OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 7 March 1989 *

Contents

page

General context 1798

No reason to hold the action inadmissible 1801

Part I: The question of judicial review in the context of Regulation No 2641/84 1802

A — The case-law of the Court with regard to imports from non-member countries involving dumping or subsidization 1802

B — Regulation No 2641/84 on illicit commercial practices compared with the regulations on dumping and subsidization 1803

The reference to international law 1804

The reference to the interests of the Community 1809

C — Conclusion with regard to Part I of the Opinion 1813

Part II: The exercise of judicial review in practice 1813

A — Were specific GATT provisions infringed? 1814

Alleged infringement of Article III(1) of the GATT 1814

Alleged infringement of Article XI(1) of the GATT as regards the system of guaranteed margins 1815

Alleged infringement of Article XI(1) of the GATT as far as the sporadic suspension of export licences is concerned 1817

Alleged infringement of Article XX of the GATT 1818

B — The alleged infringement of Article XXIII of the GATT on procedure 1819

Alleged infringement of Article XVI in conjunction with Article XX and of the preamble in conjunction with Article XXIII of the GATT 1821

* Original language Dutch

Alleged infringement of legitimate expectations in conjunction with Article XXIII of the GATT 1821

Alleged infringement of Article XXXVI setting out the general objectives of the GATT 1822

C — Conclusion with regard to Part II of the Opinion 1823

Costs 1823

General conclusion 1823

Mr President,
Members of the Court,

1. On 10 February 1986 the applicant, Fediol (EEC Seed Crushers' and Oil Processors' Federation), lodged a complaint with the Commission under Article 3(1) of Council Regulation No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit practices (Official Journal 1984, L 252, p. 1). In the complaint (which was supplemented on 9 May 1986) the Commission is requested to initiate an examination procedure concerning two practices of Argentina which Fediol claims constitute 'illicit commercial practices' within the meaning of Regulation No 2641/84.

The complaint refers to two practices. The first, a so-called 'margin-guarantee system', consists of a set of measures whose active component is a 'scheme of differential charges', designed to guarantee the Argentine soya processing industry supplies of a quantity of soya beans at a price below the world market price. The second consists in the application of quantitative restrictions on the exportation of soya beans (see also section 21). The Court has already considered those practices, but from the point of view of 'subsidy measures', in Case 187/85; Fediol's application in that case was dismissed by judgment of 14 July 1988 (see also section 8).

General context

2. 'Illicit commercial practices' are defined in Article 2(1) of Regulation No 2641/84 as any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules. Under the regulation, persons or associations acting on behalf of a Community industry which considers that it has suffered injury as a result of illicit

commercial practices may lodge a complaint with the Commission requesting it to initiate an investigation procedure (Article 3(1) of Regulation No 2641/84). [1]

In order to be effective, a complaint lodged with the Commission must contain 'sufficient evidence' first of the existence of illicit commercial practices and secondly of the injury resulting therefrom (Article 3(2) of Regulation No 2641/84). It is plain, as far as the first element is concerned, that the evidence must relate both to the factual existence of the practices complained of and to the illicit nature of those practices.

As far as the evidence to be produced is concerned, the Commission must then consult an advisory committee consisting of representatives of the Member States, with a representative of the Commission as chairman (see Article 5 of Regulation No 2641/84). After this consultation, Regulation No 2641/84 provides for two possible procedures; I shall quote the relevant two provisions:

'Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed' (Article 3(5)),

or

'Where, after consultation, it is apparent to the Commission that there is sufficient evidence to justify initiating an examination procedure and that it is necessary in the interest of the Community [it shall initiate such a procedure]' (Article 6(1)).

It can be seen from those provisions that in the course of that preliminary investigation of the complaint the Commission must first assess the evidence produced from, as has already been mentioned, three points of view: the existence of the practice complained of, the illicit nature thereof, the existence of injury resulting therefrom, and subsequently — if it considers that the evidence produced justifies closer investigation — it must also judge whether initiating an examination procedure is necessary in the interests of the Community.

3. I shall append directly to this brief overview of the opening phase of the procedure a preliminary observation which is relevant to the whole argument, that is to say: the kind of assessment which the Commission is called on to make differs substantially depending on the aspect under investigation. I shall explain myself more precisely: there is to start with a considerable difference between the evaluation of evidence, on the one hand, and assessing the interests of the Community, on the other. In making the

1 — Member States may also ask the Commission to initiate such an investigation procedure (Article 4(1) of Regulation No 2641/84). In addition, a second procedural avenue is also open to them (see Article 1(b), as compared with Article 1(a), of Regulation No 2641/84).

latter assessment the Commission plainly has a large latitude in making its judgment or, better, a discretion. Where it is a question of assessing evidence the amount of latitude — certainly no discretion is involved in such a case — is patently more limited. [2]

But two different situations may emerge also in connection with the assessment of evidence, namely the situation where the evidence to be adduced consists of factual elements (the existence of the practices complained of, the existence of injury resulting therefrom) and the situation where the evidence to be adduced relates to matters of law (the assessment in the light of stated rules of law of the illicit nature of practices which have been established as a fact). In the first case what is involved is a power to assess whether the facts adduced whose existence is to be proved in the initial phase of the procedure with which we are now concerned, do exist. In the second case, a power of assessment of another kind is involved. It relates to the characterization of facts in the light of the rules of law which are presumed to be applicable, and to the interpretation of the rules of law having regard to the facts adduced. The power of assessment is in the nature of a power of characterization and interpretation. As will become clear later, this case is concerned chiefly with the latter power, which I shall refer to hereinafter for short as the power of interpretation.

4. By decision of 22 December 1986 the Commission rejected Fediol's complaint. In the Commission's view the complaint disclosed insufficient evidence of the existence or the illicit nature of the practices objected to by Fediol in order to justify investigation under Regulation No 2641/84. The question of the existence of injury was not entered into. Neither did the Commission dilate upon the necessity to initiate an investigation in the interests of the Community. In other words, the Commission decision related solely to two of the four elements of assessment mentioned above (section 3), namely the existence of the practices complained of and the illegality thereof.

In addition, as far as the two points actually covered by the Commission's decision are concerned it must be observed that the Commission adopts a different stance with regard to the two practices complained of. In the matter of the first practice complained of, the Commission accepts that the operative element of the system (the scheme of differential charges) exists in fact but not that it is unlawful. As far as the practice consisting in the quantitative restriction on exports is concerned, the Commission holds in its decision that no such restriction exists in fact. But even if it had (for a time) existed — the Commission states in its defence — it would not have been unlawful (see the Report for the Hearing, section 26 and sections 48 and 49).

5. Fediol thereupon brought these proceedings in which it asks the Court to declare the Commission's decision void under Article 173 of the EEC Treaty.

2 — This difference is reflected in the wording of the regulation: Article 3(5) states, with regard to the assessment of evidence, 'Where it *becomes apparent* ...'; Article 6(1) provides, as regards the two-fold assessment of the evidence and the interests of the Community, 'where ... *it is apparent to* the Commission (Dutch version: 'wanneer de Commissie ... *van mening is* dat' = where the Commission is of the opinion that ...') (emphasis added).

The Commission does not dispute the applicant's capacity to bring an action under Regulation No 2641/84, nor does it deny that its contested decision is of direct and individual concern to Fediol or that its decision is subject to judicial review by the Court 'within the limits laid down in Regulation No 2641/84'. However, it does consider that the grounds adduced by the applicant are not covered by the legal protection which it enjoys under Regulation No 2641/84 and the EEC Treaty and that the application is therefore inadmissible. Nevertheless the Commission does not ask the Court to rule first on the question of admissibility, and it sets out its arguments on the merits of the case in the alternative.

My Opinion is in two parts. In Part I I shall consider how far the applicant's legal protection extends, or in other words to what extent a Commission decision taken under Article 3(5) of Regulation No 2641/84 notifying its refusal to initiate an investigation is subject to judicial review by the Court. In Part II of my Opinion I shall then discuss the practical repercussions to which that judicial review — which in my view is applicable — must give rise with regard to the actual subject-matter of the contested decision.

No reason to hold the action inadmissible

6. At the outset of my inquiry I should like to stress that the Commission's view that the — in its opinion — limited legal protection devolving upon the applicant under Regulation No 2641/84 constitutes a reason for holding the action inadmissible does not convince me.[3] In order to assess the admissibility of the applicant's action for annulment pending before the Court, reference must be made to the second paragraph of Article 173 of the EEC Treaty. Since it is not in dispute between the parties (and neither could it reasonably be disputed) that the contested decision is of direct and individual concern to the applicant (the contested decision is expressly addressed to Fediol), the admissibility of the application for annulment cannot in my view be subjected to incidental restrictions. To accept incidental restrictions would conflict with the whole corpus of the case-law of the Court, which, on the basis of Article 164 of the EEC Treaty, puts the broadest possible construction on legal protection under the Treaty.

Article 3(1) of Regulation No 2641/84 provides additional legal protection as regards capacity to bring proceedings: since it also gives trade associations without legal personality the right to lodge a complaint with the Commission, it should be accepted, as Fediol argues in its application, that such associations may also challenge before the

3 — Furthermore, in its defence the Commission expresses a reservation with regard to the admissibility of the applicant's application for reasons connected with Fediol's action for annulment in Case 187/85 which was then still pending before the Court and in which, as has already been mentioned (section 1), the same practices were at issue but seen from another viewpoint (see the Report for the Hearing, section 20). In the mean time the Court has delivered its judgment and the Commission has dropped its reservation (see also the following footnote). In its defence, the Commission also cast doubt on Fediol's interest in bringing proceedings on the basis of rumours that Argentina had since abandoned the practices complained of. Those rumours turn out to have been wrong, as the Commission admitted at the hearing.

Court a Commission decision rejecting their complaints (see in this sense the Opinion of Mrs Advocate General Rozès in Case 191/82 *Fediol* [1983] ECR 2913, at pp. 2939 and 2940, and by implication the Court's judgment of 4 October 1983 in that case, to which I shall be returning shortly).

Consequently, the Commission's defence refers not to the admissibility of the application for annulment but to the substance of the case, that is to say it raises a question as to how far the Commission's power under Article 3(5) and Article 6(1) of Regulation No 2641/84 extends and as to under what circumstances a Commission decision must be declared void on the ground that the Commission has exceeded or abused its powers.

Part I: The question of judicial review in the context of Regulation No 2641/84

A — *The case-law of the Court with regard to imports from non-member countries involving dumping or subsidization*

7. The Commission argues that the legal protection to which an applicant is entitled under Regulation No 2641/84 is more limited than the protection afforded under Regulation No 2176/84.[4] The applicant contests this: in its view the legal protection afforded under both regulations is the same (see section 19 of the Report for the Hearing). Regulation No 2176/84 also confers a right to lodge a complaint on producers and trade associations in the Community in order to request the Commission to initiate an investigation into imports from non-member countries which have allegedly been 'dumped' or 'subsidized'. A comparison of the two regulations from this point of view is therefore appropriate.

I would mention in passing that Regulation No 2176/84 has since been repealed and replaced by Regulation No 2423/88;[5] the provisions cited in this Opinion from Regulation No 2176/84 are to be found with the same wording and the same numbering in Regulation No 2423/88. All the references in the Report for the Hearing and in the parties' conclusions are to Regulation No 2176/84. Consequently, in order to avoid any confusion I shall also refer to that regulation hereinafter.

4 — Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized exports from countries not members of the European Economic Community. Dumping and subsidization are also covered by the definition of illicit commercial practices but under Community law may be challenged only under Regulation No 2176/84. This is because Article 13 of Regulation No 2641/84 provides that Regulation No 2641/84 is not to apply 'in cases covered by other existing rules in the common commercial policy field'. In its judgment of 14 July 1988 in Case 187/85 *Fediol* [1988] ECR 4155, the Court decided, as has been pointed out in section 1, that the Argentine practices challenged by Fediol could not be described as 'subsidization' within the meaning of Regulation No 2176/84. In this case it can therefore be considered whether the practices at issue are to be categorized as illicit commercial practices within the meaning of Regulation No 2641/84.

5 — OJ 1988, L 209, p. 1

8. It is precisely in connection with this right of complaint with regard to dumping or subsidization that the Court had to deal with in its judgment of 4 October 1983 in Case 191/82 *Fediol* [1983] ECR 2913. That judgment is concerned with Regulation No 3017/79, the predecessor of Regulation No 2176/84. In that case, too, Fediol complained that the Commission had wrongly rejected its complaint. The Commission argued that its communication relating to the fact that the Commission was not initiating an investigation procedure — having regard to the extent of its discretion under Regulation No 3017/79 — constituted a mere transmission of information and was therefore not open to challenge under Article 173 of the EEC Treaty.

The Court disagreed and held that the applicants had a right of action because they derived from the scheme of Regulation No 3017/79 a number of specific rights which were claimed to be infringed, namely the right to lodge a complaint, the right, which was inherent in the aforementioned right, to have that complaint considered by the Commission with proper care and according to the procedure provided for, the right to receive information within the limits set by the regulation and, finally, if the Commission decided not to proceed with the complaint, the right to receive information comprising a statement of the Commission's basic conclusions and a summary of the reasons therefor (paragraph 28 of the judgment).

However, the Court added that in effecting judicial review account had to be taken of the nature of the powers reserved to the Community institutions (paragraph 29) and, *inter alia*, of the 'very wide discretion' which the Commission had in order to decide, in terms of the interests of the Community, on any measures needed to deal with the situation which it established (paragraph 26). However, this did not preclude the Court from considering the following aspects at the applicant's request: whether the procedural guarantees granted to plaintiffs were observed, whether manifest errors were made in the assessment of the facts, whether essential matters were omitted to be taken into consideration or whether the reasons were based on a misuse of powers. By means of those assessment criteria the Court exercises supervision over the discretionary power of a public authority without encroaching upon the discretion reserved to that authority (paragraph 30 of the judgment).

In its judgments of 14 July 1988 in Case 187/85 and Case 188/85 *Fediol* [1988] ECR 4155 and 4193 respectively, the Court confirmed that assessment (paragraph 6 of each judgment).

B — *Regulation No 2641/84 on illicit commercial practices compared with the regulations on dumping and subsidization*

9. The Commission considers at length the differences between the anti-dumping regulations (citing on the one hand the old regulation No 3017/79 and on the other hand the new regulation No 2176/84, which has since been replaced by Regulation No 2423/88) and Regulation No 2641/84 on illicit commercial practices. It places its

argument on two levels. It first considers, on the level which it terms legal protection, the role played by the interests of the Community in the two types of regulation and also the differences as regards the measures which the Commission can take under the two categories of instrument. Subsequently, it discusses, on the level of the scope of judicial review, the differences between the two categories of regulation as regards the interpretation of the applicable provisions of international law, in particular the rules of the GATT.

All the observations expressed by the Commission with regard to one or the other level have the same aim: (1) they purport to show that the applicant's legal protection under Regulation No 2641/84 is very limited, that is to say that it is confined to calling on the Commission to investigate the complaint and in so doing to fulfil the procedural guarantees, and does not extend to a review (or having a review carried out) of the result of the Commission's decision (see the Report for the Hearing, section 17); and (2) that the power of judicial review by the Court is limited commensurately to extreme cases of manifest misuse of powers (see the Report for the Hearing, section 18). The Commission considers that if that were not so the result would be that applicants would be enabled indirectly by means of an action before the Court to influence the Commission's decisions with regard to commercial policy. Naturally, the applicant profoundly disagrees. For a summary of the arguments for and against I would refer to the Report for the Hearing.

From this point onwards I intend not to adhere closely to the arguments of the parties but simply to consider two important differences between the anti-dumping and anti-subsidization regulation (Regulation No 2176/84) and Regulation No 2641/84 on illicit commercial practices which is at issue in this case. There is in the first place the differently cast reference in the two regulations to the rules of international law and, secondly, the importance assumed in the two regulations by the assessment of the interests of the Community. As far as the latter aspect is concerned, the Commission has not made an assessment in the present case of the interests of the Community. Nevertheless it introduces the idea into the discussion because, in its view, it enables the overall legal position of the applicant to be situated with regard to Regulation No 2641/84.

The reference to international law

10. The Commission maintains that an incorrect application of international law is subject to review by the Court in connection with Regulation No 2641/84 only if it results in an infringement of provisions of Community law directly and individually conferring rights on individuals. The GATT rules, to which Regulation No 2641/84 refers, are insufficiently precise to cause such rights to arise. The applicant contests those arguments (see for further details the Report for the Hearing, sections 18 and 19 and also sections 31 to 33). The

Commission infers from its reasoning that the way in which it interprets the term 'illicit commercial practices' is open to review only in very exceptional cases (see the Report for the Hearing, section 18).

11. In both Regulation No 2176/84 and Regulation No 2641/84 reference to international law plays an important role. Indeed it provides the Community authorities both with the legal basis and the assessment criterion for declaring unlawful certain conduct of non-member countries (or, in the case of dumping, of undertakings from non-member countries) and for taking appropriate measures against it.

Although the legal basis for action on the part of the Community is the same, there are nevertheless clear differences between the two regulations. As far as dumping and subsidization are concerned, the relevant GATT provisions — in pursuance of a commitment entered into by the signatories of the GATT[6] — are substantially incorporated in Regulation No 2176/84 and hence they can readily be invoked by individuals within the framework of the regulation (see section 8). The situation is somewhat different in the case of Regulation No 2641/84 on illicit commercial measures. Articles 1 and 2 thereof confine themselves to making a general reference to international law and to generally accepted rules. However, the background to Regulation No 2641/84 leaves no doubt that the reference to 'international law' is a reference to the GATT; the expression 'generally accepted rules' enables the rules contained in GATT also to be applied with respect to countries which are not signatories of the GATT or refers to areas, such as the services sector, which fall outside the scope of the GATT.[7]

It is clear that such a general reference in a Community regulation cannot at a stroke confer direct effect within the Community on GATT provisions which, according to the case-law of the Court, on the basis of their spirit, general scheme and terms do not have direct effect, that is to say they confer no rights on individuals which they can invoke before the courts (judgment of 12 December 1972 in Joined Cases 21 to 24/72 *International Fruit Co.* [1972] ECR 1219, paragraphs 20 and 27; judgment of 24 October 1973 in Case 9/73 *Schlüter* [1983] ECR 1135, paragraphs 28 and 30). They become capable of being invoked by individuals within the Community solely to the extent that, explicitly or implicitly, that effect can be inferred from the Community rule referring to those provisions, which in

6 — Article 16(1) and (6) of the Agreement on the Implementation of Article VI of the GATT (revised Anti-Dumping Code) and Article 1 and Article 19(1) and (5) of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (relating to subsidies and countervailing duties) put the signatories to the agreements under a duty to adjust their domestic legislative and administrative procedures to suit the provisions of the agreements. See the preamble to Regulation No 2176/84 (OJ 1984, L 201, p. 1).

7 — For more details of the background see, *inter alia*, M. Bronckers, *Selective safeguard measures in multilateral trade relations*, The Hague, 1985, pp. 211 to 219.

this case is Regulation No 2641/84.[8] The rights that individuals therefore can derive from the GATT provisions on the basis of the reference in Regulation No 2641/84 are limited, in the first phase, to the possibility of asking the Commission — by means of a right to lodge a complaint — to interpret and apply the GATT provisions in the sense asked by the complainant. In so far as the provisions are less precise and have not been taken over in a Community regulation, the power of interpretation of the Commission (and later of the Court, of which more later) is more extensive under Regulation No 2641/84 and the rights which individuals can derive from the provisions are less precisely circumscribed than they are under Regulation No 2176/84.

12. Must it be inferred, however, from this difference with regard to greater or lesser ease of applicability of GATT provisions in Community law, on the one hand in the context of Regulation No 2176/84 and on the other in the context of Regulation No 2641/84, that in the case of Regulation No 2641/84 the Court's power of supervision is non-existent and the Council and the Commission are free under that regulation to decide themselves, without judicial supervision, on the content of what is to be regarded as illicit commercial practices in the light of international law (that is to say, the GATT in this case)? Of course not.

The courts and in particular the Court of Justice are indeed empowered — and under a duty — to interpret legislative or treaty provisions as soon as the provisions become applicable in their particular legal order (directly or indirectly, by transposition or by reference), regardless as to whether, to what extent and how easily individuals can derive rights from the provision in question. In this connection the legal concept of *renvoi* in

8 — Within the compass of this case I do not need to consider the question whether GATT provisions have direct effect (in the sense of their being capable of being invoked by individuals) since, as is argued later, the Court's power of interpretation is not dependent on the intended effect (nor on the direct applicability) in the domestic legal order of the provision to be interpreted. For the sake of a proper understanding of my train of thought I shall nevertheless clarify my conception in this regard. I shall start from the difference between (direct and indirect) applicability, on the one hand, and direct effect in the sense referred to above, on the other, of foreign (see later) or international provisions. A provision is directly applicable where it forms a part of the domestic legal order directly without the need for transposition (an example is those GATT provisions which, according to the Court, bind the Community and form an integral part of the Community legal order); a provision is indirectly applicable where it must be declared to be applicable by means of a provision of one's own legal order (an example is a provision of foreign law which is declared to be applicable in a limited way by a rule of private international law, in particular to govern an element of a particular legal relationship: see also section 12). This must be differentiated from direct effect, which means that individuals can derive from a provision with such effect subjective rights. Direct effect is dependent primarily on the type and purpose of the relevant provision itself (hence, according to the Court, on the basis of their 'spirit, general scheme and terms', GATT provisions do not have direct effect, that is to say the GATT does not have provisions which can be invoked by individuals). Such a provision which does not have direct effect *per se* may, in my view, none the less be transformed within a particular legal order, by a rule of that legal order, into a rule having direct effect, that is say a rule which can be invoked by individuals (for instance, GATT provisions which are taken over in a Community regulation or to which a Community regulation refers and from which individuals may therefore to a greater or lesser extent derive rights pursuant to and within the limits of that regulation; this is also true of a provision of foreign law which, through a rule of private international law, is occasionally declared to be applicable within one's own legal system and made capable of being directly invoked in that context). I would add that, in my view, any international or foreign provision which is directly applicable or is made applicable by transposition obtains *ipso facto* within that legal order a certain direct effect in the sense that it can be invoked by individuals in any event as an interpretative criterion but also, it appears to me, as a criteria for assessing the validity of inferior norms or measures.

private international law affords an interesting analogy. Although the provision of foreign law to which reference is made is inserted in the particular legal order and declared to be applicable as a result of the *renvoi* in a limited, only occasional manner, namely to govern an element of a particular legal relationship, and individuals may also occasionally derive rights therefrom (see footnote 8, *supra*), the national courts nevertheless have jurisdiction to interpret the provision of foreign law without any limitations with a view to its application in the particular case. It can be seen from this that the courts have unlimited interpretative jurisdiction with regard to a provision as soon as the provision comes to be applied — even on an occasional basis — notwithstanding the (in this case, indirect) way in which it is made applicable and irrespective of the extent of its direct effect (in the sense of its being capable of being invoked by individuals) and of the ease with which it can be applied.

13. Since provisions of foreign law — which are introduced in a limited way into a particular legal order by a rule of private international law and are declared to be applicable — are amenable to interpretation by the courts of that legal order, how much more must this apply to international provisions, such as the GATT provisions, which are binding on the Community and hence *directly* form part of and are applied within one's own legal order? As directly applicable provisions they must be applied by the courts as a yardstick for interpretation, irrespective as to whether they can be invoked by individuals. The Court's case-law regards it as self-evident that the courts in the Community may interpret the provisions of the GATT under the supervision of the Court, which itself takes care that the provisions are interpreted by way of preliminary ruling so that they are applied uniformly throughout the Community (judgment of 16 March 1983 in Joined Cases 267 to 269/81 *Amministrazione delle finanze dello Stato* v *SPI and SAMI* [1983] ECR 801; see also the judgment of 16 March 1983 in Joined Cases 290 and 291/81 *Singer and Geigy* v *Amministrazione delle finanze dello Stato* [1983] ECR 847).

That jurisdiction of the Court to interpret GATT provisions is of general application, both where (as in this case) the validity of Community measures is to be assessed and where the compatibility of national legislative provisions with GATT provisions must be assessed (paragraph 15 of the judgment in Joined Cases 267 to 269/81, cited above). It applies both where the interpretation takes place as a result of conduct within the Community and where it occurs with a view to appraising conduct, in this case of a third country, in connection with the external trade of the Community. Moreover, it is precisely with regard to external trade that the Court stated that the fact that the GATT provisions invoked cannot be relied on directly by individuals 'in no way affects the Community's obligation to ensure that the provisions of GATT are observed in its relations with

non-member States which are parties to GATT' (judgment of 16 March 1983 in Case 266/81 *SIOT* v *Ministero delle Finanze* [1983] ECR 731, paragraph 28, at p. 780).

14. In interpreting international and, specifically, GATT provisions, to which, as has been pointed out, Regulation No 2641/84 refers in general terms, the Community authorities should naturally apply the appropriate principles of interpretation, *inter alia* as set out in Articles 31 to 33 of the 1969 Convention of Vienna on the Law of Treaties. Under those principles a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, taking into account any subsequent agreement between the parties regarding the interpretation of the treaty and/or any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.[9] That means that each party to a treaty must be guided, not merely by its own perceptions and interpretations, but also by those of the other parties to the treaty. A broad interpretation based on usual meaning and context which exceeds the confines of a normal teleological interpretation having regard to the object and purpose of the treaty must be rejected if it appears that it is not based on subsequent agreements or subsequent parallel practices as between the parties.[10] This is because such an interpretation is not consonant with that which was agreed between the parties to the treaty.

The aforesaid rules of interpretation must be taken into account by the Council and the Commission as well as by the Court. The position is different from that which obtains within the Community legal order in that as far as the GATT is concerned the Court cannot deliver interpretative judgments which are binding outside the Community, since it is not responsible *vis-à-vis* the other parties to the GATT for ensuring the uniform interpretation of GATT provisions.[11] The Court should therefore avoid broad interpretations of GATT provisions which go further than normal, in particular teleological, methods of interpretation if they cannot be based on explicit or implicit consensus between the parties to the GATT. The Court must equally take care that the Commission complies with the aforementioned rules of interpretation and refrains from giving a broad interpretation of rights or advantages accruing to the Community or its inhabitants (i. e. an interpretation going further than what has just been stated) where complainant undertakings ask it to interpret GATT provisions under Regulation No 2641/84. Consequently, the

9 — For a brief discussion of Article 31 *et seq.* of the Treaty of Vienna, see in particular D. Carreau, *Droit international*, Paris, 1986, Nos 363 to 379, especially Nos 363 and 372 and 373.

10 — This applies in particular to the GATT in view of the generally accepted tradition in connection with that agreement of the settlement of disputes by means of consensus between the parties. (See in that regard Article 10 of Regulation No 2641/84, considered in section 15, *infra*.)

11 — See E. U. Petersmann, 'Application of GATT by the Court of Justice of the European Communities', *CMLR*, 1983, pp. 397 to 437, especially pp. 403 and 404 and 417 to 420; M. Maresceau, 'The GATT in the case-law of the European Communities', in *The European Community and GATT*, M. Hilf, F. Jacobs and E. U. Petersmann, eds, 1986, pp. 107 to 126, especially pp. 113 and 117; C. D. Ehlermann, 'Application of GATT rules in the European Community', in *The European Community and GATT*, op. cit., pp. 127 to 140, especially p. 136.

Commission's power to interpret GATT provisions is indeed subject to judicial review by the Court.

The reference to the interests of the Community

15. The role of the requirement of the Community interests is different in Regulation No 2641/84 than in Regulation No 2176/84. The Commission explores that difference at length in view of its general implications for the applicant's legal position.

In Regulation No 2641/84 the Community interest comes into play at the end of the prior investigation; once it has been determined after the consultation provided for in the regulation that there is sufficient evidence to justify initiating an investigation, the Commission may decide to initiate such a procedure if it considers that such a step 'is necessary in the interest of the Community' (Regulation No 2641/84, Article 6(1)). In the anti-dumping and anti-subsidization regulation the matter was and is handled differently: where at the end of the preliminary examination the Commission determines that there is sufficient evidence it 'shall immediately . . . announce the initiation of a proceeding' (Regulation No 2176/84, Article 7(1)). But it is in the course of or at the end of the actual investigation procedure that a provisional anti-dumping duty is imposed or definitive action is taken by the Community 'where the interests of the Community call for (Community) intervention' (Regulation No 2176/84, Article 11(1) and Article 12(1)).[12]

16. Consequently, the discretion of the Commission (or the Council as the case may be) comes into effect more rapidly in the case of Regulation No 2641/84 than in the case of Regulation No 2176/84 since account may be taken of the interests of the Community at an earlier stage of the procedure. Even if the Commission reaches the decision that an adequate case has been made out for the existence of illicit commercial practices and injury so as to justify initiating the investigation procedure, it may, on the basis of the interests of the Community, decide not to initiate an investigation.

However, does this mean that the Court may not (marginally) review the interests of the Community under Regulation No 2641/84 whereas in fact it may do so under Regulation No 2176/84, as appears from paragraph 41 of the judgment of 14 July 1988 cited in section 8 above? The Commission maintains that there is indeed such a difference: in this case the applicant — apart from its right to procedural guarantees — has only the 'right' to ask the Commission to investigate his complaint with due care and cannot require

12 — It follows that there is yet another difference between the two regulations, namely with regard to the measures which are ultimately taken if a decision to that effect is taken at the end of the investigation procedure. Under Regulation No 2641/84 regard is had once again to the necessity for action in the interests of the Community (Article 10(1)) and the compatibility of any measure taken with existing international obligations and procedures (Article 10(2) and (3)). Regulation No 2176/84 is a good deal more resolute: where dumping or subsidization has caused injury and the interests of the Community call for Community intervention 'a definitive anti-dumping duty or countervailing duty shall be imposed by the Council . . . ' (Article 12(1)).

the Commission to initiate an investigation, even if the complaint contains 'sufficient evidence' (see the Report for the Hearing, sections 16 and 17). The Commission argues that if the complainant could require the Commission to initiate an investigation it would be able to influence the Community authorities' commercial policy and tie the hands of the Council and the Commission. This cannot and may not be so: the reference to the interests of the Community therefore signifies that the Commission — at least under Regulation No 2641/84 — has a discretionary power of a political nature which is not (sometimes the Commission seems to be saying, scarcely) amenable to judicial review. [13]

The question is, does it follow from the fact that the Commission can decide at an early stage in the interests of the Community not to proceed any further — a power which it undoubtedly has — that that decision is not amenable to judicial review, as the Commission argues in this case?

17. At this point in the discussion I would consider Section 301 of the *US Trade Act* of 1974, as amended by Public Law 93-618 (1975), Public Law 98-573 (1984) and Public Law 100-418 (1988).

Section 301 authorizes the United States Trade Representative (USTR), [14] on a petition or of its own motion, to initiate investigations into, and where appropriate impose retaliatory measures against, practices of foreign countries which in violation of the 'international legal rights' of the United States deny that country 'national' treatment or 'most-favored-nation treatment', or are 'unreasonable'. Section 301(d)(3) defines 'unreasonableness' in terms of practices which, while not necessarily in violation of the international legal rights of the United States, are otherwise 'unfair and inequitable'. It is further specified that those terms refer *inter alia* to denial to US firms of fair and equitable opportunities to accede to and compete on foreign markets. It is plain from the wording of Section 301 that action by the USTR does not necessarily have to be a reaction to 'unlawful' or 'unjustifiable' practices of foreign countries, as a result of which the USTR clearly may take action in the sphere of commercial policy and even in the outright political sphere. [15]

13 — The Commission seems to see the complainant's right under Regulation No 2641/84 as a species of diplomatic protection. In international law (which is where this legal concept originates) it is generally assumed that an authority or a State which is asked to grant diplomatic protection is not under a duty to agree to that request. The 'right' of a legal subject applying to the authority for diplomatic protection goes no further than the 'right' to ask the authority for assistance. The authority is entitled to weigh the relative importance of the particular claim against the political implications connected with possible action on its part.

14 — Before the amendment of the Act in 1988 the authority to act under Section 301 was vested in the President. In 1988 the authority was transferred from the President to the USTR. In 1962 the office of the USTR was created by Congress in order to take over the role of the State Department in respect of negotiations concerning trade matters because it was feared that the State Department might sacrifice trade interests to the political interests of the United States. The USTR is appointed by the President but the appointment must be ratified by Congress. He is answerable both to Congress and to the President.

15 — 'Unreasonable practices' also include for example the denial to workers of their right of association or of collective bargaining or the imposition of particular working conditions (see indent B(iii) of Section 301(d)(3) of the Act).

Until 1988 it was generally assumed that the President's authority to take action under Section 301, whether or not in response to a petition, was an absolute discretion and not subject to judicial review.[16] The 1988 statute transferred the authority to the USTR and in so doing made a very limited inroad into its discretionary character, namely by making an investigation by the USTR *mandatory* in some cases.[17] As a rule, however, the USTR is even now completely free to initiate an investigation in a given case — albeit, in some instances as far as certain procedures are concerned, 'subject to the direction of the President' (see Section 301(a)(1)) — and therefore it continues to be the case that his discretion is not amenable to judicial review.

of legal definition. As far as Section 301 is concerned the USTR is free (subject to the 1988 amendment) to take action against practices which, albeit lawful, are in his view nevertheless unreasonable, unfair or inequitable. According to the examples set out in Section 301(d)(3)(B) the latter expressions have a political content (or, at least, no legal content) and are therefore not amenable to judicial review. The operation thereof is assigned to a pre-eminently political authority (until 1988, the President, thereafter the USTR, who is answerable to the President and to Congress).[18]

18. This brief reference to US law may show where and why only a power of a public authority may be described as a discretionary power of a political nature that is not amenable to judicial review. This appears to be the case where the key concepts on which the exercise of the discretion is made to depend are not capable

Matters are otherwise under Regulation No 2641/84. Under that regulation the Commission has only a power to initiate an investigation where evidence is produced of an illicit commercial practice.[19] Consequently the Commission's decision is firstly constrained by legally definable rules (that is to say, infringement of rules of international law; see section 10 above). The criterion of the interests of the Community operates

16 — See *inter alia* Senate Report No 1298 with the original text of the Trade Act of 1974, published in *US Code Cong. & Adm. News 7186* (1974). See also P. Hansen, 'Defining unreasonableness in international trade: Section 301 of the Trade Act of 1974', *Yale Law Journal*, 1987, pp. 1122 to 1146, note 36 on p. 1129; Hilf, 'International trade disputes and the individual: Private party involvement in national and international procedures involving unfair foreign trade practices', *Außenwirtschaft*, 1986, p. 441 *et seq.*, at p. 458.

17 — The 1984 statute inserted a 'super 301 Section' which was intended to put the USTR under a duty to initiate an investigation with regard to 'priority practices' and 'priority foreign countries' (those expressions refer to existing barriers whose diminution would particularly benefit US exporters) which are identified in the report of the annual National Trade Estimate. In addition, the statute lays down a number of 'accelerated procedures' for foreign countries that deny 'adequate and effective protection' of intellectual property rights or fair and equitable market access to US persons who rely upon intellectual property protection.

18 — I would express no opinion as to whether or not such national legislation is compatible with the free-trade principles which underlie the GATT and authorize the taking of unilateral action against the practices of a party to the GATT only where those practices conflict with international law. The European Commission has been critical of Section 301 for those reasons, since it sees in the condemnation of behaviour which is lawful yet unreasonable a departure from the spirit of the GATT. See the references in R. Denton, 'The new commercial policy instrument and *Akzo v Dupont*', *European Law Review*, 1988, p. 3, at p. 4.

19 — That limitation to illicit commercial practices and the resultant divergence from Section 301 of the US Trade Act was the result of a deliberate choice (see the references in Bronckers, op. cit., pp. 213 to 19, and in Denton, article cited above, pp. 5 and 6).

simply as an incidental condition which the Commission can apply in order not to initiate the procedure. But even then, it appears to me, the Commission's decision is not completely unconstrained, if only because the Commission must show — and in my opinion give reasons for its decision — why 'it is apparent to [it]' that the interests of the Community do not require an investigation to be initiated. Indeed, it appears to me to be a requirement of sound administrative practice that the Commission should give a minimum number of reasons why it is of that opinion, given that there is, *ex hypothesi*, prima-facie evidence of the existence of illicit commercial practices and of injury arising therefrom.

19. Essentially we are confronted here with the well-known problem of judicial review of a public power which is characterized by significant freedom of judgment or even discretion. As Mr Mertens de Wilmars, a former President of the Court, wrote in an article on the way in which the Court proceeds in such a situation, judicial review of such powers is conducted by means of a step-by-step approach; it is first determined whether the authority remained within the area of jurisdiction for which it was given a discretionary power; then it is examined whether the factual and legal circumstances on which the exercise of the discretion depends have been established and must be held to be correct, and finally the actual exercise of the discretion is tested against general principles of law,[20] in particular principles of sound administration such as the principle of equality, the principle of proportionality and the duty to state reasons.

20 — 'The case-law of the Court of Justice in relation to the review of the legality of economic policy in mixed-economy systems', *Legal issues of European integration*, 1982/1, p. 5 *et seq.*

The fact that an authority is provided with an open-ended concept such as 'the interests of the Community' as the guideline for its actions does not mean that judicial review no longer obtains, certainly not where, as in this case, that concept plays only a complementary (and negative) role, consisting of not taking action the exercise of which depends in the first place on the existence of illicit practices. Such open concepts with normative content are regularly employed in private law, such as the interests of the child or the family or the interests of the company. That does not mean that the courts must refrain from exercising review, since they must in fact ensure that the power is not abused. What the courts must not do in such cases is carry out a full review (that is to say more than a marginal or peripheral review) because they may not enter into the substance of the assessment which is carried out by the person or authority on which the private- or public-law power is conferred.

In conclusion, it can therefore be argued that the reference to the interests of the Community as a supplementary condition (alongside infringement of international law) and as a negative condition (restraining the Commission from acting) does not preclude but considerably restricts judicial review. It does not preclude judicial review, because the Court must examine whether the legal preconditions for exercising the discretion are present and whether the procedural guarantees were met, whether the factual circumstances are established and were correctly assessed and whether the actual exercise of the discretion took place in accordance with the principles of sound administration, in particular in accordance with the principle of equality and by means of correctly weighing the interests at stake. Although judicial review is limited by the

fact that ultimately it is for the Commission to determine of what the interests of the Community actually consist, in my view the fact that the Commission's assessment of the interests of the Community takes place at an earlier stage under Regulation No 2641/84 than it does under Regulation No 2176/84 makes no difference to the extent of the judicial supervision, although it does mean that the applicant is refused earlier.

C — *Conclusion with regard to Part I of the Opinion*

20. The comparison of Regulation No 2641/84 with the (former and present) anti-dumping and anti-subsidization regulations has produced no arguments to suggest that the attitude adopted by the Court in the previous Fediol case in connection with the latter regulations (see section 8 above) should not likewise apply to Regulation No 2641/84. In neither of the two cases does the Commission have a discretionary power of a political nature which is not amenable to judicial review. Under Regulation No 2641/84 the Commission has a considerable power to interpret international law and, at an early stage in the procedure, an extensive discretionary power to assess the interests of the Community, but judicial review is possible of both powers.

Part II: The exercise of judicial review in practice

21. As was pointed out at the beginning, the applicant complained to the Commission about two practices of Argentina as being illicit commercial practices within the meaning of Regulation No 2641/84. I shall confine myself to a brief indication of the practices complained of and refer for a more exhaustive description to the Report for the Hearing.

In the first place, Fediol's complaint was directed at a 'margin-guarantee' system which is designed to secure the Argentine soya processing industry a supply of quantities of soya beans at a price below the world market price. The effective (and essential) component of this system is the so-called 'scheme of differential charges' which is applied to the exportation of soya products (soya beans, soya oil and soya cake). Under that system higher duties are charged on the exportation of soya beans (from which soya oil and soya cake are made) than on the exportation of soya oil and soya cake. According to Fediol's complaint the relevant charges were calculated on the basis of artificial reference prices for those products, laid down by the Argentine authorities. The higher taxation of soya beans is claimed to have had the effect of increasing the supply of such products on the Argentine market and hence of lowering the selling price to the Argentine oil processing industry (which in fact enjoys a 'margin guarantee'). As a result, the Argentine oil-processing industry can undercut normal prices on the world market.

Secondly, Fediol's complaint refers to the existence of quantitative restrictions on the

exportation of soya beans, *inter alia* in the form of the sporadic suspension of the (obligatory) registration of exports of soya beans.

A — *Were specific GATT provisions infringed?*

Alleged infringement of Article III(1) of the GATT

The contested Commission decision rejected the applicant's complaint under both heads. The decision did not deny the existence of the 'scheme of differential charges' but stated that it was not contrary to any of the provisions of the GATT which I shall be considering subsequently. As regards the alleged quantitative restrictions on exports, the decision states that Fediol's complaint fails to disclose any evidence for the existence of such restrictions (see also the closing part of section 5 above). Accordingly, the Commission confined itself to assessing the factual existence and the legal justification for the practices complained of (without basing its decision on the interests of the Community).

I shall subsequently review the various points of the Commission decision and examine whether with regard to each point the Commission remained within its discretion, that is to say, in this case primarily the power to interpret GATT provisions on the basis of which it must be decided whether or not the practices complained of were illicit. [21]

22. Article III(1) provides *inter alia* that 'internal' taxes [22] or charges affecting 'internal' transactions such as sale, purchase, etc. should not be applied to 'imported or domestic' products so as to afford protection to domestic production.

The applicant maintains that the Argentine differential charges can indeed be regarded as internal taxes because although they are levied exclusively on exported products, the differences in the applicable rates have effects on the internal market in particular by protecting the domestic soya processing industry. In addition, the applicant argues that Article III(1) does not aim solely at protecting imported products from discriminatory taxes, but also at preventing the protection of domestic products from causing the exportation of processed products to harm industrial sectors in other countries. In support of its view the applicant refers *inter alia* to the 'travaux préparatoires' for Article III of the GATT and to the Court's case-law on Article 95 of the EEC Treaty. [23]

21 — In considering the GATT provisions relied on I have consulted the following sources: the text of the GATT, the notes on the interpretation of the agreement, the 'panel reports' drawn up by the GATT contracting parties and, as a supplementary source, academic writings.

22 — The expression used by the French version of the GATT, which along with the English version constitute the authentic versions of the Agreement, is 'taxes intérieures'.

23 — It refers to the Court's judgment of 29 June 1978 in Case 140/77 *Statens Kontrol* v *Larsen* [1978] ECR 1543.

The Commission rejects the applicant's arguments on the ground that Article III(1) of the GATT covers only the levying of internal taxes and, above all, discriminatory treatment of imported, as compared with domestic, products. The Commission takes the view that since the Argentine taxes at issue are not 'internal taxes' but export levies, they cannot be caught by Article III(1); accordingly, the applicant's complaint with regard to that point does not contain sufficient evidence of an infringement of that article.

23. In the light of the wording, the purpose and practical implementation of Article III(1) of the GATT the Commission's interpretation is not unwarranted. The fact that particular taxes levied on exportation protect a domestic product is not sufficient to make them into domestic taxes affecting internal transactions (in accordance with the wording of Article III(1)). Moreover, the article expressly refers to imported or domestic products and not to exported products. Furthermore the applicant was not able to cite one precedent to show that export duties also fall within the scope of Article III(1). Even the passage quoted from the 'travaux préparatoires' does not deal with export levies.[24]

It should also be observed that the Court's case-law with regard to the interpretation of Article 95 cannot simply be transposed by analogy to the GATT. The object and purpose of the EEC Treaty are different from those of the GATT: whilst the GATT sets out to liberalize world trade, the EEC Treaty seeks to create a single market reproducing as closely as possible the conditions of a domestic market.[25] This does not prevent the same interpretation from being given to provisions in both agreements where this is called for by the wording and the purpose of the relevant provisions. However, the applicant fails to show why that should be the case here.

Alleged infringement of Article XI(1) of the GATT as regards the system of guaranteed margins

24. Article XI(1) is designed to eliminate all quantitative restrictions on both imports and exports of products irrespective as to whether they are made effective through quotas, import or export licences 'or other measures'. However, 'duties, taxes or other charges' are expressly excluded from the scope of this provision.

Despite the express exclusion in Article XI(1) of 'duties, taxes or other charges'

24 — According to Article 32 of the Vienna Convention (section 13 above) preparatory work is merely a supplementary and limited means of interpretation.

25 — Judgment of 26 October 1982 in Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641, paragraph 30, which refers to the judgment of 9 February 1982 in Case 270/80 *Polydor* v *Harlequin Record Shops* [1982] ECR 329, paragraph 18.

Fediol argues in its complaint that the Argentine practices do in fact conflict with that article: the system of differential charges is, it maintains, only a component of a global system for guaranteeing margins, other parts of which — in particular the establishment of artificial reference prices — are covered by the words 'other measures' within the meaning of Article XI, by which is meant measures having an effect equivalent to restrictions on exports.

The Commission decision assumes that the Argentine system complained of 'basically' consists of a system of differential export charges and of the determination of reference prices which serve to determine the charge. The Commission considers therefore that there can be no question of an infringement of Article XI(1). In the Commission's view, the Argentine practices could be prohibited under Article XI(1) only if the level of the charges was so high that they amounted to a quantitative restriction on exports or a prohibition of exports. According to the Commission's decision, that possibility is ruled out in this case since statistics show that the Community's imports of soya beans from Argentina rose substantially between 1981 and 1985 (the four years prior to the lodging of Fediol's complaint).

25. Before the Court, the applicant maintained that certain essential components of the system complained of (*inter alia* the setting of artificial reference prices) constituted measures having an effect equivalent to quantitative restrictions and hence infringed Article XI(1). Its arguments are therefore based on two propositions. The first is that the Argentine system (which the applicant calls a system of guaranteed margins) is made up of various components and each component, in particular the setting of artificial reference prices, must be tested, as a separate element, against the GATT. The second proposition is that Article XI(1) does not only prohibit quantitative restrictions on exports but also, to use the language of the EEC Treaty, measures having equivalent effect to restrictions on exports. In that regard, it also refers to the Court's case-law on Articles 30 and 34 of the EEC Treaty.

Neither of those two propositions convinces me, least of all the second. Indeed, it appears to me that had the parties to the GATT wished to make available measures having equivalent effect as an extension of quantitative restrictions on exports — which alone are mentioned in the heading to Article XI — they would have had to do so expressly, as the draftsmen of the EEC Treaty did. In accordance with my earlier general remarks (section 14), the Commission is not entitled (as the applicant suggests in its reply), and nor is the Court, to effect that major addition by way of a broad interpretation which is not based on consensus between the parties to the Agreement (whether express or inferred from the practice accepted in its implementation) and to use that interpretation as the basis for taking possible measures against other parties to the GATT. Neither do I find the first proposition convincing. The determination of reference prices is a component of the scheme of differential

charges, since it determines the basis for levying the charges; it therefore does not fall within the prohibition of Article XI(1).

In view of the foregoing there is no need to consider the study of a GATT working party of 1950, which manifestly refers to quantitative restrictions on exports (and not to measures having an effect equivalent thereto), nor the argument based on the Court's case-law on Articles 30 and 34 of the EEC Treaty.[26] As far as the statistics cited by the parties are concerned, they provide no indication to suggest that quantitative restrictions on exports were established (see also the next section). The argument with regard to the suspension of export licences will be discussed below.

Alleged infringement of Article XI(1) of the GATT as far as the sporadic suspension of export licences is concerned

26. Fediol's complaint also refers to the periodic suspension of export licences for soya beans through the suspension of the (mandatory) registration (formalities) for the exportation of those products; as evidence of that claim reference is made to a press article (in English).

The contested decision states with regard to that claim that the complaint contains no evidence of it, and also refers to statistics (mentioned above) showing a rise in exports of soya beans to the European Community. According to the Commission, those statistics imply that the applicant's complaint does not contain sufficient evidence that suspension of export licences actually took place.[27] In its defence it adds that, according to the wording of the press article in question, the (alleged) suspensions were based on the need to carry out adjustments following changes in reference prices in the context of the system of charges at issue. The Commission considers that in that case the suspensions are justified under Article XI(2)(b) of the GATT.

27. That part of the Commission decision is based in the first place, as has already been repeatedly mentioned, on an evaluation of the factual evidence adduced by Fediol. From the particulars set out in the complaint and in the application it must be concluded that the Argentine licensing system for the exportation of soya beans is a so-called 'automatic' licensing system under which the issue of the requisite licences is not subject to any conditions. It is common ground that such licences are permissible

26 — For those two arguments, see section 23 and footnotes 22 and 23

27 — The applicant maintains that those statistics do not contradict its view In its opinion, the increase in Argentine exports of soya beans to the Community reflects the substantial rise in soya bean production (since 1980) coupled with a slower increase in the processing capacity of the Argentine industry The statistics therefore reflect a temporary situation which will disappear once production capacity reaches an adequate level

under Article XI(1) of the GATT.[28] Accordingly the question arises solely with regard to the alleged suspension of those licences.

Did the complaint provide sufficient evidence with regard to that point? It must be observed that the press article did not emanate from an official or even from an Argentine source but probably from a specialized European or US publication; its origin is not clear either from the complaint or from the application. The press article announces at the end of a report on an increase in the differential charges following an 18% devaluation of the Argentine peso that the temporary suspension of export registration was effected in order to carry out the 'necessary adjustments'. Accordingly it appears from the actual wording of the press article that the restriction in question, if it existed, was introduced temporarily in connection with a change being carried out in the scheme of differential charges, which as such is not caught by Article XI(1) according to the wording of that article.

Since the only evidence adduced is a more or less unidentified press article to the effect that even if the restriction was temporarily in existence it was part of the scheme of charges not covered by Article XI(1), I consider that in those circumstances the Commission was entitled to decide that Fediol's complaint did not contain sufficient evidence of the existence of unlawful restrictions on exports. Here, too, the statistical data provide no decisive answer.

Alleged infringement of Article XX of the GATT

28. Article XX contains an enumeration of a number of practices which, despite their being in the nature of restraints of trade, are expressly allowed under the GATT, subject to the (general) condition that they do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. The applicant argues that the Argentine practices complained of constitute an infringement of Article XX, indent (i) (cited *in extenso* in the Report for the Hearing, section 50). The applicant argues that that article, which authorizes a conditional exception in respect of restrictions on exports of domestic materials, constitutes an autonomous prohibition where the conditions set out therein are not fulfilled. Should the Court not uphold that argument, it maintains that the practices at issue should be prohibited under Article XX, read in conjunction with Articles III, XI(1) and XXIII. The alleged infringement of Article XX was raised by Fediol in a supplementary complaint of 9 May 1986. The Commission rejects the argument that Article XX, which in its view does not contain sufficiently concrete obligations, embodies an autonomous prohibition. It argues that since *indent (i)* of Article XX sets out an exception to Article XI, it can apply only in the event of an

28 — See *inter alia* the Panel Report on the EEC programme of minimum import prices, licences and surety deposits, adopted on 18 October 1978. See the *Analytical Index* (loose-leafed GATT edition, Geneva) under Article XI, point 4.

infringement of Article XI (that is to say in the case of quantitative restrictions on exports), which is not involved here (sections 24 to 27, *supra*).

29. In my view, the Commission's position must be accepted. The wording of Article XX and the practice adopted with regard to it [29] show that it is not regarded as imposing independent obligations or prohibitions. Moreover, to formulate a general rule from the exception to the general rule appears to me to be a questionable method of interpretation. As a result, the Commission was right to decide that Fediol's complaint did not contain sufficient evidence with regard to that point.

Whilst it is true, as the applicant maintains, that the contested Commission decision does not examine the alleged infringement of Article XX, the Commission rightly observes with regard to that point that its decision does not have to go into all the details of the argument set out in a complaint. The rule laid down in the judgment in the first *Fediol* case is that the applicant must be informed of the Commission's decision and 'that information must comprise at least a statement of the Commission's basic conclusions and a summary of the reasons therefor as is required . . . in the event of the termination of formal investigations' (Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 25 at p. 2934). In this case, that requirement is satisfied since the Commission decision was based chiefly on an examination of Articles III, XI and XXIII.

29 — The applicant has not cited any precedent or academic writings in support of its argument I would refer, inasmuch as it is necessary, to the notes, decisions and declarations connected with Article XX of the GATT which are set out in the *Analytical Index*, cited earlier Nowhere therein is there any support to be found for the applicant's argument

B — *The alleged infringement of Article XXIII of the GATT on procedure*

30. Article XXIII is designed to safeguard the concessions and benefits granted under the GATT. It enables contracting parties to the GATT to take action in certain cases in the event that they should find that one of the concessions or benefits accruing to them under the GATT is being nullified as the result of the failure of another contracting party to carry out its obligations under the Agreement (indent (a)) or of the application by another contracting party of any measure, whether or not it conflicts with the provisions of the GATT (indent (b)), or of the existence of any other situation (indent (c)). The applicant claims that benefits granted to the Community are being nullified either by the application by Argentina of measures conflicting with the GATT or by unlawful measures by Argentina which, however, do not conflict with the GATT. The applicant maintains that the alleged nullification of benefits involved in the first limb of the alternative does not have to be proved, given that there is a prima-facie case that the conflict with the GATT impaired a benefit, [30] and that it consists, in the case of the second limb, of the breach of at least three legitimate expectations.

30 — See on this subject the *Analytical Index*, Article XXIII, point 11(a)

Before examining this line of argument more closely it must be stated that the applicant can show no infringement of Article XXIII as such and certainly not at this stage of the proceedings. Indeed, that article contains no rules of substantive law. The article simply lays down a procedure which contracting parties to the GATT so desiring are to follow if they consider that a benefit accruing to them under the Agreement is being impaired or nullified. Consequently, Article XXIII relates to possible action by contracting parties (in this case the Community) which consider themselves to have been harmed and contains no provisions for reviewing the practices complained of (in this case in relation to Argentina). In addition it is solely for the aggrieved contracting party who so wishes to utilize the procedure described in that article.

This power ascribed to the contracting parties plainly implies an extensive discretion which, as far as the Community is concerned as a contracting party, is exercised according to Regulation No 2641/84 only in the last stage, that is to say at the end of the actual investigation procedure, where it is a question of deciding what measures should be taken against an illicit practice which has been definitively established. Article 10(2) of Regulation No 2641/84 provides that at that time any applicable international procedure for consultation or the settlement of disputes, as provided for in Article XXIII of the GATT, must have been discharged in accordance with a complex decision-taking mechanism dealt with in Article 11(2)(a) and Article 12 of Regulation No 2641/84. Consequently, the applicant's reliance on Article XXIII actually amounts to asking the Court whether a decision which the Commission (with the involvement of the Council — see Article 12 of Regulation No 2641/84) has not yet taken and could not yet take at this stage on the basis of the procedure set out in Regulation No 2641/84 can be reviewed by the Court. [31]

In fact, the applicant is fastening upon Article XXIII in order to invoke the infringement of a variety of articles of the GATT and a number of general legal principles, several of which were scarcely mentioned, if at all, in its complaint. Although I would be entitled to ignore those articles for the general reasons which I mentioned earlier, I shall nevertheless briefly consider those articles and principles on which reliance is made on a subsidiary basis, as it were through the medium of Article XXIII. In so doing I shall leave out of account those articles of the GATT which I have discussed earlier in this Opinion (namely Articles III, XI and XX of the GATT) which the applicant is invoking yet again — but this time in conjunction with each other. However, if each of those articles has not been infringed individually I cannot see how they could be infringed together.

31 — I shall not dwell here on the thorny question to which extent such a Commission decision, with involvement (in fact a right of veto) of the Council, is subject to judicial review. What is actually involved is an 'acte de gouvernement' in the full sense of the expression, in the international sphere in relation (not to the interpretation but) to the implementation of machinery set up by an international treaty.

Alleged infringement of Article XVI in conjunction with Article XX and of the preamble in conjunction with Article XXIII of the GATT

31. In connection with Article XXIII of the GATT, the applicant claims in the first place that (in addition to Articles III, XI and XX, which have already been discussed) the Argentine practices nullify advantages in so far as they infringe Article XVI (Section A), which contains a prohibition of subsidies. The application of Article XVI of the GATT — first alone and then in conjunction with Article XX, which has already been discussed, and rejected (section 28, *supra*) — is raised by the applicant for the first time in the application with regard to the Argentine practices complained of.

It must be stated in that regard that Fediol cannot base any argument in connection with this action for annulment on a GATT provision which it did not invoke in its complaint or at least before the Commission took the contested decision.[32] Furthermore, that article relates to the granting of subsidies, that is to say a subject that falls outside the scope of Regulation No 2641/84 (see section 7, note 4 above).[33]

In addition, the applicant also claims there to have been an infringement of rules set out in the preamble to the GATT (general prohibition of discriminatory measures) read together with the GATT articles containing specific rules against discrimination. The Commission argues against that view that the preamble to the GATT does not contain any specific obligations the non-fulfilment of which could as such give rise to an infringement of the GATT. I agree with the Commission's view on this point, too.

Alleged infringement of legitimate expectations in conjunction with Article XXIII of the GATT

32. The applicant rightly asserts that the procedure set out in Article XXIII of the GATT may also be set in train (but see section 30) where the loss of an advantage accruing to a contracting party to the GATT is caused, not by a failure to fulfil a specific GATT obligation, but by some other measure taken by another contracting party to the GATT (or even, according to indent (c) of Article XXIII(1), by the existence of any other situation). According to the complaint and the application, which provides more detail, such measures cover the infringement of generally accepted rules, such as the principle of good faith or even the principle of non-discrimination (referred to in the preamble to the GATT) or the prohibition of the evasion of treaty obligations (in particular, Article XVI on the prohibition of subsidies in conjunction with Article XX of the GATT).

32 — The applicant considers that the Court should examine all grounds which were raised before the Commission's decision became definitive That reasoning appears to be wrong in the context of these proceedings The case turns on whether the Commission correctly judged that, at the time when it took its contested decision, there was not sufficient evidence to justify initiating an investigation (Article 3 of Regulation No 2641/84) It goes without saying that evidence that was not under assessment at that time could not be taken into consideration by the Commission (whilst an infringement of Article XVI manifestly emerged from the evidence set out in the complaint, for a different view, see the following note)

33 — Admittedly the applicant argues that Article XVI of the GATT does not relate only to subsidies but also to 'any form of income or price support' (see Article XVI(1)) However, it is clear from the wording of Article XVI that a form of subsidization is meant thereby

The Community benefit which is alleged to have been impaired as a result of such infringement consists in the breach of at least three legitimate expectations of the Community (for more particulars see section 60 of the Report for the Hearing).

Against that, the Commission decision argues that the applicant does not specify the benefit which is allegedly nullified by the Argentine practices complained of. The decision refers to the fact that the consolidation at zero of the customs duty on soya cake — cited by the applicant as a lost benefit — contained no benefit for the Community (the applicant stated in reply that there is an indirect benefit incurred as the Community can thereby lay claim to concessions in return), that negotiations were not held with Argentina thereon, and that the benefits under the GATT must be assessed, not on a sectoral, but on a global, basis. In its defence the Commission adds that the 'nullification of an benefit' within the meaning of Article XXIII of the GATT is not based on general benefits such as non-disturbance of international competition or not impairing one's own industry, but on clearly specified benefits which were negotiated by the State concerned.

33. The Commission's refusal on the basis of those arguments to initiate an investigation procedure appears to me to be justified. Firstly and above all, as already stated in general in connection with Article XXIII, a Commission decision has not yet been taken on the basis of that article in the present stage of the procedure (section 30, *supra*). Secondly, 'breach of legitimate expectations' cannot, in my view, be described as the impairment of a benefit within the meaning of Article XXIII of the GATT, certainly not where such general expectations are involved as those referred to by the applicant. In connection with the most specific of the expectations (the consolidation at zero of the customs duty on soya cake) the comments made by the Commission raise serious doubts as to the legitimacy of that expectation. Lastly, it is extremely doubtful whether there is in this case an infringement of the principle of good faith. As already mentioned (section 14, *supra*) that principle refers with regard to the interpretation of treaty provisions to the need when exercising measures against a GATT contracting State not to proceed solely on the basis of one's own opinion but also to take account of those of the other contracting parties.

Alleged infringement of Article XXXVI setting out the general objectives of the GATT

34. In the supplement to its complaint lodged on 9 May 1986 (and hence before the contested Commission decision) Fediol argued that Article XXXVI must also be applied. In that article the contracting parties set out a number of general objectives in the field of international trade. The contested Commission decision does not go into that part of the complaint. In the course of the procedure before the Court the applicant has submitted no formal conclusion with respect to this point.

In my opinion, it is possible to agree withthe Commission's view that Article XXXVI contains no legally enforceable obligations and that therefore that article affords no basis for deciding that an illicit commercial practice exists.

C — *Conclusion with regard to Part II of the Opinion*

35. It does not appear from the foregoing that the Commission exercised its power wrongly in the contested decision.

Costs

36. The applicant asks the Court to order the Commission to pay the costs even if the latter is successful. It relies in this regard on the second subparagraph of Article 69(3) of the Rules of Procedure under which the Court may order even a successful party to pay costs where the Court considers that that party unreasonably caused the opposite party to incur them. I consider that there is no reason to go into that question since the substantive arguments invoked by the applicant are, according to the foregoing analysis, untenable and the Commission in rejecting the complaint did not cause the applicant to incur any 'unreasonable costs' by giving an unnecessarily strict interpretation to Regulation No 2641/84.

Nevertheless, I propose that the rule set out in the first subparagraph of Article 69(3) should be applied, under which the Court may order that the parties bear their own costs where each party succeeds on some and fails on other heads. I consider that in this case the Commission was unsuccessful with regard to its reliance on its so-called discretionary power which was described as a ground for the inadmissibility of the application for a declaration of nullity. I therefore consider that each of the parties should bear its own costs (see *inter alia* the judgment of 9 March 1978 in Case 54/77 *Herpels* [1978] ECR 585, the judgment of 18 March 1980 in Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *Valsabbia* [1980] ECR 907, and the judgment of 27 February 1985 in Case 56/83 *Italy* v *Commission* [1985] ECR 705).

General conclusion

37. In the light of the foregoing appraisal I take the view that:

(1) the objection of inadmissibility raised by the Commission in respect of the applicant's application for a declaration that the Commission's decision of 22 December 1986 is void should be rejected;

(2) the applicant's application for a declaration that the aforementioned Commission decision is void should be dismissed;

(3) the parties should be ordered to pay their own costs.