OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 16 January 2007 [1]

I — Introduction

1. An appeal has been lodged against the judgment of the Court of First Instance of the European Communities of 14 December 2004 [2] which dismissed the principal claim for annulment of the Commission REM 14/01 decision of 28 June 2002 refusing to accede to the Italian Republic's application for the remission of certain import duties payable by Nordspedizionieri di Danielis Livio & C. Snc, Livio Danielis and Domenico D'Alessandro (hereinafter 'Nordspedizionieri and Others'). [3]

2. Queries are raised, in particular, regarding the conditions for establishing a 'special situation' within the meaning of Community customs law, because only in those circumstances is exemption from payment of border duties granted. In view of the time at which the events in the dispute occurred, the analysis must be made in the light of the complicated legislation [4] in force before the adoption of the Common Customs Code. [5]

3. The dispute also turns on the interpretation of a bilateral agreement concluded between a Member State, Italy, and another country, Slovenia, which at the time was a non-member country, so the jurisdiction of the Court of Justice is at issue. [6]

1 — Original language: Spanish.

2 — Case T-332/02 *Nordspedizionieri di Danielis Livio and Others* v *Commission* [2004] ECR II-4405.

3 — It was accompanied by an alternative claim for remission of the customs debt corresponding to 8 010 kilos of foreign manufactured tobacco confiscated by the Italian authorities on 8 April 1992 in the secret warehouse in Bareggio, which, because it is irrelevant to the appeal, need not be considered in detail in this opinion.

4 — The complexity of this legislation explains the statement made by Berr, Claude J., 'Union douanière' in *Revue trimestrielle de droit européen*, 37 (3) July-Sept. 2001, pp. 627 et seq., that the problems which arise in other areas, such as monetary union or social cohesion, stimulate the mind more than customs classification or the validity of certificates of origin, so customs law has become a closed shop for a few specialists.

5 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

6 — It is surprising, in this context, that, in the judgment under appeal, the Court of First Instance did not question its own jurisdiction, or, at least, that it did not place on record that it had entertained that doubt.

II — Legal framework

A — *Community law*

4. In order to settle this case, it is necessary to examine, on the one hand, the provisions which the Court of First Instance is alleged to have infringed — all of them strictly Community provisions — and, on the other, some provisions of the Bilateral Agreement on customs administrative assistance signed in 1965 between Italy and Yugoslavia (hereinafter 'the Belgrade Agreement). [7]

5. Since the Community Customs Code is not applicable *ratione temporis*, as the facts cover a period prior to the adoption of that legislation, the relevant legal provisions are scattered, almost always in parts, among several regulations most of which have been formally repealed but whose effect has continued to be felt in the abundant legislative cover afforded by that Code since 1992.

6. That is what has happened, for example, with the customs rules governing Community transit, contained in Council Regulation (EEC) No 222/77, [8] Article 36(1) of which provides that when it is found that, in the course of a Community transit operation, an offence or irregularity has been committed in a particular Member State, the recovery of duties or other charges which may be chargeable are to be effected by that Member State in accordance with its provisions laid down by law, regulation or administrative action, without prejudice to the institution of criminal proceedings.

7. Council Regulation (EEC) No 474/90 [9] introduced a third paragraph to Article 36, in order to determine the place in which the infringement is to be deemed to have taken place, for the purposes of levying the duties and other relevant taxes, when there is no proof of the regularity of the transit operation or the place of the offence cannot be established.

7 — *Accordo di mutua assistenza amministrativa per la prevenzione e la repressione delle frodi doganali fra la Repubblica Italiana e la Repubblica Socialista Federativa di Jugoslavia*, signed in Belgrade on 10 November 1965, the Italian version is in the Bollettino Ufficiale (Trattati e convenzioni) 1967, vol. CIV- No 178; the national implementing law is published in the *Gazzetta Ufficiale* of 8 July 1967, No 169. It came into force on 1 February 1968.

8 — Regulation No 222/77 of 13 December 1976 on Community transit (OJ 1977 L 38, p. 1). External transit is governed by Articles 91 to 97 and internal transit by Articles 163 to 165 of the Customs Code, but Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit (OJ 1990 L 262, p. 1) had replaced Regulation No 222/77; however, as, pursuant to Article 47(1), it did not become applicable until 1 January 1993, it must not be taken into account in this case, which predates it.

9 — Regulation No 474/90 of 22 February 1990 amending, with a view to abolishing lodgement of the transit advice note on crossing an internal frontier of the Community, Regulation No 222/77 on Community transit (OJ 1990 L 51, p. 1).

8. Regulation No 1062/87, [10] which developed and simplified Regulation No 222/77, was in turn amended by Regulation (EEC) No 1429/90, [11] which inserted Article 11a, in Title Ia, under the heading 'Provisions applicable in the case of non-production of consignments at the office of destination'; this provided:

'1. Where a consignment has not been produced at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure shall notify the principal of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.

2. The notification referred to in paragraph 1 must indicate, in particular, the time-limit by which the proof of the regularity of the transit operation or of the place where the offence or irregularity has actually been committed must be furnished to the office of departure to the satisfaction of the competent authorities.

This time-limit shall be three months from the date of the notification referred to in paragraph 1. If the required proof has not been produced by the end of this period, the competent Member State shall take steps to recover the duties and other charges involved.'

9. The Community customs rules also provide for the total or partial repayment of import or export duties which have been paid or for the remission in part of a customs debt. The conditions for that relief in the present case were laid down by Article 13(1) of Regulation (EEC) No 1430/79, [12] as amended by Regulation (EEC) No 3069/86, [13] as follows:

'Import duties may be repaid or remitted in special situations other than those referred to in Sections A to D, which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

...'

10 — Commission Regulation (EEC) No 1062/87 of 27 March 1987 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1987 L 107, p. 1).

11 — Regulation No 1429/90 of 29 May 1990 amending Regulation No 1062/87 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1990 L 137, p. 21).

12 — Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), as amended by Regulation No 3069/86 of 7 October 1986 (OJ 1986 L 286 , p. 1).

13 — Regulation No 3069/86 of 7 October 1986 amending Regulation No 1430/79 on the repayment or remission of import or export duties (OJ 1986 L 286 , p. 1).

B — *The Belgrade Agreement*

10. With the aim of strengthening cooperation between the Italian and Yugoslav customs administrations, this Treaty is drawn up on the same lines as similar agreements of the time, as is shown by a cursory comparison with the agreement signed in 1967 in this field by the six original Member States, known as the 'Rome Convention'. [14]

11. After stating its main objectives, namely, the prevention, detection and suppression of infringements (Article 1), the Belgrade Agreement defines the concept 'customs provisions' (Article 2) and undertakes to maintain a close cooperation between the customs offices on the common border (Article 3).

12. In order to settle this appeal, what is most important is Article 4, in which the contracting parties undertake to keep under special surveillance the movement of persons, goods and vehicles which they consider suspicious (Article 4(1)).

14 — *Convention entre la Belgique, la République Fédérale d'Allemagne, la France, l'Italie, le Luxembourg et les Pays-Bas, pour assistance mutuelle entre les administrations douanières respectives*, signed in Rome on 7 September 1967; it may be consulted in *Tractatenblad van het Koninkrijk der Nederlanden*, 1968, No 172.

13. Article 4(2) states the intention to prevent smuggling; the second paragraph provides;

'On request [of the other contracting party], extra vigilance will be observed in the case of export of those products which attract special, high fiscal charges in the territory of the other contracting party.'

III — Background to the appeal

A — *Facts of the case*

14. The partnership Nordspedizionieri di Danielis Livio & C., which is made up of customs agents and has its registered office in Trieste, Italy, made, at the request of Cumberland Ltd, three external Community transit declarations to the customs office at Fernetti, Italy, concerning the shipment of cardboard boxes, purchased from the Slovenian company Proexim Export-Import, for delivery by lorry to Spain.

15. The customs documents referred to loads of 1 400 packs, weighing 12 620 kg (30 October 1991), 1 210 packs, weighing 12 510 kg (5 November 1991), and 1 500 packs, weighing 12 842 kg (16 November 1991).

16. Upon completion of the formalities in respect of the third transaction, the lorry was allowed to continue on its way. Shortly afterwards, the director of the customs office in Fernetti requested the customs police of that district to inspect the lorry's load. As it had already left the customs area, the customs police followed it and stopped it several kilometres beyond the border. The police escorted the lorry back to the customs post for inspection. The inspection revealed that the cardboard boxes were not empty, as stated in the transit declaration, but that they contained 8 190 kg of foreign cigarettes originating from outside the Community, distributed between 819 boxes. The driver of the lorry, C, was arrested and the lorry and its load were impounded, together with the documents found in the driver's possession.

17. The investigation carried out by the Italian customs authorities with the cooperation of the Slovenian authorities revealed that C had taken part in three other similar cigarette-smuggling operations, using the transit declarations completed by Nordspedizionieri and Others on 30 October and 5 November 1991, and also by Centralsped Srl on 16 September 1991.

18. The consignments of 30 October and 5 November 1991 revealed the difference between the declaration made to the Slovenian customs authorities, primarily of manufactured tobacco, and the declaration made at the Fernetti customs post, which referred to packing cases. It was also found that, once the customs formalities had been completed at that customs post, the lorry continued its journey to a place of destination different from that stated in the customs declarations, having unloaded the cargo clandestinely in Italy.

19. As a result of their investigations, the Italian authorities discovered a warehouse in Bareggio, Italy, containing the unlawfully imported goods; on 8 April 1992 it searched the warehouse and seized 801 boxes (8 010 kg of cigarettes).

20. On 16 October 1992, the revenue department of the central customs office in Trieste ordered the applicants, in their capacity as principal of the Community transit for the operations of 30 October and 5 November 1991, to pay ITL 2 501 239 200, in respect of duties, and

ITL 450 223 100 in interest, on 1 700 boxes (17 000 kg) of foreign manufactured tobacco illegally imported and offered for sale in the Community customs territory. Since the consignment of 16 November 1991 was seized by the Italian customs authorities before it was offered for sale no customs duties were claimed in that regard.

21. The applicants challenged the order to pay, which was annulled by the Tribunale civile e penale (Civil and Criminal District Court), Trieste in September 1994. By a judgment of 5 September 1996, the Corte d'appello di Trieste (Trieste Court of Appeal), reversed that judgment and ordered Nordspedizionieri and, in the alternative, its partners between them jointly to pay the sum of ITL 2 951 462 300. By judgment of 26 January 1999, the Corte suprema di cassazione (Italian Supreme Court of Cassation) dismissed the customs agents' appeal against the judgment of the Corte d'appello.

22. Meanwhile, on 14 January 1994, the judge of the Tribunale civile e penale responsible for preliminary investigations made an order withdrawing the criminal proceedings which had been brought for trafficking smuggled cigarettes against Mr G. Baldi, a partner of Nordspedizionieri and the author of the three transit declarations issued by that partnership which were used in the smuggling operations.

23. In November 2000, Nordspedizionieri and Others applied to the Commission for the remission of the duties demanded by the Italian customs authorities (ITL 497 589 687 (EUR 256 983.63)). In June 2001, the Italian authorities supported its application, by submitting a request in similar terms.

24. On 28 June 2002, the Commission rejected the Italian Republic's application ('the contested decision') on the ground that there was no special situation resulting from circumstances in which no deception or obvious negligence may be attributed to Nordspedizionieri and Others, for the purposes of Article 13 of Regulation No 1430/79, and therefore the remission of import duties in the aforementioned sum was not justified.

25. On 30 October 2002, Nordspedizionieri, Mr Danielis and Mr D'Alessandro brought an action against the Commission decision before the Court of First Instance.

B — *The judgment under appeal*

26. The appellants' main claim concentrated on the annulment of the contested decision and the remission of the import duties, and was based on two pleas in law, the first alleging certain material errors and the second claiming the existence of a special situation, where there has been no deception or obvious negligence within the meaning of Article 13 of Regulation No 1430/79.

27. The Court of First Instance did not uphold either plea.

28. It rejected the former [15] because it found no error of fact in the judgment under appeal, contrary to the claims made by the appellants, who maintained that the Commission distorted the facts by stating in the fourth recital of the contested decision that the inspection of the operation of 16 November had taken place at the Fernetti customs office. According to the appellants, that statement was incorrect, since the customs authorities had inspected the lorry after the customs formalities had been completed.

29. Moreover, in connection with the same plea, the Court of First Instance rejected as inadmissible the complaint alleging an error concerning the amount of the remission applied for, [16] on the ground that it was within the exclusive competence of the national authorities to calculate that sum.

30. As regards the combination of the two conditions laid down in Article 13 of Regulation No 1430/79, the appellants maintained: [17] first, that they were the victims of a fraud which exceeded the commercial risks inherent in their professional activities; second, that the Italian authorities deliberately took no action, allowing the smuggling operations in question to be committed in order to dismantle the smuggling network; third, that the customs authorities failed to fulfil their national obligations to supervise customs operations; fourth, that it was impossible for them to supervise the transport operations; and fifth, that in the contested decision the Commission did not balance the interests in question.

31. However, the Court of First Instance dismissed those arguments one by one, because they were based on insufficient evidence (the first and third claims) or because they were unfounded (the second, fourth and fifth claims).

15 — Paragraphs 27 to 30 of the judgment under appeal.

16 — Paragraphs 31 to 39.

17 — Paragraphs 43 to 89.

32. Of great relevance to this appeal is the argument that the national authorities had omitted to carry out the obligatory inspection of the goods at the border in accordance with the Belgrade Agreement, since the Court of First Instance concluded that that agreement did not require the Slovenian customs authorities to inform the Italian customs authorities without delay of all consignments of tobacco leaving their territory for Italy. [18]

33. That Court considered that the agreement merely provided for mutual assistance and close cooperation between the two authorities; the implementation of special surveillance of the movements of goods and vehicles identified as constituting a significant smuggling operation, and the exchange of information in particular in relation to the categories of goods which are the subject of customs infringements.

34. As it had not detected a special situation, the Court of First Instance decided that it was not necessary to examine the condition relating to the absence of deception or obvious negligence, [19] and dismissed the application.

18 — Paragraph 79.
19 — Paragraphs 90 to 96.

IV — The proceedings before the Court of Justice and the forms of order sought by the parties

35. The appeal brought by Nordspedizionieri and Others was lodged at the Registry of the Court of Justice on 11 February 2005; the Commission's defence was lodged on 19 April. The reply and the rejoinder were lodged on 22 September and 8 November 2005 respectively.

36. The appellants claim that the Court of Justice should:

— set aside the judgment of the Court of First Instance which is the subject of this appeal;

— annul the decision of the Commission (REM 14/01) of 28 June 2002 refusing to accede to the Italian Republic's application for a remission of certain import duties payable by the appellants in the sum of EUR 256 983.63, alleging special circumstances which did not involve negligence or deception; and

— order the Commission to pay the costs.

37. The Commission contends that the Court of Justice should:

— dismiss the appeal brought by Nordspedizionieri and Others in its entirety;

— order the appellants to pay their own costs and those incurred by the Commission, both at first instance and on appeal.

38. At the hearing held on 30 November 2006, the representatives of both parties reiterated their positions and claims.

V — Analysis of the grounds of appeal

39. Nordspedizionieri and Others put forward four grounds of appeal, alleging infringement of Article 36(3) of Regulation No 222/77; distortion of the facts calling for the judgment under appeal to be set aside for failure to state the grounds, in accordance with the penultimate indent of Article 81 of the Rules of Procedure of the Court of First Instance;[20] failure to apply Article 13 of Regulation No 1430/79; and the absence of deception or negligence within the meaning of that provision.

40. The Commission contends that the first ground is inadmissible and also, by implication, the second, so it is necessary to consider these claims.

A — *The admissibility of some of the grounds of appeal*

1. The first ground

41. On the basis of Article 36(3) of Regulation No 222/77, the appellants deny that they are liable for customs duties, because one of the essential conditions for liability is absent, namely, where a consignment has not been produced at the office of destination, the principal is to be notified of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.

20 — Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991 (OJ 1991 L 136, p. 1), as corrected (OJ 1991 L 317, p. 34) and amended (OJ 2005 L 298, p. 1).

42. In support of their argument, they cite the case-law of the Court concerning that provision, which permits the Member State to which the office of departure belongs to recover duty on import only if it has indicated to the principal that he has three months in which to prove where the offence or irregularity was actually committed and such proof has not been provided within that period. [21]

43. The Commission bases its contention that the plea is inadmissible on the fact that it was not raised at the prior administrative stage, during the procedure for remission of customs duties, or before the Court of First Instance, and that, in any event, since that objection relates to legal acts of the national customs authorities, who are alone responsible for applying Community customs law, it should be decided in the national courts.

44. However, it does not appear to constitute a new plea, since in the reply Nordspedizionieri and Others maintain that the Court of First Instance could have examined of its own motion this ground for annulment of the order to pay issued by the Fernetti customs office, an argument which, logically, could only be raised for the first time before the Court of Justice.

45. Moreover, it is apparent from the judgment under appeal that, in the proceedings at first instance, the appellants had already challenged the accuracy of the demand for payment, so now the degree of the inaccuracy of the calculation of the amount and the legal basis have merely been modified. [22] From a procedural point of view, therefore, the subject-matter of the plea is also unaltered, even though it is based on different arguments.

46. On the other hand, with regard to the substance of the case, the Commission's submission that jurisdiction does not lie with the Community courts is persuasive.

47. As the Court of First Instance pointed out in the judgment under appeal, [23] the sole aim of Article 13 of Regulation No 1430/79 is to enable traders, when certain special conditions are satisfied and in the absence of deception or obvious negligence, to be exempted from payment of duties due from them and not to enable them to contest the actual principle of a customs debt's being due. [24]

48. Accordingly, the Court of Justice only allows pleas seeking to show the existence of

21 — Case C-233/98 *Lensing & Brockhausen* [1999] ECR I-7349, paragraph 31.

22 — Paragraph 31 of the judgment under appeal.

23 — Paragraph 33 of the judgment.

24 — Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraph 11; Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 43.

special circumstances and the absence of negligence or deception on the part of the appellants, and not pleas seeking to show that the decisions of the competent national authorities subjecting them to payment of the duties at issue were unlawful, a matter which must be determined in actions before the competent national court. [25]

49. In spite of the fact that it is not a new plea, it is illogical from a procedural point of view for the Court of First Instance to raise of its own motion a rule which it is not competent to apply; the first ground of appeal is therefore weakened, and cannot be upheld.

50. Furthermore, even if it were accepted that the ground of appeal was admissible, it would be irrelevant because the documents before the Court reveal no dispute concerning the place where the irregularity or offence occurred, as required under Article 36(3) of Regulation No 222/77. It could not be otherwise, since the Community transit of the consignment took place in Italy, as Slovenia was not a member of the Community at the time of the events. Therefore, there was no doubt as to the place in which the offence occurred, a prerequisite for application of that provision, and the Fernetti customs authorities were not required to grant the appellants a period within which to adduce evidence regarding the place in which the law was infringed.

51. In short, the foregoing considerations lead me to suggest that the first ground of appeal be rejected as inadmissible.

2. The admissibility of the second ground of appeal

52. Nordspedizionieri and Others maintain that the Court of First Instance distorted the facts of the case by not accepting, in paragraph 29 of the judgment under appeal, their complaint that the fourth recital of the contested decision contained a material error; it stated that the Fernetti customs authorities had asked the customs police to check the consignment declared on 16 November 1991, whereas, in fact, the inspection had taken place after the border formalities had been completed and the lorry had already driven a few kilometres into Italy.

53. As proof of the precise chronology of the facts and of the reasons which actually led to the order to check the goods, the appellants have submitted a statement signed by Mr

25 — *CT Control (Rotterdam) and JCT Benelux* v *Commission*, paragraphs 44 and 45.

Vito Portale, who was the director of the Fernetti Customs Office at the time the events at issue took place. With those two elements, distortion and the circumstantial evidence, the appellants claim to provide an accurate account, in the light of which it may be clear that there was a 'special situation' within the meaning of Article 13(1) of Regulation No 1430/79.

54. The Commission submits that the criticisms contained in the previous points seek a re-examination of the facts of the case, so it therefore suggests that they (including Mr Portale's letter) should be rejected as inadmissible.

55. I am not convinced by the Commission's line of argument, which is simplistic.

56. First, the Court has acknowledged [26] that it may be appropriate to refute both the finding and the assessment of the facts made at first instance, going beyond its own original case-law. [27]

57. Second, where, in an appeal, the accuracy or evaluation of the facts is challenged, an alternative assessment must be offered, since otherwise it would never be possible to invoke distortion of facts or evidence.

58. Nordspedizionieri and Others come to the appeal with the intention of replacing the view taken by the Court of First Instance of the factual context of the fourth recital of the contested decision with their own view, as explained in point 52 of this opinion; it is therefore appropriate to accede to their request and reject the Commission's suggestion that it is inadmissible.

59. However, it is difficult to understand the appellants' objective, because, even if it is acknowledged that there was an error in the account of the facts, the account given by Nordspedizionieri and Others coincides exactly with that contained in paragraphs 10 to 19 of the judgment under appeal and, specifically, with the content of paragraph 11.

60. In the circumstances, the ground put forward by the appellants and Mr Portale's

26 — Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 42 and 43.

27 — Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 12, mentioned by the Commission in its response.

testimony [28] are superfluous since, by suggesting an identical version, the appellants do not call into question the version given in the judgment of the Court of First Instance.

61. In the light of the foregoing, the second ground of appeal must be rejected as irrelevant.

B — *The third ground of appeal*

62. Here, the appellants allege failure to apply Article 13 of Regulation No 1430/79, when the judgment under appeal denied the existence of a 'special situation' within the meaning of Article 13(1) of Regulation No 1430/79. The Commission, on the other hand, requests that the ground be rejected as unfounded.

63. The long, complex and intricate explanations given in the appeal and the no less full replies of the other party make it necessary to set the bounds of the subject-matter of the claim, in order subsequently to examine the substance.

1. Delimitation of the ground of appeal

64. Nordspedizionieri and Others structure this ground on the five pleas put forward before the Court of First Instance, [29] namely, that they were the victims of a fraud which exceeded the commercial risks inherent in their professional activities; that the Italian authorities deliberately took no action, allowing the unlawful operations in question to be committed in order to dismantle the smuggling network; that the customs authorities failed to fulfil their national obligations to supervise customs operations; that it was impossible for them to supervise the transport operations; and that in the contested decision the Commission did not weigh up the interests in question.

65. Apart from the fact that the appellants' arguments repeat, in essence, the pleas in law

28 — This means of evidence has been the subject of controversy both as regards its admissibility (the Commission described it as inappropriate) and its usefulness. The appellant's argument that it was valid to present it for the first time at the appeal because the former Chief Customs Officer had originally refused to give evidence must be rejected outright, since the Rules of Procedure of the Court of First Instance, Article 68 et seq. of which govern the summoning and examination of giving of witnesses and experts, establishes the manner in which difficulties which may arise in taking statements from witnesses may be overcome. Accordingly, Article 69(1) requires them to appear, under penalty of fine, a sanction also imposed on a witness who, without good reason, refuses to give evidence. Therefore, the Court of First Instance does not lack powers for persuading them. Moreover, in some cases, letters rogatory may be issued for the purpose of taking evidence from witnesses or experts. Therefore, the only aim of this (belated) submission of this evidence is to make up for its regrettable omission at first instance. In short, as the Commission points out in its response, the content of Mr Portale's written statement corroborates the version of the Court of First Instance, and is of no further interest.

29 — Point 30 of this Opinion.

put forward at first instance, it seeks a review of the facts which the Court of Justice, under Article 58 of its Statute, is not authorised to carry out, and therefore they cannot be analysed during this appeal.

66. The strategy is clear; a different scheme from that used at first instance was devised so as to liken the situation to that in the judgment in *De Hann*, [30] in which the Court stated that 'the demands of an investigation conducted by the national authorities may, in the absence of any deception or negligence on the part of the person liable, and where that person has not been informed that the investigation is being carried out, constitute a special situation within the meaning of Article 13(1) of Regulation No 1430/79 where the fact that the national authorities have, in the interests of the investigation, deliberately allowed offences or irregularities to be committed, thus causing the principal to incur a customs debt, places the principal in an exceptional situation in comparison with other operators engaged in the same business'. [31]

67. Consequently, since the aforementioned lines of defence must all be rejected because they are of a factual nature, the only claim which it is appropriate to investigate relates to the error of law committed by the Court of First Instance in interpreting the Belgrade Agreement, since Nordspedizionieri and Others believe that circumstance is comparable to the kind of legal infringement which the judgment in *De Hann* accepted in order to justify the existence of a special situation within the meaning of Article 13(1) of Regulation No 1430/79.

68. However, the nature of that Agreement, a bilateral treaty between a Member State (Italy) and, at the time the events took place, a non-member country (Slovenia), makes it necessary to consider a preliminary point: whether the Court of Justice has jurisdiction to interpret a rule of that kind, particularly when the Court of First Instance omitted to rule on the matter in the judgment under appeal. Once this difficulty is overcome, the way is free to explore the basis of the complaint.

2. The jurisdiction of the Court of Justice to interpret the Belgrade Agreement

(a) International treaties before the Court of Justice

69. The starting-point is the powers conferred, generically, on the Court of Justice by

30 — Case C-61/98 *De Hann* [1999] ECR I-5003.
31 — Idem, paragraph 56.

Article 220 EC, which states that '... it shall ensure that in the interpretation and application of this Treaty the law is observed'.

70. Any doubts concerning the extension of the power to comment on international treaties which, by their very nature, do not form an integral part of the EC Treaty, were dispelled in the judgment in *Haegeman,* [32] concerning the Agreement of Association with Greece, [33] which considered that this kind of agreement was an act of one of the institutions within the meaning of Article 234 EC and that the provisions of the agreement, from the coming into force thereof, formed an integral part of Community law. [34]

71. The debate continued, moving into the realm of mixed agreements, that is to say, agreements concluded between the Community and the Member States, on the one hand, because they share legislative powers, and non-member countries, on the other, and the view that the Court had jurisdiction prevailed.

72. This is inferred, first, from the judgment in *Demirel,* [35] where the Court derived its power from the fact that the Association Agreements cover all the matters included in the EC Treaty, [36] a view confirmed, secondly, in the judgment in *Hermès,* [37] which inferred the Court's power to give a ruling on Article 50 of the TRIPS Agreement [38] from the fact that both the Community and the Member States were competent to conclude that agreement.

73. This alignment of the Court's powers to interpret, with the Community's powers to act, confirmed in the judgment in *Dior,* [39] makes it necessary in the present case to ascertain whether the Belgrade Agreement falls nowadays within some competence of the Community, which would justify the interpretive role of the Court of Justice, or whether it is necessary to explore other paths.

74. I am aware of the differences between the matters in the judgments cited in the previous points and, in particular, of the fact that in this case the agreement is not

32 — Case 181/73 *Haegeman* [1974] ECR 449. That judgment was subsequently corroborated by the judgments in Case 87/75 *Bresciani* v *Amministrazione delle Finanze* [1976] ECR 129, which interpreted the Yaounde Convention of 1963; Case 65/77 *Razanatsimba* [1977] ECR 2229, concerning the interpretation of the Lomé Convention; and, more recently, by the judgments in Case C-18/90 *Kziber* [1991] ECR I-199, and Case C-103/94 *Krid* [1995] ECR I-719, on the Cooperation Agreements with Morocco and Algeria; also Opinion 1/76 of 26 April 1977 ECR 741, paragraph 18.

33 — Agreement establishing an Association between the European Economic Community and Greece, approved in Council Decision 63/106/EEC of 25 September 1961 (OJ 1963 26, p. 293).

34 — *Haegeman*, paragraphs 3 to 6.

35 — Case 12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] ECR 3719, paragraph 9.

36 — The German and United Kingdom Governments openly disputed the jurisdiction of the Court of Justice in relation to provisions on freedom of movement for persons contained in the Agreement of Association with Turkey.

37 — Case C-53/96 *Hermès* [1998] ECR I-3603, paragraphs 28 and 29.

38 — Agreement on Trade-Related Aspects of Intellectual Property Rights, contained in Annex 1C of the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1).

39 — Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 35 et seq.

concluded by the Community but by a Member State and a non-member country, and also that the controversy has been dealt with in a direct action, now on appeal, not in preliminary ruling proceedings.

75. Even if these points affect subsequent developments, to define the scope of national, Community or shared competence simply serves to confirm or, if not, to reject the argument based on the theory of the alignment of powers. It is therefore necessary to study its consequences in depth.

(b) The competence of the Community in respect of customs: development

76. In view of the scope of the Belgrade Agreement, which is limited to mutual administrative assistance in the prevention, detection and suppression of infringements of customs legislation, it is unnecessary to make a detailed analysis of the distribution of powers in that sector, from its origins in Articles 18 to 29 of the EEC Treaty, most of which have been repealed, [40] to the entry into force of the Community Customs Code in 1993.

77. The integration achieved in this field has removed from the Member States the administration of customs duties and similar charges, except the specific measures of enforcement and of suppression of infringements. [41] It is sufficient, therefore, to examine the subject-matter of the Belgrade Agreement in order to ascertain whether the national rights and powers it affects have suffered the same fate or are still exercised by those who hold them.

78. I have already alluded to the Rome Convention [42] of 1967, which laid down detailed rules for communication and methods of cooperation between the information and investigation services in connection with the prevention and suppression of infringements, and was similar in nature to the agreement under consideration here; one of the most serious criticisms it received was for excluding interpretation of its provisions by the Court of Justice. [43]

40 — By the Treaty of Amsterdam, which only left in force Articles 28 and 29 (now Articles 26 EC and 27 EC respectively). Their removal from the legislation reflected a technical rather than a political need, since, in fact, the objectives set out in those provisions had been fully realised and no longer needed to be implemented in the future.

41 — Berr, C.J., op. cit. p. 632.

42 — In point 10 of this Opinion.

43 — Vaulont, N., *La Unión Aduanera de la Comunidad Económica Europea*, OOPEC, Luxembourg, 1981, p. 12.

79. Now, the history of its development provides a very important piece of information: in 1981 Regulation No 1468/81 was adopted [44] on the basis of Article 308 EC, it absorbed into the Community legal order some basic elements of the Rome Convention of 1967. The legal surgical operation consisted in separating what was strictly functional from the customs point of view, namely, mutual administrative assistance, from the core tasks which come within the exclusive competence of the Member States, in particular the rules relating to judicial cooperation in criminal matters. [45]

80. Thus, the aforementioned Rome Convention kept judicial cooperation apart from the Community treaties and that is now incorporated in the 'third pillar'; in exchange, it lost, through amputation, the inter-State collaboration in customs administration.

81. Owing to the nature of the provision used as a legal basis — Article 308 EC — , which confers competence on the Community when differences arise between the aims pursued and the powers of its bodies, [46] making up for the lack of capacity to act on the part of the institutions of the Union in the Treaty, [47] there is no doubt as to the Community character of the powers contained in Regulation No 1468/81, [48] which have gone on to swell the list of the 'unforeseen'. [49]

82. Although the Belgrade Agreement was a bilateral treaty with a non-Member State when the events of the case occurred, it should now be called, after the turn taken by events, an implementing measure in the context of a Community power, because its international character has been left behind in the process of extension of the European customs powers.

83. In short, using the method of aligning the Court's powers of interpretation with the Community powers, as described above, it is clear that at least a significant part of the Belgrade Agreement lies within the competence of the Union.

44 — Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144, p. 1).

45 — Penultimate recital of the preamble to Regulation No 1468/81.

46 — Rossi, M., 'Artikel 308 EG-Vertrag' in Callies, C. and Ruffert, M., *Kommentar zu EU-Vertrag und EG-Vertrag*, 2nd ed. extended and revised, Neuwied and Kriftel, 2002, p. 2538.

47 — Opinion 2/94 of 28 March 1994, ECR I-1759, paragraph 29.

48 — Replaced by Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1997 L 82, p. 1).

49 — This is what they are called by Alonso García, R., *Derecho comunitario — Sistema constitucional y administrativo de la Comunidad Europea*, Ed. Centro de Estudios Ramón Areces, S.A. Madrid, 1994, p. 570.

84. Furthermore, that dynamic development continues, because the Rome Convention of 1967 has been replaced by another of 1998, [50] which regulates the role of Member States in cooperation in the field of justice and home affairs; especially relevant is Article 26, which confers jurisdiction on the Court of Justice to interpret the Convention, although with a number of significant differences in respect of ordinary preliminary ruling proceedings. [51]

(c) Particular features of the present case

85. For the benefit of those who distrust the method of applying the alignment of powers to the case, either because they consider it inappropriate where mixed agreements are not involved, [52] or because they are imbued with reverence for legal formalism and cannot imagine adapting a bilateral treaty with the characteristics of the Belgrade Agreement to the vicissitudes of the process of European integration, other equally convincing arguments should be added.

86. First, the Court has held that it has jurisdiction in respect of a bilateral treaty unconnected with the Community, even after maintaining the contrary.

87. Thus, in the judgment in *Vandeweghe*, [53] it stated that it had jurisdiction to reply to a question referred for a preliminary ruling concerning Article 2 of Supplementary Agreement No 3 to the General Convention on Social Security, concluded on 7 December 1957 between the Kingdom of Belgium and the Federal Republic of Germany, on the ground that some of the provisions of Regulation No 1408/71 [54] had relevance to that supplementary agreement. [55]

88. Secondly, Advocate General Trabucchi, in the Opinion he delivered in *Bresciani*, cited above, stressed the need to use indirectly a rule of international law, like the Convention of Yaoundé of 1963, to determine the scope of a State's undertaking,

50 — Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations (OJ 1998 C 24, p. 1).

51 — For further details, see the Explanatory Report on the Convention cited in the previous footnote, approved by the Council on 28 May 1998 (OJ 1998 C 189, p. 1).

52 — With regard to the difficulty in interpreting all agreements, including the different categories of mixed agreement, in a uniform manner, the opinion delivered by Advocate General Tesauro in *Hermès*, is helpful, especially point 18.

53 — Case 130/73 *Vandeweghe* v *Berufsgenossenschaft Chemische Industrie* [1973] ECR 1329.

54 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition Series I Chapter 1971(II), p. 416).

55 — *Vandeweghe* v *Berufsgenossenschaft Chemische Industrie*, paragraph 3.

in spite of the doubts raised regarding the Court's competence to go beyond mere interpretation and a declaration that a Community act is valid. [56]

89. These two examples show the insistence on putting the interests of judicial activity before orthodox formalism, by allowing the European and national legal systems to integrate, without infringing any rule and without jeopardising the institutional balance designed by the EC Treaty.

90. If, in order to supplement the Community rules, it is acknowledged that the Court has jurisdiction, within Article 234 EC, to interpret legal order in principle unconnected with that legal order, it can hardly be denied jurisdiction in this case, when a decision on the appeal requires the interpretation of Article 13(1) of Regulation No 1430/79, on the basis of a bilateral treaty, not because the assessment of that provision needs such interpretative assistance but because the concurrence, in this case, of the factual circumstances permitting application of that provision in accordance with the judgment in *De Haan*, cited above, in particular the infringement of a legal obligation by the Slovene authorities, depends on the correct understanding of the Belgrade Agreement.

91. It is, therefore, merely a task of integration carried out by the legal system, so the interpretation of that agreement will not be applicable *erga omnes*, but will be only instrumental.

92. In the circumstances, to conclude that the Court is not competent would, ultimately, be to yield, to bring about a denial of justice, a situation which is irreconcilable with the duties of this superior Community Court, as set out in Article 220 EC. [57]

93. In the light of the above considerations regarding the jurisdiction of the Court to interpret the Belgrade Agreement, it is only possible to confirm it, since it cannot be contested by any other means.

56 — Opinion delivered by Advocate General Trabucchi in *Bresciani* v *Amministrazione delle Finanze*, point 4. The judgment, on the other hand, did not deal with this matter.

57 — Simon, D., *Le système juridique communautaire*, Presses Universitaires de France, 2nd ed. Paris, 1998, p. 332. Also Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* [1957] ECR 81, paragraph 115.

3. Analysis of the ground of appeal

94. Nordspedizionieri and Others maintain that, according to the spirit of the treaty at issue, the Slovene authorities were required to inform the Fernetti customs authorities of any 'sensitive' transportation of goods. As they knew the movements of the lorry from 30 October 1991 and were aware that the load contained cigarettes, which in Italy are subject to a special higher duty, the Slovene border guard should have informed the Italian security forces, in accordance with Article 4 of the Belgrade Agreement.

95. As that responsibility was not fulfilled in Slovenia, the manufactured tobacco entered Italian territory illegally, to the detriment of the customs agents, who, if they had discovered the smuggling operation in time, would not have paid the corresponding duties. The Court of First Instance considered that the aforementioned provision did not impose any express duty of information in respect of the goods, a view which the appellants criticise because they believe it constitutes an error of law.

96. It is therefore necessary to examine whether that interpretation was correct, as the Commission maintains in the contested decision.

97. I share the view that the possible infringement of the Belgrade Agreement may be compared with the breach which the judgment in *De Haan* accepted to justify the existence of a special situation within the meaning of Article 13(1) of Regulation No 1430/79, since, otherwise, it would make no sense to continue analysing the ground of appeal.

98. Certainly, at first glance, the compulsory nature of the Agreement is clear enough. This is evident, for example, from its own aim, to combat infringements of the customs rules of both States and, in particular, to prevent them (Article 1(1)).

99. Furthermore, the contracting parties undertake to maintain a 'close cooperation between the customs offices on the common border' (Article 1(1)), which points to a strict application of the Agreement.

100. If that were not enough, Article 4 introduces 'special surveillance' of some kinds of person, vehicle and goods (Article 4(1)), a requirement which becomes 'extra vigilance' in respect of 'exports of those

products which attract special high fiscal charges in the territory of the other contracting party' (second paragraph of Article 4(2)).

101. However, the coercive force of these provisions diminishes when the limits of the Agreement are considered, such as the priority of simple and quick customs inspections (Article 3(b) and (c)), and the attenuation of the obligation to exercise special surveillance (Article 4(1)).

102. Particularly relevant in this connection is the 'extra vigilance' in respect of certain goods — including in any event cigarettes —, to be exercised only 'at the request (of the other contracting party)' (second paragraph of Article 4(2)), which shows that the Slovene authorities would have infringed the Agreement only, in any case, if the Italian State had asked the other party to be that conscientious.

103. Any other explanation would be unfounded, because it would be absurd for an international treaty to require a signatory State to know, without being told, which goods were subject to especially high fiscal charges in the other contracting country. A requirement of that nature would far exceed what may reasonably be expected of co-operation in good faith in international law. [58]

104. Therefore, the Court of First Instance did not err in law when it found that the Belgrade Agreement does not impose on the customs authorities of each of the two countries a duty to inform the other of the passage of goods which, in the relevant neighbouring country, are subject to special high charges.

105. In the light of these arguments, the third plea must necessarily be rejected.

C — *The fourth ground of appeal*

106. The criticism of Nordspedizionieri on this occasion refers to the absence of a statement of the grounds in the judgment under appeal, since the Court of First

58 — The circular of 14 January 1985 issued by the Ministero delle Finanze, to which the parties referred at the hearing, only contains technical instructions for implementing the Belgrade Agreement, addressed to the Italian customs authorities on the border with Slovenia, which does not invalidate my argument.

Instance, as it had not established the existence of a special situation, which is a prerequisite for the remission of customs duties, omitted to examine the second requirement of Article 13(1) of Regulation No 1430/79, relating to the absence of deception or obvious negligence. [59]

107. However, it would be illogical to claim an analysis of the cumulative conditions of a provision. When the Court of First Instance considers the possibility of a remission of the customs debt claimed from an agent, it is not required to prepare a full report on the requirements in a particular case, but to decide whether they are all satisfied, since, if one of them is not, the claim must, by law, be dismissed and any ruling on the remaining requirements is superfluous.

108. The case-law leaves no doubt as to the role of the Community courts in respect of cumulative conditions, for example, with regard to the Community's non-contractual liability, where the success of a claim depends on establishing the unlawfulness of the conduct alleged against the Community institution, the fact of damage and the existence of a causal link between the conduct and the damage complained of, so that, if any one of those conditions is not satisfied, the action must fail. [60]

109. The wording of Article 13(1) of Regulation No 1430/79 requires both of the conditions indicated to be present; therefore, the Court of First Instance did not err or fail in its duty to state grounds by omitting to examine whether the second condition was satisfied, and the fourth ground must therefore be dismissed as manifestly unfounded.

110. In the light of the analysis of the grounds of appeal, which are in part inadmissible or inoperative and in part unfounded, I have to propose that the appeal be dismissed in its entirety.

VI — Costs

111. Under Article 122, in conjunction with Article 69(2), of the Rules of Procedure,

59 — Point 34 of this Opinion.

60 — Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19; Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 14; and Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 65.

which by virtue of Article 118 apply to appeal proceedings, the unsuccessful party must be ordered to pay the costs. If, as I propose, the grounds on which the appellants rely, are dismissed, they must pay the costs of the appeal.

112. The Commission has requested that Nordspedizionieri and Others be ordered to pay the costs of the proceedings at first instance. However, the judgment under appeal has already awarded those costs against the appellants, and therefore the Community institution's new request must be considered irrelevant.

VII — Conclusion

113. In the light of the foregoing, I propose that the Court should dismiss the appeal lodged by Nordspedizionieri di Danielis Livio & C. Snc, Livio Danielis and Domenico D'Alessandro against the judgment of the Court of First Instance of 14 December 2004 in Case T-332/02 as in part inadmissible and in part unfounded, and order the appellants to pay the costs incurred in connection with it.