope of examination, but not the structure of the examination as to proportionality.

33 — See the case-law discussed in points 58 to 64.

82. However, it would be welcome, not least on grounds of legal certainty, if the Court would expressly make it clear that, even where the Community institutions have a broad discretion, it does not confine itself to the question whether a measure is manifestly inappropriate but, beyond that, also considers whether a measure is necessary and reasonable, albeit without going into so much detail.

3. No manifestly unlawful objectives

83. As stated above, [34] the broad discretion of the Community institutions in relation to the common agricultural policy and the common trade policy must be taken into account, particularly with regard to the choice of the objectives pursued. The choice of objectives and their respective weighting in those areas are for that reason subject to only a very limited review by the Court. This applies also to the question of how conflicting aims are to be reconciled.

34 — See point 80 of this Opinion.

84. Consequently, there can be no objection on legal grounds to the fact that the Council and the Commission pursued objectives not only of agricultural policy, but also trade policy, in organising the overall system for regulating the importation of preserved mushrooms from non-member countries. Likewise, there can be no objection to the fact that, for pursuing the abovementioned aims of trade policy, [35] the Community limited its means of action in international law in relation to agricultural policy by concluding the Agreement on Agriculture. [36]

4. Not manifestly inappropriate

85. The specific duty of EUR 222 per 100 kg drained net weight for products of CN code 2003 10 30 is not manifestly inappropriate for

35 — See point 75 of this Opinion.

36 — This must be distinguished from the question whether this is justified in view of the additional burdens this entails for the undertakings affected. The question will be examined in connection with the necessity for and the appropriateness of the measure.

attaining the agricultural-policy and trade-policy objectives which it pursues.

5. Not manifestly unnecessary

86. First, imposition of the specific duty is not manifestly inappropriate for the *agricultural-policy objective* of making it economically less attractive to import preserved mushrooms from non-member countries outside the quota opened by Regulation No 1864/2004, as amended, and thereby limiting the disruption to the market arising from excessive imports of preserved mushrooms from non-member countries.

87. Second, the form taken by that measure for protecting Community producers as a specific duty with a fixed rate is in keeping with the classification of goods for customs purposes, which seeks to make access to the agricultural markets more transparent and easier to calculate. Therefore the measure cannot be regarded as manifestly inappropriate for the *trade-policy objectives* pursued by tariff classification.

88. Next is the question whether the specific duty of EUR 222 per 100 kg drained net weight for products of CN code 2003 10 30 is manifestly unnecessary. So far as necessity is concerned, the question is whether, apart from the measure concerned, other appropriate measures with less of an adverse effect on those concerned are available for attaining the objectives pursued, but which would achieve the objective in question just as effectively. Because of the broad discretion of the Community institutions, however, the examination of the question whether an alternative, less intrusive, measure is available is limited to aspects which are manifest. [37]

89. The measure under scrutiny is the imposition of a specific duty of EUR 222 per 100 kg drained net weight. This amount corresponds to that agreed upon in the Community's schedule of commitments to the WTO. The first question to arise is thus whether the agricultural- and trade-policy objectives which were pursued could have been achieved just as effectively if a lower amount had been *agreed on* (a). The next question is whether a less extreme means of attaining the Community's aims in agricultural and trade policy could be for the Community *unilaterally* to set a specific duty in the CCT which is less

37 — See points 66 and 80 of this Opinion.

than the maximum rate agreed upon in the schedule of commitments to the WTO (b). That is followed by the question whether adjusting the level of the specific duty to different quality grades would be a more moderate measure (c). Finally, it is necessary to examine the claimant's argument that larger subsidies for Community producers would constitute a more moderate measure (d).

a) Agreement on a lower rate of duty than EUR 222 per 100 kg drained net weight in the Community's schedule of commitments to the WTO

90. The first question is whether the Community could have achieved its agricultural and trade policy objectives just as effectively if it had agreed a lower rate of duty than EUR 222 per 100 kg drained net weight in its schedule of commitments.

91. I think the reply must be in the negative.

92. First, it must be observed that the imposition of a specific duty at a level which renders the importation, outside the quota set, of preserved mushrooms from non-member countries unattractive must be regarded as necessary in view of the *agricultural-policy objective* of limiting disruption caused to the Community market by imports from non-member countries. [38]

93. Secondly, it must be noted that determining the level of the specific duty above which imports from non-member countries are rendered economically unattractive requires complex calculation. Consequently, the Community institutions must be allowed a broad discretion in the matter. [39] That is all the more

38 — See point 59 of this Opinion.
39 — See point 62 of this Opinion.

true where it is not a matter of setting a specific rate of duty, but of agreeing on a maximum rate of customs duty in the Community's schedule of commitments to the WTO. A maximum duty rate of that kind may not be exceeded by the Community, is permanent [40] and, in accordance with the most-favoured-nation principle of Article 1 of GATT 1947, applies to imports from all Member States of the WTO. Therefore the competent Community institutions must, when negotiating a maximum duty rate of that kind, take account *ex ante* of the extent to which a specific duty, which cannot exceed the agreed maximum, is appropriate, even in the event of price fluctuations, for reducing imports of preserved mushrooms into the Community outside the agreed quota.

94. Third, it must be borne in mind that the Court will regard even a variable levy as being no longer necessary only when it is so high that it has not only the effect of making the importation of preserved mushrooms into the Community economically unattractive, but also has the *de facto* effect of a ban on imports which is accompanied by economic sanctions. [41]

95. Even if that consideration were applied to the amount of the agreed maximum customs duty, the criteria applied by the Court to variable agricultural levies cannot be applied automatically to a maximum customs duty which has been contractually agreed within the framework of the WTO. In particular, an agreed maximum rate of duty cannot be regarded as necessary on the ground that it is general and permanent because it does not take sufficient account of the differences that existed at any particular time between the prices of Community products and the prices of imports from a particular Member State of the WTO. Rather, an agreement on such a maximum duty may, in view of the agricultural-policy objectives, be regarded as manifestly unnecessary only if the maximum duty, even allowing for potential imports from all WTO Member States and possible price fluctuations, would far exceed what would be necessary in order to reduce

40 — In the present case the safeguard provision of Article 5 of the Agreement on Agriculture cannot be invoked because the products covered by CN code 2003 10 30 are not designated by the symbol 'SSG'.

41 — See point 63 of this Opinion.

imports from non-member countries outside the fixed quota for the protection of the Community industry.

96. Bearing in mind those considerations, in the present case I can see no reason why the agreement on a maximum duty of EUR 222 per 100 kg drained net weight in the Community's schedule of commitments to the WTO could have been manifestly unnecessary. The Commission and the Council point out that they had to take account of the (sometimes) considerable fluctuations in the prices of preserved mushrooms both within and without the Community. The Commission and the Council add that the agreement on a maximum duty of EUR 222 per 100 kg drained net weight was necessary in order to prevent Community production from being stifled under the pressure of imports from non-member countries. I see nothing in the documents on the case-file to indicate that that conclusion was manifestly incorrect at the time of the Uruguay Round negotiations.

97. Rather, this conclusion of the Community institutions was confirmed subsequently by the market data produced by the Commission. It can be seen from the diagram of price trends, which forms Annex 3 to the Commission's pleading, that in 2004 and 2005 the difference between the average prices of preserved mushrooms imported from China and the average dealer prices of Community preserved mushrooms was in part so great that it was not economically unattractive to import preserved mushrooms from China into the Community even with a specific duty of EUR 222 per 100 kg drained net weight.

98. This is confirmed by the data in Annex 4 to the Commission's pleadings, which show that preserved mushrooms were imported from China into the Community not only on the basis of the quota fixed under Regulation No 1864/2004, as amended, but also to a large extent also outside the quota. According to those data, the specific duty of EUR 222 per 100 kg drained net weight was at least on some occasions not high enough to make it economically unattractive to import preserved mushrooms from China into the

Community outside the quota. In those circumstances, it certainly cannot be presumed that the specific duty had already reached a level above which it could have had the effect of a ban on imports accompanied by an economic sanction.

b) Application of a specific duty in an amount lower than the maximum rate of duty agreed in the Community's schedule of commitments to the WTO

100. At the hearing the Council and the Commission confirmed that the specific duty in the CCT was set at EUR 222 per 100 kg drained net weight because that corresponded to the rate of duty agreed upon in the Community's schedule of commitments to the WTO. No other criteria were taken into account.

99. Even if the legality of a measure depends on the date when it was put into effect, the development of the market for preserved mushrooms suggests that, in agreeing with the WTO on a maximum Community duty of EUR 222 per 100 kg drained net weight, the Community institutions did not exceed their broad discretion. Consequently, the agreement on a rate of customs duty of EUR 222 per 100 kg drained net weight in the Community's schedule of commitments to the WTO cannot be regarded as manifestly unnecessary in view of the agricultural-policy objective pursued by the customs duty of protecting Community producers against excessive imports of preserved mushrooms from non-member countries.

101. The question which arises is therefore whether a fixed specific duty of EUR 222 per 100 kg drained net weight is to be regarded as manifestly unnecessary because the Community institutions did not limit the specific duty to the amount necessary — in view of the price differences between preserved mushrooms from China and those from the Community at any particular time — to achieve the agricultural-policy objective of minimising disruption caused to the Community market by excessive imports from non-member countries.

102. It cannot be said that a specific duty of EUR 222 per 100 kg drained net weight is necessary on the ground that the Community merely fulfilled its commitments to the WTO by applying a specific duty in that amount. The rates agreed on in the schedule of commitments are only maximum rates of duty. Under Article II(2)(a) GATT 1947 the Community may vary that rate downwards, but not upwards. [42]

103. Furthermore, the need for a duty in that amount cannot be justified on the ground that the WTO members did not oppose it in the framework of the Uruguay Round. That circumstance cannot, on its own, affect the question whether the level of the specific rate of duty is compatible with the Community-law principle of proportionality. [43]

104. In addition, the argument that a specific duty in that amount is necessary on the ground that, under Article 9(2) of Regulation No 2658/87, the Commission has no power to alter customs tariffs independently cannot be upheld. The principle of proportionality must also be taken into account by the Community legislature, which must, where necessary, provide appropriate powers for the Community institutions.

105. A system based solely on the amount up to which the specific duty would be necessary with regard to the agricultural-policy objectives — and thus having regard to the differences between the prices of Chinese preserved mushrooms and Community mushrooms — would not take sufficient account of the fact that the specific duty pursues *trade-policy objectives* also. Therefore the specific duty may be regarded as unnecessary only if all the trade-policy objectives could also be just as effectively achieved by means of the alternative measure. [44] However, the Community would not be able to pursue its trade-policy objectives with equal efficacy if the maximum rate of duty agreed in the Community's schedule of commitments to the WTO were to be reduced unilaterally.

42 — See Geboye Desta, M. (cited in footnote 27, p. 21), who points out that a unilateral reduction in the agreed rates of customs duties is permissible under WTO law.

43 — *Hüpeden,* cited in footnote 3, paragraph 36.

44 — See point 59 above and the cases there cited.

106. First, an alternative method whereby the level of the specific duty would be variable and adjusted according to the price differences between preserved mushrooms from the Community and those from China would be nothing other than a variable import levy and consequently incompatible with Article 4(2) of the Agreement on Agriculture. It would undermine the trade-policy objective of making the conditions for market access more transparent and more predictable through the prohibition of variable import levies. [45]

107. However, a system is conceivable under which, although the specific duty is in principle fixed, it would be altered periodically in the light of the difference between the prices of Community preserved mushrooms and those from non-member countries. It is unnecessary to decide whether that would be compatible with Article 4(2) of the Agreement on Agriculture [46] because, with such a system, the Community's trade policy aims could not be achieved as effectively.

108. First, such a system would no doubt be very laborious because it would require the Community institutions to compare prices in the Community with the prices of imports from all countries which are members of the WTO and from which preserved mushrooms could potentially be imported into the Community. Furthermore, under the most-favoured nation provision of Article 1 of GATT 1947, it would also not be allowed to set the specific duty at different levels in respect of individual members of the WTO. [47] For that reason a system whereby the level of the specific duty takes into account specifically the differences from prices in certain WTO members is unacceptable from the outset.

45 — See the Report of the Appellate Body of the WTO, 23 September 2002, Chile —Price Band System, WT/DS207/AB/R, paragraphs 232 to 234.

46 — In paragraph 232 of the abovementioned report it is stated that the mere fact that duties are periodically adjusted does not necessarily mean that they are to be regarded as variable import levies within the meaning of footnote 1 to Article 4(2) of the Agreement on Agriculture. Rather, paragraph 233 of the Report refers to the fact that the duty rate varies automatically in accordance with a scheme or formula.

47 — See Geboye Desta, M. (cited in footnote 27, p. 23), who points out that the benefits granted to a Member State are rendered universal by the most-favoured nation principle.

109. In addition, any unilateral undercutting of the maximum rate of duty agreed in the Community's schedule of commitments to the WTO would mean that the Community grants undertakings from other WTO members access to the Community's agricultural market without any assurance that Community undertakings will be given access to the markets of the other WTO members in return. As the Council and the Commission correctly note, it would no doubt be difficult for the Community to negotiate an appropriate *quid pro quo* after the event in return for unilaterally undercutting, outside a negotiating round, the agreed maximum rates. Consequently, a unilateral reduction would jeopardise the trade-policy objective of negotiating, via the *quid pro quo* principle, benefits for Community undertakings with regard to access to the markets of the other WTO members.

110. In response to that apprehension, it could be said that in the present case there is no requirement to allow undertakings from other WTO member countries access to the Community's agricultural market by reducing the amount of the specific duty. Rather, the principle of proportionality requires only that no specific duty be charged which is so high that it far exceeds what is necessary in order to make imports economically unattractive.

111. In practice, however, that objection, while sound in theory, is not in practice convincing. As shown above, the preserved mushroom market is subject to significant price fluctuations,[48] with the consequence that the specific duty of EUR 222 per 100 kg drained net weight produces different effects, depending on the size of the price differences. Accordingly, the duty may sometimes reach or even exceed the level necessary to make imports into the Community unattractive, but it can also remain below that level, thereby making Community market access economically attractive. Because of the significant price fluctuations, therefore, the possibility cannot be ruled out that setting a specific duty which for a certain period unilaterally falls below the agreed maximum rate of duty of EUR 222 per 100 kg drained net weight may make market access attractive for undertakings from other WTO member countries, without ensuring that Community undertakings will, in return, secure equivalent access to the markets of the other WTO members.

48 — See point 97 et seq. above.

112. Therefore, it must be stated that the unilateral application of a specific duty which is less than the maximum duty agreed in the Community's schedule of commitments to the WTO cannot be considered a more moderate measure. It would not be appropriate for attaining the aims of the Community's agricultural policy with comparable effectiveness.

c) Adjustment of the level of the specific duty according to quality grades

113. Finally, the referring court points out that the specific rate of duty does not differentiate between the various quality grades of mushrooms. The question therefore arises as to whether the specific duty of EUR 222 per 100 kg drained net weight must be deemed manifestly unnecessary because it does not distinguish between individual quality grades of preserved mushrooms.

114. I think the reply to that question must also be in the negative.

115. First, it must be observed that a specific rate of duty is not disproportionate merely because it provides for a fixed rate for different quality grades of the same product. The question whether a fixed rate is necessary will depend on a number of factors, such as whether it is appropriate for effectively achieving the desired aims. [49]

116. In the present case, the application of a fixed rate does not appear to be manifestly unnecessary.

117. First, the Council points out that there are substitution effects as between individual quality grades of preserved mushrooms. If the Community were to levy a different duty according to the grade of preserved mushrooms, there would be an incentive for importers, when importing them, to indicate a lower grade than the true one in order to obtain a lower rate of duty. That would have to be countered by means of stricter controls, which would create a heavier burden for the customs authorities.

49 — Case 77/86 *The National Dried Fruit Trade Association* [1988] ECR 757, paragraph 29.

118. Second, unilateral differentiation by the Community between different grades of preserved mushrooms would not be in the same way appropriate for the purpose of promoting its trade-policy objectives. As already explained,[50] because of the significant fluctuations in the price of preserved mushrooms, the possibility cannot be ruled out that the application of a lower rate of duty for preserved mushrooms of a lower quality grade will not only reduce the specific duty to the point where it becomes economically unattractive to import preserved mushrooms, but that it will reduce the duty even further. It would then make it economically attractive to import preserved mushrooms into the Community and thereby improve access to the Community market. But it would no doubt be very difficult for the Community to negotiate an appropriate *quid pro quo* with the other WTO members in return for such improved market access, which would be granted unilaterally and outside a negotiating round.

119. Graduation according to quality grades cannot therefore be regarded as a manifestly more moderate means by which to achieve the objectives of the Community's trade policy.

50 — See points 109 to 112 above.

d) Higher subsidies for Community producers

120. Finally, the claimant's argument that higher subsidies for Community producers are possible as a more moderate measure must also be rejected. Irrespective of the question whether such a measure would be compatible with the Agreement on Agriculture, it must be observed that an alternative measure that is likely to lead to considerable financial burdens for the Community cannot be regarded without question as a more moderate measure.

e) Conclusion

121. It must thus be held that in the present case, apart from the application of a specific duty of EUR 222 per 100 kg drained net weight, there appears to be no manifestly more moderate means of pursuing the agriculture- and trade- policy objectives.

6. Not manifestly unreasonable

122. Finally, the imposition of a specific duty of EUR 222 per 100 kg drained net weight also cannot be regarded as manifestly unreasonable. It is true that the application of that duty may lead to substantial burdens for an importer. Nevertheless, in a case such as the present, it cannot be regarded as manifestly unreasonable that priority should be given to the trade-policy objectives of the Community. On the one hand, it must be borne in mind that the customs classification of barriers to trade has achieved considerable trade-policy benefits. On the other hand, it must not be forgotten that a prudent importer will in any case import goods into the Community only if it is worthwhile for him to do so. For that reason, the only importers who will be affected are those who provide false or mistaken information concerning the imported goods. Regardless of whether there is intention or error, it seems to me not to be manifestly unreasonable that in such cases the trade-policy objectives of the Community should be given priority.

C — *Summary conclusion*

123. The foregoing survey has revealed nothing to indicate that the imposition of a specific rate of duty of EUR 222 per 100 kg drained net weight on preserved mushrooms which were imported into the Community outside the quota opened pursuant to Regulation No 1864/2004, as amended, is inconsistent with the principle of proportionality.

124. It may also be added that the *ad valorem* duty amounts to 14.9 %, and not 18.4 %, as assumed by the referring court. [51]

51 — See the rules set out in points 19 to 22 and 70 of this Opinion.

VII — Conclusion

125. Against that background, I propose that the Court should reply as follows to the question referred by the Finanzgericht Hamburg:

'Examination of the specific rate of duty, applicable pursuant to Commission Regulation (EC) No 1719/2005 of 27 October 2005 amending Annex I to Regulation (EEC) No 2658/87, of EUR 222 per 100 kg drained net weight, charged on imports of preserved mushrooms of the genus *Agaricus* (CN subheading 2003 10 30) outside the quota opened pursuant to Commission Regulation (EC) No 1864/2004 of 26 October 2004 opening and providing for the administration of tariff quotas for preserved mushrooms imported from third countries, as amended by Commission Regulation (EC) No 1995/2005 of 7 December 2005 amending Regulation No 1864/2004, has, in relation to the principle of proportionality, disclosed nothing capable of affecting the validity of that specific rate of duty.'