the time of entry into force of the Convention or subsequently, have become generic in the State of origin, they are justified because they fall within the scope of the derogations authorized by Article 36 on grounds of the protection of industrial and commercial property. Their objective, which is to prevent producers of a Member State from using the geographical names of another Member State of the Community, thereby taking advantage of the reputation attaching to the products of the undertakings established in the regions or places indicated by those names, is intended to ensure fair competition.

Furthermore, those prohibitions do not conflict with the obligation on the part of the Member States to have due regard for fair and traditional user in the other Member States, since that obligation cannot work to the advantage of operators established in a State who use names referring to regions or places in another State.

REPORT FOR THE HEARING
in Case C-3/91 *

I — The 1973 Franco-Spanish Convention, the facts in the main proceedings and the questions referred to the Court for a preliminary ruling

1. Article 1 of the Convention between the French Republic and the Spanish State (now the Kingdom of Spain) on the protection of designations of origin, indications of provenance and names of certain products, signed in Madrid on 27 June 1973 (*Journal Officiel de la Republic Française* of 18 April 1975, p. 4011, hereinafter the 'Franco-Spanish Convention'), provides that 'Each Contracting State shall take any necessary measures to ensure the effective protection of natural and manufactured products originating in the territory of the other State against unfair competition...and to ensure effective protection of the names specified in Annexes A and B to this Convention ...'.

2. According to Article 3 of the Convention, 'the names specified in Annex B shall, in the territory of the French Republic, be reserved exclusively to Spanish products or goods and shall be used there only in accordance with the conditions laid down in the legislation of the Spanish State ...'.

3. Article 5(1) requires the use, in contravention of the provisions of the Convention, of the names specified in Annexes A and B to

* Language of the case: French.

be suppressed and, according to Article 5(2), the same requirement applies even where the names specified in the annexes to the Convention '... are used in translation or with an indication of the true provenance or with the addition of such terms as "style", "kind", "type", "imitation" or "similar".'

4. Among the protected Spanish names listed in Annex B to the Convention are 'Turrón de Alicante' and 'Turrón de Jijona'.

5. In France the companies SA LOR and Confiserie du Tech manufacture and sell in Perpignan a range of confectionery products which include 'tourons Alicante' and 'tourons Jijona', manufactured by the former, and 'tourons type Alicante' and 'tourons type Jijona', manufactured by the latter.

6. The Asociación de Empresas Exportadoras de Turrones de Jijona (Association of 'Turrón de Jijona' Exporting Firms, hereinafter 'Exportur'), formed in 1975 in Alicante with 'the exclusive aim of launching and promoting the export of all kinds of "turrones" and sugar confectionery ...', relying on the Franco-Spanish Convention of 1973, unsuccessfully applied to the judge responsible for granting interim relief for an injunction prohibiting the two French undertakings from using the designations or indications in question.

7. Exportur subsequently brought the matter before the Tribunal de Commerce (Commercial Court), Perpignan, which dismissed its application in its entirety. On 3 August 1989 Exportur appealed against that judgment.

8. The Cour d'Appel (Court of Appeal), Montpellier, before which the appeal was brought, found in the first place that the designations used by the undertakings LOR and Confiserie du Tech, namely 'touron Alicante', 'touron Jijona', 'touron type Alicante' and 'touron type Jijona', did come within the provisions of the 1973 Convention.

9. Since Spain acceded to the Community after the signature of the 1973 Franco-Spanish Convention, it followed, in the present case, according to the Cour d'Appel, Montpellier, that Community law took precedence over national law. The provisions of Article 234 of the EEC Treaty could not be relied upon by French natural or legal persons because the 1973 Convention was signed after the EEC Treaty to which France acceded. Nor could Article 234 be relied on by Spanish natural or legal persons, since Spain, by becoming a signatory to the Treaty, adopted the rules which it laid down and thereby waived, with respect to the other Member States, provisions of earlier agreements which might be inconsistent with it. The question which arose, therefore, according to the Cour d'Appel, concerned the compatibility of the 1973 Convention with Community law.

10. Since the provisions of the convention in question were binding in like manner on the nationals of both States and contained no national determination, the national court expressed some doubts as to whether they constituted measures having equivalent effect within the meaning of Article 30 of the Treaty. Moreover, even if the provisions could be classified as measures having equivalent effect, the question would arise whether they ought not to come within the derogation provided for in Article 36 of the Treaty, which authorizes 'prohibitions or

restrictions ... justified on the grounds of ... the protection of industrial and commercial property'.

11. Accordingly, the Cour d'Appel, by judgment of 6 November 1990, stayed the proceedings and, pursuant to Article 177 of the EEC Treaty, referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

'1. Are Articles 30 and 34 of the EEC Treaty to be understood as prohibiting the measures for the protection of designations or indications of origin or provenance laid down in the Franco-Spanish Convention of 27 June 1973, in particular the designations or indications "Alicante" or "Jijona" for "tourons"?

2. If so, is Article 36 of the Treaty to be interpreted as authorizing the protection of those designations or indications?'

12. The judgment of the Cour d'Appel was registered at the Court Registry on 8 January 1991.

II — Written Procedure

13. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 15 April 1991 by SA LOR and Confiserie du Tech, respondents in the main proceedings, represented by F. Greffe, of the Paris Bar, on 26 April 1991 by the Spanish Government, represented by A. Navarro González and G. Calvo Díaz, acting as Agents, on 26 April 1991 by the United Kingdom, represented by J. E. Collins and E. Sharpston, acting as Agents, on 30 April 1991 by the German Government, represented by J. Karl and A. von Mühlendahl, acting as Agents, and on 19 April 1991 by the Commission of the European Communities, represented by its Legal Adviser, R. Wainwright, acting as Agent.

14. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — Written observations submitted to the Court

Observations of the defendants in the main proceedings

15. SA LOR and Confiserie du Tech observe first of all that they have been manufacturing and marketing for very many years, as part of their Roussillon specialities, 'tourons' under the names 'touron Jijona' and 'touron Alicante'.

16. They go on to argue that it follows from the case-law of the Court concerning recourse to the derogations laid down in Article 36 of the Treaty that the protection of industrial or commercial property rights may justify a restriction of the freedom of intra-Community trade only on strict conditions, which are also valid with respect to the protection of designations of origin and indications of provenance.

17. The Court, they maintain, has laid down two rules regarding the protection of those names:

(a) a designation of origin requires that the products to which it refers actually possess characteristics and qualities attributable to the geographical area from which they come.

(b) longstanding and lawful user of those names by third parties must itself be protected.

18. As regards the first of those two rules, the respondents in the main proceedings refer to the judgment of the Court in Case 12/74 (*Commission* v *Germany* [1975] ECR 181) in which the Court held that the names 'Sekt' and 'Weinbrand', which were intended to designate, respectively, sparkling wines and spirits obtained by distilling wine, did not qualify as either designations of origin or indications of provenance, on the following grounds:

— the 'area of origin' of the grapes used 'does not show homogeneous natural features which distinguish it in contrast to adjacent areas', and

— the method of production for such products may, indeed, play some part in determining their characteristics but 'it is not alone decisive, independently of the quality of the grape used, in determining its origin'.

19. There may be further derived from that judgment the general rule that the geographical locality of the origin of a product must impart to it a specific quality and specific characteristics which are such as to distinguish it.

20. The conditions established by that judgment of the Court are not satisfied in the present case.

21. The respondents in the main proceedings observe in this regard firstly that the standards for the production and marketing of 'turrones and mazapanes' in Spain were only laid down by Royal Decree No 1787 of 14 May 1982, as amended by Royal Decree No 1167 of 21 September 1990, which means that until that time these products were not the subject, in Spain itself, of any production and marketing standard prescribed by legislation.

22. Moreover, the 'Turrón de Jijona' has only recently benefited from the rules for the protection of designations of origin under a regulation ratified by the authorities of the Autonomous Community of Valencia, and this designation of origin is not yet recognized in the whole of the territory of Spain, while recognition as a designation of origin does not seem to have been accorded by the Spanish authorities to 'Turrón de Alicante'. Furthermore, 'turrones de Jijona' are made in Alicante and vice versa, and not always on the basis of fixed rules as to the proportions of their ingredients.

23. The two French companies maintain that the Jijona and Alicante 'tourons' cannot therefore derive their specific qualities from

the place where they are produced, and that they are merely types of 'touron' produced by certain methods which are not necessarily linked to a given geographical area. The names 'touron Jijona' and 'touron Alicante' designate *types of 'touron'*, the former containing ground almonds and being of a soft consistency, while the second is a brittle speciality made with whole almonds.

24. Moreover, there is no reason to believe that the use of ingredients such as honey or almonds from the geographical area around Alicante or Jijona characterize the products in question. The disputed names are therefore not designations of origin, since the products which they designate do not possess qualities and characteristics attributable to the geographical area from which they come. Nor are they indications of provenance, because, to be considered as such, the geographical area of origin of a product must impart to it a specific quality and specific characteristics of such a nature as to distinguish it.

25. It follows that the disputed names are *generic names*, and prohibition of their use constitutes a measure having equivalent effect (Case 193/80 *Commission* v *Italy* [1981] ECR 3019 and Case 182/84 *Miro* [1985] ECR 3731). Furthermore, in so far as they indicate certain types of tourons and constitute generic terms, they are necessary in order to identify the products in question for the benefit of the consumer, so that to reserve them solely for Spanish producers is unlawful.

26. As regards the interests of protection against unfair competition and of consumer protection, the respondents in the main proceedings maintain that, in order to avoid confusion concerning the provenance of the products in question, they use the terms 'touron Alicante', 'touron Jijona', 'touron type Alicante' and 'touron type Jijona', and not 'touron *de* Alicante' and 'touron *de* Jijona'. Thus the interests in question are taken into account, since the ingredients of these products and their quality are not significantly different from those made in Alicante or Jijona (Case 298/87 *Smanor* [1988] ECR 4489).

27. As regards the rule according to which longstanding and lawful user of names by third parties must be protected, the respondents in the main proceedings refer to the judgment of the Court in Case 16/83 (*Prantl* [1984] ECR 1301) in which, as regards the manner in which wines are presented to the public, the Court held that, in the system of the common market, consumer protection and fair trading must be guaranteed with regard on all sides for the fair and traditional practices observed in the various Member States.

28. They maintain, so far as this is concerned, that the production of 'tourons' is an age-old activity in the French Roussillon and they have themselves been using the disputed names for very many years, before the entry into force of the Franco-Spanish Convention.

29. LOR and Confiserie du Tech maintain that the Convention could have consequences incompatible with the principle of

unity of the common market, in so far as a product lawfully and traditionally is manufactured and marketed, under one of the disputed names, in another Member State of the Community could not be sold in France or Spain. Moreover, the provisions of the Convention imply a prohibition on the use of those names for products manufactured in France but intended for export to other Member States of the Community.

30. Finally, LOR and Confiserie du Tech maintain that, in any case, the 1973 Convention cannot be relied upon, since Article 234 of the Treaty only concerns agreements between a Member State and a non-member country. On the other hand, Member States may not derogate from the rules of Community law, and this so also in the case of an agreement concluded prior to the accession of the Member State in question (Case 121/85 *Conegate* v *HM Customs and Excise* [1986] ECR 1007 and Case 812/79 *Attorney General* v *Burgoa* [1980] ECR 2787).

31. The respondents in the main proceedings submit finally that the formulation of the preliminary questions does not seem to enable an appropriate answer to be given, in so far as the essential question concerns, in reality, the conditions which the products must satisfy in order to be accorded protection by means of designations of origin.

32. They propose, therefore, that the Court answer the questions as follows:

'1. Recognition of a designation of origin or indication of provenance may be accorded if:

— a geographical area is delimited which has special features as regards soil, climate and flora ... which play a part in conferring an identity and qualities peculiar to the product in question;

— the essential raw materials for the manufacture of the product necessarily come from the geographical area in question.

A method of manufacture cannot suffice to justify a designation of origin.

2. An age-old, lawful and fair production of products corresponding to products covered by a designation of origin in another Member State cannot be adversely affected by designations of origin which came into being only very much later.'

Observations of the Spanish Government

33. The Spanish Government states that the fundamental objective represented by the free movement of goods, expressed in Article 30 of the EEC Treaty, does not preclude the possibility of allowing derogations from that principle, as is evidenced by Article 36 of the Treaty. Such derogations must nevertheless remain the exception and Article 36 must be

strictly interpreted (Case 95/81 *Commission* v *Italy* [1982] ECR 2187).

34. Measures designed to protect the rights and interests guaranteed by the system of industrial and commercial property constitute such a derogation. According to the case-law of the Court, the restrictions on the free movement of goods that such protection entails are compatible with the Treaty only to the extent to which such exceptions are justified for the purpose of safeguarding rights which constitute the specific subject-matter of the aforementioned property, so that, whilst the Treaty does not affect the existence of rights recognized by the legislation of a Member State in matters of industrial and commercial property, yet the exercise of those rights may nevertheless, depending on the circumstances, be restricted by the provisions of the Treaty.

35. The Spanish Government cites the judgment of the Court in Case 119/75 (*Terrapin* v *Terranova* [1976] ECR 1039) as authority for concluding that it is compatible with the provisions relating to the free movement of goods that an undertaking established in a Member State, by virtue of a right to a trade-mark or a right to a commercial name which are protected by the legislation of that State, to prevent the importation of products of an undertaking established in another Member State and bearing by virtue of the legislation of that State a name giving rise to confusion with the trade-mark and commercial name of the first undertaking, provided that there are no agreements restricting competition and no ties between the undertakings and that their respective rights have arisen independently of one another.

36. These principles apply in the present case. The names 'Alicante' and 'Jijona' constitute collective marks, and, by virtue of the provisions of both the 1973 Convention and the previous Spanish legislation, are designations of origin which permit derogation from the principle of the free movement of goods in order to protect industrial and commercial property.

37. The Court held in *Commission* v *Germany* (Case 12/74, cited above) that, in order to be protected, designations of origin and indications of provenance must describe a product coming from a specific geographical area and must ensure that the interests of the producers concerned as well as those of the consumer are safeguarded. Although the Treaty therefore does not stand in the way of the power of each Member State to legislate in matters of indications of provenance, it does prohibit Member States from introducing new measures of an arbitrary and unjustified nature.

38. Similarly, the Spanish Government goes on to say, in the absence of Community rules, obstacles to the free movement of goods resulting from disparities between national rules must be accepted, according to the case-law of the Court, in so far as such rules, applying to national and imported products alike, may be justified as being necessary in order to satisfy imperative requirements of, *inter alia*, consumer protection and fair trading, fair trading being understood as regard on all sides for the fair and traditional practices observed in the various Member States (Case 182/84 *Miro* and Case 16/83 *Prantl*, cited above).

39. The Spanish Government refers to the concept of measures having equivalent effect, as explained in Directive 70/50/EEC of 20 December 1969 (OJ, English Special Edition 1970 (I), p. 17) and interpreted in the case-law of the Court, and concludes that the provisions of the 1973 Convention in no way infringe the principle stated in Article 30 of the Treaty, in view of the derogation constituted by Article 36.

40. As regards the answer to the question as to which rules are applicable in the present case, those of the 1973 Convention or the Community rules, the Spanish Government observes in the first place that, according to Article 234 of the Treaty, the Convention in question may be relied upon only in so far as its provisions are not contrary to Community law.

41. The aims of the Convention are also pursued by Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States in relation to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1), inasmuch as Article 15(2) provides that the prohibition of the application of non-harmonized national provisions does not cover national provisions enacted to protect industrial and commercial property. The 1973 Convention therefore comes fully within the scope of that article and may be relied upon within the context defined by Community law.

42. This is confirmed by the proposal for a Council Regulation, submitted by the Commission on 21 December 1990, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1991 C 30, p. 9). The proposal sets forth, in the third and seventh recitals, the principle of regard for the quality of foodstuffs and the need to adopt Community rules which would allow the ever more frequent use of geographical indications and designations of origin.

43. Thus the rules contained in the proposal for the regulation in question would totally protect the names 'Alicante' and 'Jijona' (Articles 3 and 18). The names at issue should therefore be protected as such; to omit the preposition 'de' when using them would not be sufficient, contrary to what the respondents in the main proceedings claim.

44. In conclusion, protection of fair competition and consumers requires, as does respect for industrial property rights, the application of the 1973 Convention, which is compatible with the Community provisions.

45. The Spanish Government therefore proposes that the Court's reply should be that Articles 30 and 34 of the Treaty are not to be interpreted as prohibiting the measures for the protection of designations of origin or provenance laid down in the Franco-Spanish Convention of 27 June 1973, in particular the designations 'Alicante' or 'Jijona' for 'turrones', and that, should the Court consider that the first question must be answered in the affirmative, Article 36 of the Treaty authorizes the protection of those designations.

Observations of the United Kingdom

46. The United Kingdom notes in the first place that the wording of the 1973 Convention is such that it applies also to the sale, under the names in question, of products legitimately manufactured in other Member States not parties to the Convention and exported to France.

47. As to the facts of the case, the United Kingdom states that it emerges from the order for reference that 'turrón de Alicante' and 'turrón de Jijona' represent certain recipes for confections, whose principal distinctive ingredients, namely honey and almonds, originate in different regions or even different countries. This was alleged by Confiserie du Tech before the national court and was not contested by Exportur. Furthermore, the labelling of the products in question indicate that they are manufactured in France and not in Spain.

48. Moreover, the United Kingdom is of the opinion that the proposal for a Council regulation on the protection of geographical indications and designations of origin underlines the undesirability, from the point of view of the free movement of goods, of a plethora of bilateral agreements, varying in their scope, that may cover generic names as well as genuine geographical designations of origin.

49. In order to answer the questions from the national court, it is necessary to examine first of all whether the names at issue do indeed represent geographical designations of origin or whether, whatever the original position may have been, they have now become generic terms.

50. The United Kingdom notes in that connection that it is not unusual for successful foodstuffs produced in one Member State to be imitated in other Member States. If appropriate labelling ensures that such 'imitations' are clearly distinguishable from the originals on whose recipe they are based, there is no risk of fraud or deception and consumer choice is enhanced, and so the original name becomes generic (Case 286/86 *Ministère Public* v *Deserbais* [1988] ECR 4907, especially paragraph 12).

51. As it is necessary to formulate a definition in this regard, it could be considered, according to the United Kingdom, that a *genuine geographical description of origin* covers only those products that possess distinctive characteristics produced by the distinctive features of the place from which the name derives, whereas a *generic name* is one which, although it may indicate where the food was first produced, has become the common name for a particular process, type or style of foodstuff, irrespective of its place of manufacture. This definition would be in keeping with the Court's judgment in Case 12/74 *Commission* v *Germany*, above.

52. On the basis of those considerations, it appears from the order for reference that the

names at issue have ceased to possess the close link with the places of origin indicated by them and that they have become generic names.

53. As regards the application of Article 30 of the Treaty, the United Kingdom maintains that, according to the case-law of the Court, any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having equivalent effect (Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837). Furthermore, under the terms of Article 2(3) of Directive 70/50/EEC, measures which 'confine names which are not indicative of origin or source to domestic products only' constitute measures having equivalent effect.

54. The same reasoning applies mutatis mutandis to a bilateral convention which reserves the use in France of the names in question only to products manufactured in Spain, even though the ingredients used in the manufacture of those products only rarely come from the geographical region concerned and the labelling used adequately informs the consumer.

55. As to the application in the present case of Article 36 of the Treaty, the United Kingdom maintains that there is nothing to suggest that in the present case the Spanish producers of the products in question have any registered industrial, intellectual, commercial or trademark property rights. Moreover, the names in contention have become generic in nature and cannot qualify for a derogation in favour of designations of origin or indications of provenance. The restrictions resulting from the 1973 Convention are not justified under Article 36 of the Treaty.

56. In order to answer the question whether the restrictions in question must be justified by the 'mandatory requirements' relating to fair trading and consumer protection, as developed by the Court in Case 120/78 (*REWE Zentrale* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, 'Cassis de Dijon'), the United Kingdom considers that it is necessary to look at the nature of the product in question and the measure used to protect it.

57. The United Kingdom notes that the Court has consistently held that Member States are not allowed to restrict a generic term to one national variety alone to the detriment of other varieties lawfully produced in other Member States (Case 12/74 *Commission* v *Germany*, cited above, Case 193/80 *Commission* v *Italy*, cited above, Case 182/84 *Miro*, cited above, Case 178/84 *Commission* v *Germany* [1987] ECR 1227, and Case 286/86 *Deserbais*, cited above). In the same way, the restriction of the use of the designations in question is not justifiable.

58. Moreover, the total ban on the use of the disputed names for products other than those manufactured in Spain does not satisfy

the requirement of proportionality. Adequate labelling would enable the consumer to choose between the original product, which might be more expensive, and an imitation (Case 90/86 *Zoni* [1988] ECR 4285).

59. Furthermore, Council Directive 79/112/EEC, mentioned above, already offers adequate protection to producers and consumers. The additional and sweeping protection afforded by the 1973 Convention is disproportionate to the objective pursued, a fortiori since the very use of terms such as 'façon', 'type', 'imitation', and so forth, is excluded.

60. As regards, lastly, the application of Article 34 of the Treaty, the United Kingdom maintains that the Franco-Spanish Convention does not apply exclusively to exports and cannot be regarded as a national measure which has as its specific object or effect the restriction of patterns of exports in such a way as to provide a particular advantage for national production (Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409). Article 34 may therefore not be applied to the present case.

61. The United Kingdom therefore proposes that, in answer to the questions referred to it, the Court should rule that Article 30 of the Treaty is to be understood as prohibiting a Member State from applying a bilateral agreement restricting the use of a geographical product name that has become a generic product name to products manufactured in the Member State in which the geographical name originated; and that such restrictions may be justified neither by reference to the exceptions contained in Article 36 of the Treaty nor, provided adequate labelling is used, by reference to the 'mandatory requirements' of ensuring fair trading and/or consumer protection.

Observations of the Government of the Federal Republic of Germany

62. The Government of the Federal Republic of Germany states, as a preliminary point, that the present case is of considerable importance because it is the first time that the Court has to rule on the compatibility with the Treaty, in particular with the provisions on the free movement of goods, of bilateral conventions concluded between Member States and relating to the protection of indications of provenance and designations of origin. The Federal Republic has itself concluded similar conventions with France in 1960, Italy in 1963, Greece in 1964 and Spain in 1970, under which it is prohibited to use in Germany precisely the names 'Turrón Alicante' and 'Turrón Jijona'. Moreover, several other Member States have also concluded similar treaties between themselves or with non-member countries.

63. The German Government maintains that, so long as there is no Community legislation on the subject, as is the case here, the protection of geographical designations of the products in question is a matter for the Member States to regulate, whether by means of national legislation or, as in the present case, of bilateral agreements

concluded with other Member States. There is, however, in this area framework legislation at Community level, consisting of Directive 79/112/EEC, mentioned above, and Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising. The Franco-Spanish Convention is compatible with the provisions of those directives.

64. It might be asked in the first place whether the Convention can infringe Article 30 of the Treaty, inasmuch as cross-border trade is not involved.

65. The convention in question is in conformity with the general provisions of the Treaty. According to the case-law of the Court, a measure does not fall under the prohibition contained in Article 30 when it applies to national and imported products alike and is justified on the grounds of consumer protection and fair trading. These conditions are satisfied in the present case.

66. The prohibition on the use of the names at issue for products having other origins applies to national and foreign products alike. Moreover, it follows from the very wording of the names in question that these are designations of origin or indications of provenance which conform to the criteria laid down by the Court in Case 12/74 *Commission* v *Germany*, cited above. The measures adopted to protect them are therefore justified, according to the case-law of the Court, on grounds of consumer protection and fair trading.

67. As regards the case decided by the judgment just mentioned, the German Government takes the view that, as Community law now stands, it is not possible to generalize the considerations set out in the judgment beyond the circumstances of that case and that, even where the names in question are 'simple' geographical names for which there is no direct link between the geographical origin and the specific quality or specific characteristics of the products concerned, they are names deserving of protection.

68. The German Government considers that, generally speaking, third parties who are not locally resident cannot have a legitimate interest in using a geographical name which is not a generic or invented name. Otherwise, the result would be that the consumers would be misled and unfair trading encouraged to the detriment of the inhabitants of the locality concerned (Case 16/83, *Prantl*, cited above). The circumstances in the present case do not fall within the scope of the exception to the protection of indirect indications of origin recognized in the abovementioned judgment since the names at issue had only been used by the respondents in the main proceedings after the entry into force of the 1973 Convention.

69. Those considerations apply equally with regard to the prohibition on the use of the names in question in conjunction with indications such as 'type', 'façon', 'imitation', and so forth, on the ground that their use with such distinguishing indications is liable to deceive purchasers. The use of such distinguishing additions is also prohibited in the proposal for a Council regulation (OJ 1991 C 30, p. 9, mentioned above).

70. On the basis of the foregoing considerations, the German Government maintains that the reservation of the names in question to Spanish products does not constitute a measure having equivalent effect, prohibited by the Treaty.

71. In the light of the position which it has taken on the first preliminary question, the German Government would simply note, in the context of the second question put in the alternative by the national court, that the protection of indications of provenance and designations of origin come within the scope of the protection of industrial and commercial property within the meaning of Article 36 of the Treaty and that measures relating to that protection are, in any event, justified under that provision.

Observations of the Commission

72. The Commission, as a preliminary point, agrees with the assessment of the Cour d'Appel, Montpellier, which pointed out that the provisions of the 1973 Convention cannot prevail against contrary provisions of the Treaty. According to the case-law of the Court (Case 121/85 *Conegate*, cited above), Article 234 only covers rights and obligations arising from agreements concluded and established between Member States and non-member countries prior to the Treaty. Conventions between Member States may not therefore be relied upon in order to justify restrictions of intra-Community trade.

73. The Commission goes on to state that in the situation under consideration by the national court, there is no actual or potential importation operation. Interpretation of Article 30 therefore is not at first sight likely to provide the national court with anything of use for the purpose of deciding the case before it.

74. The rules of the Convention could nevertheless have an impact on trade, since they are equally applicable in the case of a product manufactured in another Member State and marketed in France. It may therefore be useful, and in conformity with the case-law of the Court, to consider the compatibility of the measures for the protection of the names in question with Article 30 (Case 298/87 *Smanor*, cited above).

75. Referring to the definition given by the Court in Case 8/74 *Dassonville*, cited above, the Commission maintains that rules which prohibit the use of a particular trade description for certain products create, where they apply to imported products, an obstacle to imports. The Court has so held on several occasions in relation to names such as Sekt, Weinbrand, vinegar, Edam, beer, yoghurt and pasta.

76. The protection of the names in question, because it applies to national and imported products alike, might not be contrary to Article 30, despite its obstructive effect, if it is justified by imperative requirements

relating, in accordance with the case-law of the Court, to the protection of consumers and fair competition, and also of commercial property which, according to the Commission, encompasses the first two categories.

77. As regards the protection of designations of origin and indications of provenance, the Commission refers to the judgment of the Court in Case 12/74, cited above, as well as to its abovementioned proposal for a Council regulation.

78. The proposal provides for the creation of a Community system of protection for agricultural products and foodstuffs bearing a protected geographical indication (name of a region, specific place or, in exceptional cases, a country) or a protected designation of origin, where the quality, characteristics or reputation of the product in question are essentially or exclusively due to the geographical environment, with its inherent natural and human components.

79. The Commission therefore considers that the prohibition on the use of the names in question could be justified only where the tourons manufactured in those regions possess qualities or a reputation due to natural or human factors peculiar to the geographical environment. Such would be the case, for example, where those tourons were manufactured from products possessing qualities peculiar to the area of production, or according to traditional recipes requiring staff having particular qualifications or experience. It is for the national court to decide this question of fact.

80. As regards the facts, the Commission provides the following information: the composition of 'turrones' is regulated in Spain by Royal Decree 1787 of 14 March 1982 (*Boletín del Estado* No 183 of 2 August 1982, p. 20908), as amended by Royal Decree 1167 of 21 September 1990 (*Boletín del Estado* No 231 of 26 September 1990, p. 27967), and the notification of the draft of the latter decree had given rise to the formulation by the Commission of an opinion stating that the specifications laid down for the national product could not apply to the imported product where this was legitimately manufactured and marketed in another Member State.

81. Moreover, according to the Commission's information, it would seem that the names in question are not reserved in Spain to products originating exclusively in those places, and, for the normally discriminating consumer, the 'turrón de Alicante' describes a hard 'turrón' and 'turrón de Jijona' a soft one. If such is the case, the prohibition on the use of those names is unjustified and therefore contrary to Article 30 of the Treaty, and the consumer would be sufficiently protected by appropriate labelling.

82. The Commission considers that Council Directive 79/112 may provide the national court with relevant material. The directive contains unconditional and sufficiently clear provisions rendering it directly applicable as

regards both national and imported products (Case 98/86 *Mathot [1987] ECR 809).*

83. For the purposes of the application of the abovementioned directive, a distinction must be made between geographical names which have become generic, and those which correspond to products whose characteristics and qualities are due to the geographical location from which they come. The use of a geographical name which has become generic is not liable to mislead the consumer as to the product's origin (Article 2) and the risk of mistake disappears with appropriate labelling (Article 3).

84. As regards the applicability of Article 34 of the Treaty, the Commission states that the Court has consistently held that a measure falls within the scope of this provision where it specifically restricts the patterns of exports and favours national products, providing a particular advantage for them. The 1973 Convention does not have as its object or effect to restrain the export of French products.

85. The Commission therefore proposes that the questions be answered as follows:

'1. Articles 30 and 34 of the Treaty do not preclude the application of rules governing the marketing within a Member State of products originating in that State and not having been the subject of importation.

2. Articles 30 and 36 of the Treaty, and also Directive 79/112/EEC, preclude the application to a product imported from a Member State of rules prohibiting the use of a geographical indication where it does not reflect qualities, characteristics or a reputation due to the geographical environment with its inherent natural and human factors. If a risk exists that the consumer might be misled as to the true origin of the product, mention of the place of origin or provenance must appear on the label.'

C. N. Kakouris
Judge-Rapporteur