2. The provisions of Council Regulation (EEC) No 2779/78 on the procedure for applying the European unit of account to legal acts adopted in the customs sphere are not applicable to products which fall within the ambit of the ECSC Treaty.

3. The Commission derived from Article 74 of the ECSC Treaty and from Recommendation No 77/329 the power to issue Recommendation No 3140/78 on the anti-dumping duties charged on certain steel products, of which the Commission's communication of 30 December 1978 must be regarded as an integral part.

4. The prolonged maintenance of obligatory conversion rates for calculating the anti-dumping duty applicable to products falling within the ambit of the ECSC cannot be considered as such to be incompatible with Community law, unless it is established that the resulting calculation conflicts with the requirements of Commission Recommendation No 77/329 and, in particular, with Article 19 (3) thereof.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 26 September 1985 *

Mr President,
Members of the Court,

1. The course of the main proceedings

It appears from the opening part of the decision whereby the College van Beroep voor het Bedrijfsleven [administrative court of last instance in matters of trade and industry] made this reference to the Court that on 16 and 17 June 1982 the Collector of Import Duties at Bergh (the Netherlands) gave notice to the plaintiff in the main proceedings of the imposition of four anti-dumping duties in respect of the importation of unalloyed steel sheets and plates (Common Customs Tariff subheading 73.13 B IV (c)) from the German Democratic Republic. The Inspector of Customs and Excise at Lobith refused the plaintiff's objections to those duties, whereupon the latter lodged an appeal with the Tariefcommissie [administrative court of last instance in revenue matters]. The Tariefcommissie forwarded the relevant applications to the competent court, the College van Beroep voor het Bedrijfsleven, which, on 18 September 1984, decided to refer the following questions to the Court for a preliminary ruling:

'(a) Is Council Regulation (EEC) No 2779/78 of 23 November 1978 applicable to products falling within the ambit of the ECSC Treaty, such as those described in this judgment?

(b) If question (a) is answered in the negative, does the Commission of the European Communities derive from another provision of Community law the power to fix the conversion rates of the currencies of the Member States in relation to the ECU so as to be legally binding by means of a communication published in the *Official Journal of the European Communities*?

* Translated from the Dutch.

(c) If question (b) is answered in the affirmative, is a system in which the said conversion rates are fixed only once or a few times a year compatible with Community law as it stands at present?'

2. The basis of the contested duties

The decision requesting the ruling states that the contested duties are based on Article 1 of Commission Recommendation No 1006/78/ECSC (Official Journal 1978, L 131, p. 8) and the basic price laid down pursuant thereto with its associated conversion rate of 1 ECU = HFL 2.7136, published in Official Journal L 372 of 29 December 1981, p. 1.

However, it transpired in the course of the proceedings before this Court that, as a result of a gap in the information supplied by the Commission to the Netherlands Ministry of Economic Affairs, it was not realized that Commission Recommendation No 3140/78/ECSC of 29 December 1978 (Official Journal 1978, L 372, p. 1) was applicable and not Recommendation No 1006/78/ECSC.

With reference to the Court's judgment of 21 March 1985 in Case 172/82 (*Celestri* v *Amministrazione delle Finanze dello Stato* [1985] ECR 966), which has similar facts in that regard, the Commission stated the following at the hearing:

'The imports which gave rise to these proceedings took place on 16 and 17 June 1982. At that time Recommendation No 3140/78/ECSC of 29 December 1978 applied to the importation of certain steel products from the German Democratic Republic. That recommendation refers to the prices published on 30 December 1978 (Official Journal 1978, L 372, p. 2). That was clearly confirmed by the Court of Justice in paragraph 13 of the *Celestri* judgment. Although the decision of the College van Beroep does not mention all the relevant facts it appears justifiable to assume that, as a result, no anti-dumping duties are outstanding in this case, since the prices published on 30 December 1978 are significantly lower than those published on 29 December 1981. If that assumption is correct the proceedings no longer have any purpose.'

The plaintiff in the main proceedings, while not contesting the applicability of the recommendation, claims that a conversion rate of 1 ECU = HFL 2.60565 should have been applied (in accordance with the general conversion rate in force on the day of importation, as published by the Commission). However, according to the Commission's written observations the basic prices actually applicable, namely those published on 30 December 1978 (Official Journal L 372, p. 1), were, after conversion into Dutch guilders, even lower than the price that the plaintiff seeks to have applied — about 30% lower than the basic price published on 29 December 1981.

In response to questions put by myself at the hearing the Commission further explained that once it discovered the omission it informed the Netherlands Ministry of Economic Affairs. But to its knowlege that had not resulted in an out-of-court settlement of the case, which is, naturally, to be regretted.

Since it is for the national court alone to apply to the actual facts of the case the abstract interpretation of Community law which the Court will provide in its judgment, the Court unfortunately has no option but to answer the questions referred to it for a preliminary ruling. Those

questions, which are couched in much more general terms than that submitted in the *Celestri* case, naturally must be interpreted in such a way that the Court's answers enable the national court to resolve the dispute on the basis of the applicable Commission recommendation, Recommendation No 3140/78/ECSC. The applicability of that recommendation in the period in question has been confirmed by the Court's judgment in *Celestri.* Since that judgment has not yet been published it may be useful to forward a copy of it to the national court together with the judgment in this case.

3. Answers to the questions

3.1. *The first question*

In its first question the national court asks the Court of Justice to rule whether the general anti-dumping regulation, Council Regulation (EEC) No 2779/78 of 23 November 1978, is applicable to ECSC products.

Although the Commission confirmed, in answer to a question put by myself, that it did in fact consider itself to be bound by the GATT anti-dumping rules, it takes the view — rightly in my opinion — that the first question must be answered in the negative.

In support of its view the Commission argues that, according to Article 232 (1) of the EEC Treaty, the provisions of that Treaty are not to affect the provisions of the ECSC Treaty, in particular as regards the rights and obligations of Member States, the powers of the institutions of the ECSC and the rules laid down by that Treaty for the functioning of the common market in coal and steel.

The ECSC Treaty derogates as a *lex specialis* from the EEC Treaty. Indeed the Community legislature has made that clear in the seventh recital in the preamble to Recommendation No 77/329/ECSC of 15 April 1977 and in the 27th recital in the preamble to Recommendation No 3018/79/ECSC of 21 December 1979. According to those recitals the EEC anti-dumping rules do not apply to coal and steel products, which are governed by separate rules.

3.2. *The second and third questions*

3.2.1. *The relationship between the second and third questions*

In my view, the second and third questions put by the national court can best be answered in conjunction with one another. In the first place, it is clear from their wording that they are closely related, in the sense that what, in particular, is plainly contemplated by the second question is a system of the type referred to in the third question, in which conversion rates are fixed only once or a few times a year. Secondly, to answer the questions in conjunction with one another is the easiest way to take account of the applicable recommendation and of the Court's judgment in *Celestri.*

3.2.2. *The second question*

As far as the second question is concerned, the preamble to the applicable recommendation, Recommendation No 3140/78/ECSC, expressly refers to Articles 74 and 86 of the ECSC Treaty and to Recommendation No 77/329/ECSC (Official Journal 1977, L 114, p. 6), which largely corresponds to the anti-dumping regulation which was applicable to the EEC at the material time. That general recommendation was in turn based on Articles 74 and 86 of the ECSC Treaty. Those parts of Article 74 of the ECSC Treaty which are relevant for present purposes read as follows:

'The High Authority' (now the Commission of the European Comunities) 'is empowered to take any measure which is in accordance with this Treaty . . . and to make to Governments any recommendation which is in accordance with the second paragraph of Article 71:

(1) if it is found that countries not members of the Community or undertakings situated in such countries are engaging in dumping or other practices condemned by the Havana Charter.'

In view of the fact that it was already clear during the ECSC Treaty negotiations that the Havana Charter would not be ratified, it is naturally very unfortunate that the ECSC Treaty should nevertheless refer to it. However, the relevant part of the Havana Treaty had already been incorporated at that time into the GATT. In particular, Article 34 of the Havana Charter (relating to dumping) was incorporated in Article VI of the GATT.[1] In my view, it is beyond doubt — and accepted in legal practice — that Article 74 of the ECSC Treaty is intended to refer to Article VI of the GATT and to the GATT anti-dumping code (in this case, the binding agreement, signed on 30 June 1967, to implement Article VI of the GATT), which is based on the said Article VI and is binding also on the ECSC. In reply to a question which I put at the hearing, the Commission confirmed that it shared the view that the GATT anti-dumping codes were binding on the ECSC. However, I consider that the Court's answer needs merely to refer to Articles 74 and 86 of the ECSC Treaty and to the relevant general recommendation, No 77/329/ECSC, which is based thereon.

I therefore propose that the Court should answer the national court's second question in the following terms:

'The Commission of the European Communities derives from Articles 74 and 86 of the ECSC Treaty and the relevant general recommendation, No 77/329/ECSC (Official Journal 1977, L 114, p. 7), which is based thereon, the power to make recommendations such as that applicable in this case, Recommendation No 3140/78/ECSC (Official Journal 1978, L 372, p. 1) concerning the anti-dumping duties imposed on certain iron and steel products.'

3.2.3. *The third question*

Contrary to the assumption made by the national court as a result of the misunderstanding about the applicable law, the applicable recommendation provides that 'the amount of the anti-dumping duties ... shall henceforth be equal to the amount by which the effective price (basic price plus extras) established by contract, free-at-frontier duty-paid, is lower than the effective price (basic price plus extras) as published by the Commission on 30 December 1978 for the product in question'. The effective prices in question for products falling within subheading 73.13 B IV (c) are set out on pages 17 and 18 of Official Journal 1978, L 372 and the corresponding conversion rates on page 2 thereof. It is not possible to say with certainty on the basis of the national court's decision precisely which product is involved in this case. However, in order to answer the question put by the national court it is important to establish that the effective price in this case, expressed, in ECU per tonne, is determined by reference to a constant conversion rate of 1 ECU = HFL 2.7238. I consider that the Court might possibly assume in this case, as it decided in paragraph 15 of the judgment in *Celestri*, that the third question was designed solely for the eventuality that the communication of 29 December 1981, on which the contested duties were based, was applicable. Since that communication was not applicable in this case, whilst the

1 — For further particulars see Quadri-Monaco-Trabucchi, *Commentario CECA II*, pp. 1075 to 1978. As regards the ECSC system in force in the material period, see also Beseler, *Die Abwehr von Dumping und Subventionen durch die Europäischen Gemeinschaften*, 1980, pp. 20 *et seq.* and 26 *et seq.*

communication of 30 December 1978, which was in fact applicable, presumably benefits the plaintiff in the main proceedings in the same way as Celestri benefited (see paragraph 7 of the judgment in that case), I consider that, strictly speaking, the national court's third question need not be answered. In principle, however, the issue raised by the national court in its third question arises even more acutely where, as in this case, the conversion rates are of long standing.

Should for that reason the Court decide to answer the third question as recast to suit the applicable recommendation, I would observe that the Commission's unreservedly affirmative answer to that question is not, in my view, convincing if the anti-dumping duty imposed conflicts with Article 19 (3) of (general) Recommendation No 77/329/ ECSC as a result of the ECU's actual value having been lower for some considerable time at the date of importation, (and hence at the date when the duty was imposed) than the level at which it was fixed on 30 December 1978. The said Article 19 (3) provides that 'an anti-dumping duty, whether definitive or provisional, shall not exceed the margin of dumping established' and that an anti-dumping duty 'should be less than the margin if such lesser duty would be adequate to remove the injury'. If, as a result of exchange-rate movements or for other reasons that injury ceases to exist or diminishes, the anti-dumping duty should, in my view, be adjusted accordingly with the utmost celerity. Even the Commission finally admitted in response to questions put by myself at the hearing that from time to time price adjustment was necessary and unavoidable on account of such developments. That must also be true of the conversion rates employed in that connection. However, I concur with the Commission's view that legal certainty and the danger of trade being artifically diverted may warrant anti-dumping duties not being calculated on the basis of the daily ECU rates but being periodically adjusted to take account of clearcut changes in factors which are relevant for the purposes of assessing injury. In view of the virtual certainty that the third question is merely of academic interest I propose that the issues raised should be tackled in general terms only and the question answered as follows:

'The question whether the application, as a result of Recommendation No 3140/78/ ECSC, of the conversion rates published on 30 December 1978 to imports in 1982 is consonant with Community law needs to be considered only if in practice the outcome would be the application of anti-dumping duties which might conflict with Commission Recommendation No 77/329/ ECSC of 15 April 1977 (Official Journal 1977, L 114, p. 6) and, in particular, with Article 19 (3) thereof. The protracted application of legally binding conversion rates in anti-dumping measures for ECSC products cannot be considered to conflict *per se* with Community law, regardless of the effects on the level of an anti-dumping duty.'

4. Conclusion

In sum I propose for the reasons given above that the Court should answer the questions referred to it as follows:

'(a) Council Regulation (EEC) No 2779/78 of 23 November 1978 does not apply to products which fall within the ambit of the ECSC Treaty, such as those involved in this case.

(b) The Commission of the European Communities derives from Articles 74 and 86 of the ECSC Treaty and the relevant general recommendation, No 77/329/ECSC (Official Journal 1977, L 114, p. 7), which is based thereon, the power to make recommendations such as that applicable in this case, Recommendation No 3140/78/ECSC (Official Journal 1978, L 372, p. 1) concerning the anti-dumping duties imposed on certain iron and steel products.

(c) The question whether the application, on the basis of Recommendation No 3140/78/ECSC, of the conversion rates published on 30 December 1978 to imports in 1982 is consonant with Community law needs to be considered only if in practice the outcome would be the application of anti-dumping duties which might conflict with Commission Recommendation No 77/329/ECSC of 15 April 1977 (Official Journal 1977, L 114, p. 6) and, in particular, with Article 19 (3) thereof. The protracted application of legally binding conversion rates in anti-dumping measures for ECSC products cannot be considered to conflict *per se* with Community law, regardless of the effects on the level of an anti-dumping duty.'