JUDGMENT OF THE COURT
10 September 1996 *

In Case C-61/94,

Commission of the European Communities, represented by Jörn Sack, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Bernd Kloke, Oberregierungsrat at the Federal Ministry of Economic Affairs, D-53107 Bonn, acting as Agent, assisted by Dietrich Ehle, Rechtsanwalt, Cologne,

defendant,

APPLICATION for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty by authorizing the importation under inward processing relief arrangements of dairy products whose customs value was lower than the minimum prices set under the International Dairy Arrangement, approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 1), and by thus failing to have regard to (1) the duty of cooperation laid down in Article 6(1)(a) of Annex I and in Article 6(a) of Annexes II and III to the Arrangement,

* Language of the case: German.

(2) the obligation under Article 3(1) of each of those Annexes and (3) the economic conditions for the granting of authorizations for inward processing relief, laid down by Articles 5 to 8 of Council Regulation (EEC) No 1999/85 on inward processing relief arrangements (OJ 1985 L 188, p. 1),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet (Rapporteur) and G. Hirsch (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 5 July 1995,

after hearing the Opinion of the Advocate General at the sitting on 7 May 1996,

gives the following

Judgment

1 By application received at the Court Registry on 14 February 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the Treaty by authorizing the importation under inward

processing relief arrangements of dairy products whose customs value was lower than the minimum prices set under the International Dairy Arrangement ('the IDA'), approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 1), and by thus failing to have regard to (1) the duty of cooperation laid down in Article 6(1)(a) of Annex I and in Article 6(a) of Annexes II and III to the IDA, (2) the obligation under Article 3(1) of each of those Annexes and (3) the economic conditions for the granting of authorizations for inward processing relief, laid down by Articles 5 to 8 of Council Regulation (EEC) No 1999/85 on inward processing relief arrangements (OJ 1985 L 188, p. 1).

2 By Decision 80/271, the Community approved a series of multilateral agreements concluded under the General Agreement on Tariffs and Trade (GATT) pursuant to the Ministerial Declaration adopted in Tokyo on 14 September 1973. One of those agreements was an arrangement concerning the dairy sector.

3 Article I of the IDA states that its objectives are to achieve the expansion and ever-greater liberalization of world trade in dairy products under market conditions as stable as possible, on the basis of mutual benefit to exporting and importing countries, and to further the economic and social development of developing countries.

4 The IDA applies to the dairy products sector, covering primarily the following products: milk and cream, fresh or preserved, concentrated or sweetened; butter, cheese and curd, and casein (Article II).

5 The IDA imposes upon participating States general obligations to provide information and to cooperate with one another (Articles III and IV) and to furnish aid

to developing countries (Article V). It establishes an International Dairy Products Council which comprises representatives of all parties to the IDA and which is responsible for its implementation (Article VII).

6 Special provisions are contained in three protocols annexed to the IDA, relating to certain milk powders (Annex I), milk fat (Annex II) and certain cheeses (Annex III). Those protocols form an integral part of the IDA and are binding on the participating States, subject to any reservations formulated by any one of them at the time when the IDA was agreed and approved by the participating States.

7 The three annexed protocols, whose provisions are virtually identical, primarily lay down obligations concerning compliance with the minimum export prices for dairy products:

— for each participating State, the protocols are applicable to exports of products 'manufactured or repacked inside its own customs territory' (Article 3(7) of Annex I and Article 3(6) of Annexes II and III);

— participating States undertake to take the steps necessary to ensure that the export prices of the products defined as pilot products are not lower than the minimum prices set by each protocol or subsequently adjusted — taking into account the results of the operation of the IDA and the evolution of the situation of the international market — by the committee established under the IDA for the implementation of each protocol (Article 3 of each annex);

— participating States undertake in particular that, when importing products covered by any of the protocols, they will cooperate in implementing the minimum prices objective of that protocol and ensure, as far as possible, that those products are not imported at prices lower than the appropriate customs valuation equivalent to the minimum prices set; they also undertake to consider sympathetically proposals for appropriate remedial action if imports at prices

inconsistent with the minimum prices threaten the operation of the protocol in question (Article 6(1)(a) and (c) of Annex I and Article 6(a) and (c) of Annexes II and III).

8 The IDA entered into force on 1 January 1980 *vis-a-vis* those participating States who had already approved it. For those who approved it after that date, the IDA took effect from the date when they accepted its terms. Initially valid for a period of three years, it is tacitly renewed for further periods of three years at a time, save where otherwise decided by the International Dairy Products Council. The Community did not stipulate any reservation when it became a party to the IDA.

9 According to the documents before the Court, the Commission found in 1990 that certain Member States were not complying with the IDA in that they were granting authorizations for the inward processing of dairy products imported from non-member countries in cases where the customs value was lower than the minimum prices under the IDA. By telex message of 8 November 1990, the Commission called on those Member States to revoke authorizations granted in such cases. The Federal Republic of Germany refused to do so, principally on the grounds that goods placed under inward processing relief arrangements were not released for free circulation, that the products obtained were re-exported to non-member countries which were not necessarily parties to the IDA and, more generally, that the IDA did not apply to transactions under the said arrangements.

10 In its letter of 26 March 1991 serving formal notice on the German Government, the Commission rejected that interpretation. It maintained that the IDA applied to all imports of dairy products at prices lower than the minimum prices set, even under inward processing relief arrangements. Pursuant to Articles 5 to 8 of Regulation No 1999/85, authorizations for placing goods under inward processing relief arrangements could not be granted where their customs value was lower than the minimum price specified in the IDA. Furthermore, the practice of granting authorizations in such cases might, if the goods were later released into free circulation, lead to their being taxed on the basis of a customs value incompatible with the IDA.

11 The German Government rejected the Commission's objections. In its reply of 8 May 1991, it pointed out that it had referred to the special committee appointed by the Council in accordance with Article 113 of the EC Treaty ('the Article 113 Committee') the question of how the IDA should be interpreted in this respect. Pending a unanimous decision of that committee, there was no justification for making the acceptance of dairy products for inward processing contingent on findings based on the value of the product.

12 On 3 February 1993 the Commission delivered a reasoned opinion to the German Government under Article 169 of the Treaty, in which it restated all its objections. In its communication of 27 April 1993 the German Government again rejected those objections, whereupon the Commission decided to bring these proceedings.

Admissibility

13 Although the German Government does not formally raise a plea of inadmissibility, it nevertheless observes in its defence that the Commission should have awaited the opinion of the Article 113 Committee before making its application. In its view, the Article 113 Committee was set up for the specific purpose of discussing the interpretation and implementation of international agreements and of establishing a common Community position in that regard. So long as the Committee has not reached a consensus, the Commission may not bring infringement proceedings against a Member State for the alleged breach of an international agreement.

14 However, the German Government's observation is unfounded. It is clear from the wording of the second subparagraph of Article 113(3) that the Article 113 Committee's task is to assist the Commission in negotiating tariff and trade agreements. Its role is purely advisory.

15 Under Article 155 of the EC Treaty, the Commission is responsible for ensuring application of the Treaty and, accordingly, compliance with international agreements concluded by the Community which, pursuant to Article 228 of the Treaty, are binding both on the Community institutions and the Member States. For the Commission to succeed in that task, it must not be hindered in the exercise of its power under Article 169 of the Treaty to bring proceedings before the Court where a Member State has failed to fulfil its obligations under such an agreement. The initiation of proceedings before the Court by the Commission cannot therefore depend on the outcome of consultations within the Article 113 Committee; *a fortiori*, it cannot hinge on whether a consensus between the Member States has first been found to exist within the Committee with regard to the interpretation of the Community's commitments under an international agreement.

16 Furthermore, it is for the Court, within the framework of its jurisdiction over the interpretation of agreements concluded by the Community, to ensure their uniform application throughout its territory (Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641, paragraph 14).

Substance

The first and third complaints

17 By these complaints, which it is appropriate to consider first, the Commission alleges that the Federal Republic of Germany failed to comply with the provisions of the IDA pursuant to which participating States undertake to ensure, as far as possible, that the dairy products concerned are not imported at prices lower than the appropriate customs value equivalent to the minimum prices set and that it infringed the Community rules on inward processing relief arrangements.

The first complaint

18 The Commission argues, first, that the IDA covers all trade between the Community and non-member countries, including, on the one hand, goods imported into the Community and placed under inward processing relief arrangements and, on the other, those exported or re-exported after processing.

19 The German Government contends, to the contrary, that neither class of goods falls within the scope of the IDA, since in neither of the cases described above can the goods be regarded as having been 'imported' or 'exported' for the purposes of the IDA.

20 The German Government's interpretation in this respect must be rejected.

21 Under Article 3(7) of Annex I and Article 3(6) of Annexes II and III, for each participating State, each protocol is applicable to 'exports of the products specified in Article 1 ... manufactured or repacked inside its own customs territory'. None of the three annexed protocols places any restriction on the IDA's application to products exported from the customs territory of a participating State after inward processing.

22 Nor do the obligations laid down by the IDA on importing countries impose any restriction in respect of imported products placed under inward processing relief arrangements.

23 Although the IDA provides for derogations from the obligations it imposes in connection with the undertaking to comply with the minimum prices set, they do not extend to goods which have entered the customs territory of a participating State under inward processing relief arrangements.

24 Save for the exceptions expressly mentioned, the IDA does not provide for any derogations other than those granted, upon request by a participating State and in accordance with Article 7 of each annex, by the committee responsible for ensuring the IDA's implementation. In reply to a question from the Court, the Commission stated that no derogation had been sought by the Community.

25 Nor does the relevant Community legislation offer more in the way of support for the German Government's argument that goods entering the Community under inward processing relief arrangements cannot be regarded as 'imported' or 'exported'.

26 Even under Community law — as is clear from Article 1(3) of Regulation No 1999/85 — non-Community goods which have undergone formalities for being placed under inward processing relief arrangements are classified as 'import goods'. Compensating products obtained by processing operations are regarded as 're-exported' or, if they are obtained from equivalent goods, as 'exported' (Article 2 of Regulation No 1999/85).

27 Lastly, contrary to the German Government's contention, although, under what is known as the 'suspension' system, imported goods are not subject to import duties, those goods nevertheless enter the customs territory of the Community. Furthermore, under the drawback system, inward processing relief arrangements apply to goods which have already been released there for free circulation.

28 The Commission's second argument in support of its first complaint is that the undertaking to ensure compliance with the minimum IDA prices applies to both imports and exports of participating States. However, the Commission acknowledges that, in contrast with Article 3, the obligation laid down by Article 6 of each annex is not unconditional. The dilution of the obligation to comply with the minimum prices in the case of imports is explained by the fact that a party to the IDA is not always able to prevent imports at prices below the minimum. In the present case, however, Community law provides Member States with the means to preclude such imports.

29 The German Government challenges that interpretation. It contends that the IDA does not lay down any legal obligation to comply with the minimum prices in respect of the importation of dairy products. Article 6 of each annex merely requires an undertaking to cooperate on a voluntary basis, which is not binding.

30 In order to interpret that provision, account must be taken of the purpose of the IDA, the context of Article 6 and the general rule of international law requiring the parties to any agreement to show good faith in its performance (see the judgment in *Kupferberg*, cited above, paragraph 18).

31 Since the purpose of the IDA is to achieve stability on the world market in dairy products in the mutual interests of exporters and importers, the Community must interpret its terms in such a way as to encourage the attainment of the objective pursued.

32 In the context of trade in dairy products between participating States, it is not in principle possible for products to be imported from one of those countries at prices below the minimum, where the participant State from which the product comes ensures that its commitments under the IDA are honoured by exporters operating from its territory.

33 In the context of trade between participating States and countries which are not parties to the IDA, the former are under a duty to make sure that the minimum export prices under the IDA are complied with by exporters operating from their territory. In this respect, the IDA is of general application: its scope is by no means confined solely to trade between participating States.

34 On the other hand, traders who export their dairy products from countries which are not parties to the IDA and who are not bound, therefore, by the minimum export prices could jeopardize the IDA's operation if they were able to export their products to a participating State or to the Community at prices below the minimum without fear of competition from exporters who operate from the territory of participating States and are required for their part to comply with the minimum prices.

35 The specific purpose of Article 6 of each of the annexed protocols is to require participating States to prevent such transactions as far as possible. Furthermore, an obligation to provide information is specifically laid down by Article 6(1)(b) of Annex I and Article 6(b) of Annexes II and III, in respect of imports from non-participating States.

36 The Commission's interpretation is also supported by the actual wording of Article 3(5) of Annex I. That provision expressly derogates from the requirement of compliance with the minimum prices — as regards not only exports, but also imports — of products intended as animal feed. Furthermore, when negotiating the IDA, it was considered necessary to add a second paragraph to Article 6 of Annex I, which expressly provides that Article 6(1) does not apply to imports of that kind, thereby confirming the binding nature of the first paragraph.

37 In that context, the phrase 'as far as possible' in Article 6(1)(a) of Annex I and Article 6(a) of Annexes II and III is not intended to release participating States from the obligation laid down by those provisions but rather to relieve a

participant of liability where, notwithstanding the means at its disposal, it is unable to prevent dairy products from being imported into its territory at prices below the minimum set by the IDA. That is also the reason why Article 6(1)(c) of Annex I and Article 6(c) of Annexes II and III provide that participating States are to cooperate in taking remedial action to prevent the implementation of the annexed protocols from being undermined in the future by imports at prices which do not comply with the minimum prices set.

38 In the present case, the Commission is right in arguing that the Federal Republic of Germany possessed the means to secure compliance with the IDA, in so far as all processing operations are conditional on authorization granted by the Member State concerned.

39 The Commission is therefore justified in maintaining that Article 6 of the annexes precluded the Federal Republic of Germany from authorizing imports of dairy products, including those effected under inward processing relief arrangements, at prices lower than the minimum.

The third complaint

40 The Commission argues also that the Community legislation on inward processing relief arrangements precluded the Federal Republic of Germany from granting authorizations under those customs arrangements: where dairy products were not imported in compliance with the minimum prices under the IDA, the German authorities should have taken the view that the economic conditions referred to in Articles 5 and 6 of Regulation No 1999/85 were not satisfied. The Federal Republic of Germany therefore failed to fulfil its obligations, not only under the IDA

with respect to the minimum prices in the case of imports, but also under that regulation.

41 As a preliminary point, the German Government contends that the failure, if any, to fulfil its obligations must be assessed in the light of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) — which repealed and replaced Regulation No 1999/85 — even though it did not enter into force until 1 January 1994, that is, several months after the time-limit set in the Commission's reasoned opinion had expired. As the Court has consistently held (see Case 125/77 *Koninklijke Scholten-Honig and Another* v *Hoofdproduktschap voor Akkerbouwprodukten* [1978] ECR 1991), amending legislation applies, unless otherwise provided, to the future consequences of situations which arose under the previous legislation.

42 That argument cannot be accepted. An action under Article 169 of the Treaty can be based only on the arguments and submissions already set forth in the reasoned opinion (see *inter alia* Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 16). It follows that, in such proceedings, the existence of an infringement must be assessed in the light of the Community legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion.

43 The German Government wholly rejects the third complaint set out by the Commission. First, it argues that the Commission is wrong in considering the essential interests of Community producers, referred to in Article 5 of Regulation No 1999/85, to be impaired by the authorizations at issue. On the contrary, Community producers could well be attracted by the prospect of processing or working goods under inward processing relief arrangements without being bound to comply with the minimum prices under the IDA.

44 Article 5 of Regulation No 1999/85 provides that the customs authorities of the Member States are to grant authorization for inward processing relief 'if [those] arrangements may contribute towards creating the most favourable conditions for the export of compensating products, provided that the essential interests of Community producers are not affected (economic conditions)'.

45 In view of the conclusion reached by the Court in paragraph 39 above, suffice it to note that the essential interests of Community producers would inevitably be impaired if it were possible, in the absence of derogations provided for under the IDA, for certain traders to obtain in a Member State authorizations for inward processing relief in the case of dairy products imported at prices below the minimum under the IDA, that is, in the case of products brought into the Community customs territory in disregard of the rules which the IDA specifically set out to establish 'in the mutual interests of producers and consumers, and of exporters and importers' (preamble to the IDA).

46 Secondly, the German Government argues that the economic conditions imposed by Regulation No 1999/85 are satisfied. It points out that, under Article 6(1)(d) of that regulation, those conditions are considered to be fulfilled when the goods which are intended to be processed are produced in the Community but cannot be used because their price is such as to make the proposed commercial operation economically impracticable.

47 Germany maintains that, in the circumstances, it is possible that Community manufacturers may not use goods produced in the Community because the minimum export prices make it unprofitable to do so. Where that is the case, those traders should be authorized to carry out inward processing with dairy products imported from non-member countries which are not required to comply with the minimum prices.

48 Once again, the German Government's premiss is incorrect, since, as the Court has pointed out, participating States are also under a duty to ensure that the minimum prices are complied with in respect of the importation of dairy products.

49 Consequently, the German Government cannot rely on Article 6(1)(d) of Regulation No 1999/85 where competition between goods produced in the Community and those produced in non-participating States has been distorted to the detriment of the former, as will inevitably be the case if, contrary to the IDA, the goods have been imported into a Member State at prices lower than the minimum prices which Community producers must comply with.

50 Thirdly, the German Government objects that the Community inward processing relief arrangements themselves preclude application of the measures provided for by the IDA. Under Article 16 of Commission Regulation (EEC) No 2228/91 of 26 June 1991 laying down provisions for the implementation of Regulation (EEC) No 1999/85 (OJ 1991 L 210, p. 1) — which on this point incorporates certain provisions of Council Regulation (EEC) No 3677/86 of 24 November 1986 (OJ 1986 L 351, p. 1) — where non-Community goods are entered for inward processing relief arrangements using the suspension system, any specific commercial policy measures to which imports of the said goods are subject do not apply.

51 That objection must be rejected.

52 When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. Likewise, an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation (see Case C-90/92 *Dr Tretter* v *Hauptzollamt Stuttgart-Ost* [1993] ECR

I-3569, paragraph 11). Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.

53 It follows from the conclusions arrived at in relation to the Commission's first complaint that the IDA applies to imports of goods into the Community under inward processing relief arrangements. To construe Article 16 of Regulation No 2228/91 in such a way as to exempt such goods from the IDA would therefore be incompatible with that agreement.

54 It appears, however, that goods placed under inward processing relief arrangements, using the suspension system, qualify for exemption under Article 16 of Regulation No 2228/91 only by reason of the fact that they are to be re-exported from the customs territory of the Community and are not therefore offered for sale on the Community market.

55 It follows that the exemption under Article 16 of Regulation No 2228/91 is designed to apply only to commercial policy measures not entailing the imposition of tariffs which, like customs duties, are levied on imported goods for the purpose of protecting the Community market.

56 However, that is not the objective of the IDA, whose scope is much wider. It lays down minimum rules for the organization of the world market in dairy products, the purpose of which is to ensure minimum price levels in international trade. In particular, the inclusion of provisions concerning application of the minimum prices to imports is not designed to protect the Community market, but is explained by the fact that not all countries are parties to the IDA and it is therefore necessary to prevent traders established in a non-participating State from undermining the rules introduced for stabilizing the market by exporting their products to a participating State at prices below the minimum set.

57 Consequently, Article 16 of Regulation No 2228/91 must be construed as not exempting from the IDA goods which enter the Community under inward processing relief arrangements, using the suspension system.

58 The Commission is therefore justified in its assertion that Community legislation on inward processing relief arrangements precludes the Federal Republic of Germany from granting authorizations under those customs arrangements in respect of dairy products imported at prices below the minimum prices set under the IDA.

The second complaint

59 The Commission argues that, by authorizing imports of dairy products under inward processing relief arrangements at prices lower than the minimum prices set under the IDA, the Federal Republic of Germany has failed to ensure compliance with the minimum export prices, contrary to Article 3(1) of the three annexes to the IDA.

60 In that respect, the Commission — as the Advocate General has pointed out in point 14 of his Opinion — simply maintained that, if the minimum prices are not adhered to with respect to imports of dairy products, it automatically follows that those products will also be re-exported in disregard of those prices. In response, the German Government contended that, in view of the cost of processing operations and transport, the products at issue can only be re-exported at prices higher than those set under the IDA.

61 It is settled law that, in proceedings under Article 169 of the Treaty, the Commission is required to establish the existence of the alleged infringement and may not rely on any presumption (see Case 290/87 *Commission* v *Netherlands* [1989] ECR 3083, paragraph 11).

62 In the light of the above circumstances, however, it must be concluded that the Commission has failed to provide evidence of the alleged infringement. The Commission's second complaint must therefore be rejected.

63 It follows from all the foregoing considerations that, by authorizing the importation under inward processing relief arrangements of dairy products whose customs value was lower than the minimum prices set under the IDA, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1)(a) of Annex I and Article 6(a) of Annexes II and III to the IDA, and under Regulation (EEC) No 1999/85.

Costs

64 Under Article 69(3) of its Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. However, since the Federal Republic of Germany has been essentially unsuccessful in its pleadings, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by authorizing the importation under inward processing relief arrangements of dairy products whose customs value was lower than the minimum prices set under the International Dairy Arrangement, approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations, the Federal Republic of Germany has failed to fulfil its obligations under Article 6(1)(a) of Annex I and Article 6(a) of Annexes II and III to that Arrangement, and under Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements;**

2. **Dismisses the remainder of the application;**

3. **Orders the Federal Republic of Germany to pay the costs.**

Rodríguez Iglesias Edward Puissochet

Hirsch Mancini Moitinho de Almeida

Kapteyn Gulmann Murray

Delivered in open court in Luxembourg on 10 September 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President