THE COURT

in answer to the questions referred to it for a preliminary ruling by the Tariefcommissie by decision of 16 August 1962, hereby rules:

1. **Article 12 of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.**

2. **In order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in Article 12 of the Treaty, regard must be had to the duties and charges actually applied by the Member State in question at the date of the entry into force of the Treaty.**
Such an increase can arise both from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an increase in the rate of customs duty applied.

3. **The decision as to costs in these proceedings is a matter for the Tariefcommissie.**

Donner Delvaux Rossi

Riese Hammes Trabucchi Lecourt

Delivered in open court in Luxembourg on 5 February 1963.

A. Van Houtte — Registrar

A. M. Donner — President

OPINION OF MR ADVOCATE-GENERAL KARL ROEMER DELIVERED ON 12 DECEMBER 1962[1]

Mr President,

Members of the Court,

The present proceedings originate in an action before the Tariefcommissie, a Dutch administrative court. This action is for the annulment of a decision of the Nederlandse administratie der belastingen (the Netherlands Inland Revenue Administration) of 6 March 1961 concerning the application of a particular customs duty to the import of urea-formaldehyde from the Federal Republic of Germany. The decision is based on

1 — Translated from the German.

the new Netherlands customs tariff which entered into force on 1 March 1960 and which was fixed by the Brussels Protocol of 25 July 1958 by the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands and was ratified in the Netherlands by the Law of 16 December 1959.

The parties to the proceedings are in agreement with the Tariefcommissie that at the date of importation (9 September 1960) the imported goods were correctly classified under a particular tariff heading of the customs tariff in force. But this tariff differs from the previous tariff (which came into force in the three Benelux countries by virtue of the Customs Convention of 5 September 1944) fixed by the Brussels nomenclature (laid down in the Agreement of 15 December 1950 on the Tariff Nomenclature for the Classification of Goods in the Customs Tariffs), which entailed an alteration of the former tariff headings.

Whereas before 1 March 1960 the product in question—as can be seen from two decisions of the Tariefcommissie—was classified in a category subject to a duty of 3% under the Dutch customs tariff (Tariefbesluit 1947), after the Brussels nomenclature was introduced it became subject to a higher duty resulting from the re-arrangement of previous tariff numbers.

That is why the plaintiff in the main action considered that this alteration of the customs tariff by the Brussels Protocol contravened Article 12 of the EEC Treaty, and that the decision made by the customs authorities should be annulled in view of the provisions of the EEC Treaty.

The Tariefcommissie has not decided this question but referred it to the Court of Justice on 16 August 1962 under Article 177 of the Treaty, asking the Court to give a preliminary ruling on two questions. It wished to know:

'1. Whether Article 12 of the EEC Treaty has direct application as it is said to do by the plaintiff in the main action; in other words; whether nationals of Member States can, on the basis of the Article in question, lay claim to individual rights which the courts must protect;

'2. In the event of an affirmative reply, whether there has been an unlawful increase of an import duty, or whether it was in this case a reasonable alteration of the duty applicable before 1 March 1960, an alteration which, although amounting to an increase from the arithmetical point of view, is nevertheless not to be regarded as prohibited under the terms of Article 12.'

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, the Registrar notified the Member States and the Commission and the parties to the national proceedings of the reference for a preliminary ruling. The parties to the proceedings, the Governments of the Kingdom of the Netherlands, the Kingdom of Belgium and the Federal Republic of Germany and the Commission of the EEC submitted written observations. During the oral procedure only the applicant and the Commission of the EEC addressed the Court. I shall mention the contents of all these observations when I examine the reference for a preliminary ruling.

Legal consideration

I — The order of examination

In the written observations it was suggested that the Court should begin by answering the second question.

In the opinion of the Netherlands Government the second question is based upon the view that there is a conflict between Article 12 of the EEC Treaty and the Brussels Protocol (which

forms the basis of the customs tariff which is criticized). This view rests upon a false interpretation of the EEC Treaty. However it was not the intention of the Benelux Agreement unlawfully to set aside the EEC Treaty. If the second question is answered in this way, the first question becomes pointless.

It seems to me appropriate, in order not to delay the proceedings, first of all to dwell on this argument for a moment. In principle, I consider that, when the Court answers questions of interpretation, it must follow the order adopted by the court making the reference, at least if that order is determined by the degree of importance in the national proceedings of the questions to be answered, and if the referred questions, according to the system of Community law, have a material and logical connexion with each other which allows the selected order to be followed. But in this case I do not have to go more deeply into this problem.

It would only be possible to think of reversing this order if it appeared at first sight, and before beginning the actual examination, that the second question is simpler and ought to be answered in such a way as to make beyond any doubt an examination of the first question unnecessary. But in this case it is by no means obvious that the second question only calls for consideration of the aspect mentioned by the Netherlands Government, that it presents a lesser degree of difficulty and requires a less exhaustive review, or that in all probability it should be answered along the lines indicated by the Netherlands Government. This view is sufficient to justify the retention of the order chosen by the Tariefcommissie, which furthermore—so it appears to me—is the logical result in the circumstances. For an interpretation of the content of Article 12 is only relevant for the Netherlands court if it knows that it must apply that provision.

II—The first question

1. *Admissibility*

Whether the reference by the Tariefcommissie is admissible under Article 177 of the Treaty must be considered by the Court of its own motion. It is a question which cannot be disposed of by agreement between the parties concerned, for we are dealing with an objective procedure for interpreting the Treaty. Naturally, this does not preclude the parties from raising questions of admissibility. The Netherlands and Belgian Governments have thus drawn attention to the following points bearing on the first question:

1. It is not concerned with the interpretation of an Article of the Treaty, but with a problem under Netherlands constitutional law.
2. The answer to the first question has no effect upon the solution of the real difficulties in the Dutch case. Even if an affirmative reply is given to the question, the Netherlands court is still faced with the problem of deciding to which law of ratification (that relating to the EEC Treaty or that relating to the Brussels Agreement) it should give precedence.

These observations must be examined before solving the problems of interpretation which have been submitted.

On the first point

With regard to the question whether the Tariefcommissie has submitted to the Court a problem of Dutch constitutional law the following observations may be made: it seems clear to me that the *wording* of the first question ('whether Article 12 . . . *has* direct application') gives the impression that the Court is faced with a task which goes beyond its jurisdiction under Article 177. It is impossible to clarify exhaustively the

real legal effects of an international agreement on the nationals of a Member State without having regard to the constitutional law of that Member State.
But, on the other hand, it is clear that the question does not refer exclusively to problems of constitutional law. The effect of an international treaty depends in the first place on the legal force which its authors intended its individual provisions to have, whether they are to be merely programmes or declarations of intent, or obligations to act on the international plane or whether some of them are to have a direct effect on the legal system of Member States. If the examination is limited to this aspect, without reaching a conclusion on the question how national constitutional law incorporates the intended effects of the treaty into the national legal system, it comes within the field of interpretation of the Treaty. In spite of the unfortunate wording of the first question, it is possible to recognize in it an admissible request for an interpretation which the Court can extract without difficulty from the facts put forward and can deal with under Article 177.

On the second point

The second objection concerns the so called 'Relevance of the Decision', that is, the question whether the solution of a particular problem according to Community law is of any importance in reaching a decision in the national proceedings.
In my view the Court has, in principle, no jurisdiction to consider this preliminary question. As is shown by the wording of the second paragraph of Article 177 which must also apply to a reference under the third paragraph of that Article (' . . . if it considers that a decision on the question is necessary . . .'), the national courts have to this extent a certain freedom of evaluation. They form an idea how the national proceedings should be decided and ask themselves at what stage their method of evaluating the law and the facts must be supplemented with the help of a binding interpretation of the Treaty under Article 177. This Court which, in principle, must not apply national law, may neither review nor rectify arguments based on national law, lest it be convicted of exceeding the limits of its jurisdiction. It should thus accept the determination made by the national court of those issues which seem to it to be necessary for its decision.
A difficult procedure can if necessary be applied in exceptional cases where the evaluation by the national court is manifestly wrong (for example in cases of offences against the laws of logic, or failure to apply correctly general principles of law or to understand national legal questions which have been clearly decided, which would make the procedure of reference for a preliminary ruling appear to be an abuse of procedure).
As regards this particular case, it must not be forgotten that after the first question has been positively answered another question follows. It may be that its examination leads to an interpretation of Article 12 according to which there is no conflict between the EEC Treaty and the Brussels Protocol, perhaps because Article 12 allows room for exceptional treatment in special cases. Further, we cannot estimate the importance that the Dutch court would attach to a conflict which might arise and how it would decide this issue. For all these reasons, it is not possible to deny the relevance of a decision in determining the issues in the national proceedings and to refuse to answer the first question.

2. Examination of the first question

I have already mentioned that the question is not happily phrased. But its meaning appears clear when looked at in the light of the constitutional law of

the Netherlands. Article 66 of the Netherlands Constitution—according to its interpretation in cases decided by its courts—gives international agreements precedence over national law, if the provisions of such agreements have a general binding effect, that is, when they are directly applicable ('self-executing'). The question is, therefore, whether it can be inferred from the EEC Treaty that Article 12 has this legal effect or whether it only contains an obligation on the part of Member States not to enact laws to the contrary, the infringement of which would not result in the national laws being ineffective.

The opinions expressed in the course of the proceedings are not unanimous. The plaintiff in the Netherlands action and the Commission of the EEC maintain that Article 12 has a direct internal effect in that authorities and courts of Member States must apply it directly. According to this opinion the first question should receive an affirmative answer. The Dutch, Belgian and German Governments, on the other hand, see in Article 12 only an obligation on the part of Member States.

In its written observations and during the oral procedures, the Commission attempted to support its view by presenting a detailed analysis of the structure of the Community. Very impressively, it submitted that, judged by the international law of contract and by the general legal practice between States, the European Treaties represent a far-reaching legal innovation and that it would be wrong to consider them in the light *only* of the general principles of the law of nations.

It is right that these conclusions should have been reached in proceedings which raise the fundamental question of the relationship between Community law and national law.

Anyone familiar with Community law knows that in fact it does not just consist of contractual relations between a number of States considered as subjects of the law of nations. The Community has its own institutions, independent of the Member States, endowed with the power to take administrative measures and to make rules of law which directly create rights in favour of and impose duties on Member States as well as their authorities and citizens. This can be clearly deduced from Articles 187, 189, 191 and 192 of the Treaty.

The EEC Treaty contains in addition provisions which are clearly intended to be incorporated in national law and to modify or supplement it. Examples of such provisions are Articles 85 and 86 relating to competition (prohibition of certain agreements, prohibition of the abuse of a dominant position in the Common Market), the application of the rules on competition by the authorities of Member States (Article 88), and the duty of national courts to cooperate with the Community institutions as regards decisions and their enforcement (Articles 177 and 192 of the Treaty; Articles 26 and 27 of the Protocol on the Statute of the Court of Justice). In this connection mention can be made of the provisions which are designed to produce direct effects at a later stage, for example the provisions under the Title of the Treaty devoted to the Free Movement of Persons, Services and Capital (Articles 48 and 60).

But on the other hand it must not be forgotten that many of the Treaty's provisions expressly refer to the *obligations* of Member States.

From the first part of the Treaty which sets out the principles of the Community I would mention Article 5 which provides that Member States shall take all appropriate measures to ensure fulfilment of *obligations* arising out of the Treaty, or Article 8 which provides for a finding that the objectives specifically laid down for the first stage have in fact been attained and that certain *obligations* have been fulfilled. In the Title relating to the free movement of goods, Article 11 (obligations with re-

gard to customs duties) and Article 37 (obligations relating to State monopolies) can be mentioned. Finally I might mention, without claiming to be exhaustive, Article 106 in which Member States undertake to authorize payments in a specified currency.

It can surely be inferred from the carefully phrased wording of the Treaty and also from its material content and its context that these provisions in fact only lay down an obligation on the part of Member States.

Further we find a series of provisions which, although drafted in a *declaratory* form, are clearly intended, having regard to their content and context, only to be obligations of Member States and not to have direct internal effect.

These are the provisions on the abolition of customs duties on imports and on exports, the lowering of customs duties of a fiscal nature (Articles 13, 16, 17), on the progressive introduction of the Common Customs Tariff (Article 23), on the conversion of import quotas into global quotas and on the increase of the latter (Article 33), on the adjustment of State monopolies of a commercial character (Article 37), on the abolition by progressive stages of restrictions on the freedom of establishment (Article 52), on the abolition of restrictions on the movement of capital (Article 67) and on the abolition of discrimination in transport (Article 79).

By comparison, it is relatively rare to find in the wording of the Treaty the terms 'prohibition' or 'prohibited' as for example in Articles 7, 9, 30, 34, 80, 85 and 86. And in some of these provisions, in particular in so far as they are not addressed to nationals, the text or the context makes it quite clear, by reference to regulations to be made later or to other implementing provisions, that they cannot have any direct legal effect (Articles 9, 30 and 34).

What is striking is that even in the previsions which contain the phrase 'incompatible with the Common Market' (Article 92, aids granted by States), there can be no question of direct application; for, according to Article 93, when the Commission finds that such regulations on aids are incompatible with the Treaty, it has the power to decide that the state concerned must *abolish* or *alter* them within a given time.

The first conclusion we can draw from this analysis is that large parts of the Treaty clearly contain only obligations of Member States, and do not contain rules having a direct internal effect.

It is accordingly within the framework of supranational law that ways of dealing with breaches of the Treaty have been devised. Under Article 169, the Commission gives a Member State which does not fulfil its obligations under the Treaty a time limit within which it can *comply* with the reasoned opinion of the Commission. Under Article 171 a State in this situation is required *to take the necessary measures* to comply with the judgment of the Court of Justice. If, for the purpose of Community law, it had been intended to make the direct application of the provisions of the Treaty, in the sense that they are to prevail over national law, a fundamental principle, the procedure for enforcing obedience could have been confined to a declaration of the nullity of measures taken contrary to the provisions of the Treaty. At least the provisions in Article 171, if not also the fixing of a time limit under Article 169, would be superfluous.

If we consider the place which Article 12 can occupy in this system, in this range of legal possibilities, it is useful to begin by recalling its wording. It reads as follows:

'Member States shall refrain from introducing between themselves any new customs duties or imports or exports or any charges having equivalent effect and from increasing those which they already apply in their trade with each other.'

It seems to me beyond doubt that the

form of words chosen—which moreover no one has called into question—no more precludes the assumption of a legal obligation than does the similar wording of other Articles of the Treaty. To give Article 12 a lower legal status would not be in keeping with its importance in the framework of the Treaty. Further, I consider that the implementation of this obligation does not depend on other legal measures of the Community institutions, which allows us in a certain sense to speak of the direct legal effect of Article 12.

However, the crucial issue according to the question raised by the Tariefcommissie is whether this direct effect stops at the Governments of the Member States, or whether it should penetrate into the national legal field and lead to its direct application by the administrative authorities and courts of Member States. It is here that the real difficulties of interpretation begin.

In the first place what is remarkable is that the Member States are named as the addressees just as in other provisions which clearly only intend to impose obligations on states (Articles 13, 14, 16, 27 etc). They, the Member States, shall not introduce new customs duties or increase those which they already apply. It must be concluded from this that Article 12 does not have in mind administrative practice, that is, the conduct of the national administrative authorities.

But apart from designating those to whom it is addressed, Article 12 recalls the wording of other provisions which appear to me beyond any doubt only to lay down obligations for Member States, for they speak expressly of 'obligations' even if only in later paragraphs (see for instance Articles 31 and 37).

In this connexion it is also necessary to mention Article 95 which provides that no Member State shall impose directly or indirectly on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products and then continues in the third paragraph:

'Member States shall, not later than at the beginning of the second stage, *repeal or amend* any provisions existing when this Treaty enters into force which conflict with the preceding rules.'

It should further be noted that the wording of Article 12 does not contain such terms as 'prohibition', 'prohibited', 'inadmissible', 'without effect', which are found in other provisions of the Treaty. It is just when a provision is meant to be applied directly, that is, by the administrative authorities of Member States, that a precise indication of the intended legal effects is indispensable.

But above all we must consider whether, *judged by its content,* Article 12 appears to be adapted for direct application. We must bear in mind that, at least for the time being, Member States still retain to a large degree their legislative powers in customs matters. In certain Member States they lead to formal laws. The direct application of Article 12 would thus often take the form of a review of legislative acts by the administrative authorities and the courts of Member States, with the help of the provisions of Article 12.

If we look at the object of this provision it appears that, contrary to first impressions, it is very complex. It is therefore scarcely possible for its provisions to be applied in every case without creating problems.

Article 12 applies, *inter alia,* to charges having equivalent effect. We have seen recently in another case the difficulties which an exact definition of this concept can entail. Further, Article 12 refers to customs duties or charges having equivalent effect *applied* at a particular moment. In the practice of this Court we have learned that even the term 'applied' can raise considerable difficulties of interpretation. Finally the present proceedings themselves show

what problems can be created by a finding of the existence of an increase in applied tariffs based on an alteration of customs nomenclature.

These difficulties emerge all the more clearly when it is realized that in customs law states are not only under a negative duty. Under the Treaty they are required by a continuous series of measures to adapt their customs law and regulations to the development of the Common Market. But if the customs system is continually changing, the supervision of the supplementary standstill provision of Article 12 is certainly not easy.

I find it difficult to understand how, in view of this, the Commission can expect that the direct application of Article 12 will bring about an increase in legal certainty.

Can it really be assumed that undertakings rely in their commercial operations on a particular interpretation and application of specific provisions of the Treaty or would they not find more reliable guidance in positive national customs provisions?

Even if these arguments alone provide sufficient reasons for rejecting the view that Article 12 has direct internal effect, the following additional arguments must be mentioned:

The position of the constitutional laws of the Member States, above all with regard to the determination of the relationship between supranational or international law and subsequent national legislation, is far from uniform.

If Article 12 is deemed to have a direct internal effect, the situation would arise that breaches of Article 12 would render the national customs laws ineffective and inapplicable in only a certain number of Member States. That appears to me to be the case in the Netherlands, the Constitution of which (Article 66) gives international agreements containing generally binding and directly applicable provisions a superior status to that of national law; in Luxembourg (where the courts, in the absence of explicit provisions in the Constitution, have arrived at essentially the same conclusion)[1]; and, it may be, in France (perhaps because the relevant Article 55 of the Constitution of 4 October 1958 is not quite clear with regard to later laws and contains moreover a reservation that there must be reciprocal application)[2].

On the other hand, it is certain that the Belgian Constitution does not include any provision dealing with the legal effect of international treaties in relation to national law. They seem, according to the case law of that country, to have the same status as national laws.

Similarly, there is no provision in the text of the Italian Constitution from which the supremacy of international law over national law can be inferred. The case law and the prevailing doctrine do not accord any superior status to treaties, at least in relation to later national laws.

Finally, with regard to German constitutional law, Article 24 of the Basic Law provides that the Federation may by legislation transfer sovereign rights to international institutions. Article 25 provides that the *general* rules of international law shall form an integral part of Federal law, and shall take precedence over legislation under that law and create rights and duties directly applicable to the inhabitants of the territory of the Federation. However, contrary to the views of certain authors,[3] it cannot be inferred from case law that

1 — Pescatore: 'L'autorité en droit interne des traités internationaux'; Pasicrisie Luxembourgeoise, 1962, page 99 et seq.

2 — 'Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.'(Treaties or agreements duly ratified or approved have, from the moment of promulgation, an authority superior to that of the laws, subject, for each agreement or treaty, to its being put into effect by the other party).

3 — Gerhard Behr: 'The Relationship between Community Law and the Law of the Member States'. (Restrictive Practices, Patents, Trade Marks and Unfair Competition in the Common Market).

international treaties have supremacy over later national laws.

The authors of the Treaty were faced with this situation in the field of constitutional law when they drafted the legal texts of the Community. Having regard to this situation it is in my opinion doubtful whether the authors, when dealing with a provision of such importance to customs law, intended to produce the consequences of an uneven development of the law involved in the principle of direct application, consequences which do not accord with an essential aim of the Community.

But neither would a uniform development of the law be guaranteed in those States whose constitutional law gives international agreements precedence over national law.

The Treaty does not provide any machinery to ensure the avoidance of this danger. Article 177 only provides for a right and a duty to refer a question concerning the *interpretation* of the Treaty to the Court, but not on the other hand a question concerning the *compatibility* of national with Community law. It is therefore conceivable that national courts might refrain from making a reference to the Court of Justice for a preliminary ruling because they do not see any difficulties of interpretation, and then, however, come to different conclusions in their own interpretation of the Treaty. In this way variations in the application of the law could occur in the courts of the different States as well as in courts of the same State.

After all these considerations which are based upon an examination of the system of the Treaty taken as a whole, upon the wording, the content and the context of the provision to be interpreted, I come to the conclusion that Article 12 should be legally classified in the same way as the other rules relating to the customs union. Article 11 has a fundamental importance for all of them when it speaks explicitly of 'obligations with regard to customs duties', a phrase which excludes direct internal effect within the meaning of the first question. It is my conviction therefore that question No 1 of the Tariefcommissie should be answered in the negative.

III — Question 2

This proposition means that the second question in the reference to the Court should not be dealt with in your judgment nor in this opinion. The court making the reference expressly asked the second question contingently, in case this Court should hold that the national court must apply Article 12 of the Treaty directly. But even if the court which sought a preliminary ruling from this Court had not made this reservation, the second question ceases to be relevant after the negative reply to the first.

However I am aware that the attempt to settle the problems which have been touched upon in this action can lead to widely conflicting views. I am thinking here not only of the differences in the statements of the parties to the action, but also of the variety of opinions with which we are faced concerning the theory and practice of public and international law when we consider the problems raised by these proceedings. For these reasons, I shall make a subsidiary examination of the second question of the Tariefcommissie, proceeding from the hypothesis that your answer to the first question is that the national court is bound by Article 12.

On the second question, only the Dutch and Belgian Governments, the EEC Commission and the plaintiff in the Dutch proceedings have submitted their own observations.

1. *Admissibility*

To begin with, just as with the first question, there arise certain problems regarding admissibility raised by the

Belgian and Dutch Governments. In particular they submit that:

1. The second question is inadmissible because it concerns the application and not the interpretation of the Treaty;
2. The second question seeks to avoid the procedure of Articles 169 and 170 of the Treaty; individuals cannot complain indirectly of the behaviour of Member States; it is not admissible to bring an alleged infringement of the Treaty before the Court under Article 177.

On the first submission

On reading the text of the second question, it is impossible to avoid the impression that the Court is expected to apply the Treaty.
Article 177 of the Treaty—so far as it is relevant in this case—deals only with the interpretation of the Treaty. By interpretation is meant the general construction of the meaning of a provision, the sense and purpose of which are not clear from the wording. It is necessary to distinguish from this the application of a provision in a specific case, that is, whether *certain facts fall within* a particular legal provision and the resulting evaluation of those facts. It is sometimes difficult to draw the line between interpretation and application especially if only part of a provision has to be construed and if—which may appear to be useful in facilitating the task of the Court—the court requiring a preliminary ruling clarifies the interpretation problem by a statement of the facts falling within the particular provision. However, I should not like to assume that in this case the Dutch court is asking the Court of Justice to consider the application of the Treaty. At this point reference can be made to the first application to this Court for a preliminary ruling (13/61) in which the Court held that the national court could frame the questions forming the subject matter of the application in a specific and simple way (Rec. 1962).
The Court can, after considering the whole of the subject matter of the decision to apply for a preliminary ruling, deduce the substance and purpose of the question referred, and answer it in a general way within the framework of its jurisdiction. In any case we shall keep within the limits of the Court's jurisdiction and not enlarge on the direct application of the Treaty to a concrete case. Findings of fact are not necessary for this purpose. But, contrary to the assumption of the Dutch Government, they would not be excluded from proceedings for a preliminary ruling (cf. Article 103(2) of the Rules of Procedure, which refers to Articles 44 et seq. of the same Rules). The second question is therefore admissible in its entirety.

On the second submission

As regards the doubts which have arisen concerning the relation between the present proceedings and the procedure under Articles 169 and 170 of the Treaty, and the danger of circumventing that procedure, the following must be noted:
Article 169 governs the judicial finding of an infringement of the Treaty by Member States. It can be invoked by the Commission if the Member State concerned does not comply with the opinion of the Commission. Article 170 provides an analogous procedure, which is initiated by an application to the Court by another Member State, and indeed, in certain circumstances, without a previous reasoned opinion by the Commission.
In this case, if the Court deals with the second question within the limits of its jurisdiction, it can give only a general interpretation of Article 12, of its meaning and purpose, leaving it to the nat-

ional court to draw the necessary conclusions from it. There must not be a single word in the operative part of the judgment and in the grounds of judgment concerning the conduct of a Member State and there must not be any finding that its conduct is compatible with the Treaty, or that it constitutes an infringement of it. The Court accordingly does not have to make an assessment, which could only be made under the procedure of Articles 169 and 170.

If the view were held that Articles 169 and 170 preclude *national* courts from holding that certain measures taken by the Member State to which they belong are ineffective because they infringe the provisions of the Treaty, this would challenge the very existence of treaty provisions which can be directly applied by the national courts. For direct applicability must mean that provisions endowed with this attribute can produce their effects without restrictions, even, should the occasion arise, in face of conflicting national law. It does not apply when a previous finding by this Court is necessary.

We must conclude that Articles 169 and 170 deal primarily with cases in which a provision of the Treaty is not directly applicable but contains simply an order addressed to Member States. In such a situation there is scope, legally and logically, for enforcement proceedings, that is, for proceedings having as their technical objective the alteration of the legal situation, but not where a conflict arises because, by virtue of its direct application, Community law can prevail over national law.

As the second question was only put in case the answer to the first was in the affirmative, that is to say in the event of its being acknowledged that Article 12 has direct internal effect, it is not possible to see in the answer to it an inadmissible way for the Court of Justice to circumvent Article 169.

I see no other problems in the field of admissibility. We can therefore turn our attention to the actual examination of the second question.

2. *Examination of Question 2*

Having regard to the remarks on admissibility, this question must be construed in such a way that only pure problems of interpretation emerge. According to the facts submitted by the Dutch court, this means that the Court of Justice has to define the criteria for determining whether there is a relevant increase of customs duties under Article 12. Starting with the wording of Article 12, the principal question in the Dutch proceedings is the interpretation of the terms 'apply' and 'increasing'.

In its written observations the Commission endeavoured to establish a systematic order for the numerous subsidiary questions into which the second question can be subdivided.

With regard to the prohibition of an increase in import duties, the following particular problems arise:

1. Does the prohibition apply to each particular product or does it refer to the general level of import duties?
2. Is the prohibition absolute, or are there certain exceptions to it which arise out of the meaning and purpose of Article 12 itself or out of its connection with other provisions of the Treaty?

With regard to the term 'apply', some subsidiary questions are also to be distinguished.

1. Is it a question of which rates are in fact applied in customs practice?
2. Must account be taken of a customs practice which was brought about by false customs declarations?
3. In the appraisal of customs practice how are the decisions of the Tariefcommissie to be evaluated?

4. Must we focus our attention on customs practice in the Netherlands, or in all the Benelux countries?

With regard to the first group of problems, the Commission in the first place emphasizes the fact, which none of the parties has questioned, that the prohibition in Article 12 applies to each individual product. The text gives no indication to the contrary; in particular the use of the plural (customs duties) is instructive. Likewise it can be deduced from the other customs provisions of this Chapter that they apply to each product (Article 14), unless express mention is made of an aggregation of all customs measures (total customs receipts, Article 14).

Further, it cannot be denied that Article 12 has an absolute effect which allows no exceptions. Its function corresponds, in the field of customs duties, to that of Article 31 in the case of quantitative restrictions. In Case 7/61, the Court expressed its opinion on Article 31 and confirmed emphatically that it has absolute effect which permits no exception.

The Commission, in my opinion correctly, draws the conclusion from this fact that even difficulties which can be connected with a rearrangement of tariff nomenclature do not in principle make it possible to depart from the prohibition of Article 12. The Commission points out that even before the conclusion of the Treaty Member States were preoccupied with the problems of the transfer of customs tariffs into the Brussels nomenclature. They were therefore familiar with the difficulties. If, nevertheless, they omitted to include in Article 12 a reservation to that effect, the omission can only be an indication of the absolute effect of this Article.

As can be seen from the text of the Brussels agreement on nomenclature for the classification of goods in customs tariffs (of 15 December 1950), the contracting parties can create sub-headings within the headings of the tariff nomenclature for the classification of products, and thereby maintain a differentiation of customs tariffs. The Brussels nomenclature therefore does not necessarily result in the suppression of certain customs duties.

The Member States of the EEC can further eliminate certain difficulties resulting from the rearrangement of the nomenclature by reducing their inter-Community customs duties for certain headings below the amount prescribed by the Treaty, thus avoiding infringement of Article 12.

Even if it can be thought that in many cases there are nevertheless insurmountable difficulties, it should be noted that the general and largely unsubstantiated arguments of the Dutch and Belgian Governments do not disclose any such difficulties. Further their persuasive effect is weakened by the statements of the Netherlands Secretary of State for Finance in the parliamentary debate on the Benelux Agreement[1], which lead one to believe that there existed in the case of the products in question, even after the old Customs Law of 1947, certain technical difficulties in customs administration connected with the exact determination of the composition of this product and of its possible uses. It would be possible to gain from this the impression that the difficulties connected with the rearrangement of nomenclature of customs duties were not the determining factors in the treatment of customs duties under the Brussels Protocol.

But in the final analysis these questions of fact can remain open. I shall simply state that, at least so far as the facts of this case are concerned, no legal possibility can be found of departing from the absolute prohibition of Article 12 by way of an alteration of the customs nomenclature.

1—Schedule IV to the request for a preliminary ruling.

Likewise, Article 233, which expressly provides that the EEC Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg or between Belgium, Luxembourg and the Netherlands, does not allow any relaxation of the standstill clause of Article 12. As can be seen from the additional words 'to the extent that the objectives of these regional unions are not achieved by application of this Treaty', the main concern of this provision is to allow the Benelux States to accelerate and intensify their regional integration independently of the Treaty. But it cannot be used to justify a breach of the primary and basic provisions of the Community Treaty which are imposed in the same way on all Member States and which can be complied with without calling in question the objectives of the regional union, which had a common external tariff before the entry into force of the EEC Treaty.

The concept of 'applied customs duty' is at the heart of the second group of questions.

Here too we can begin by referring to a judgment of this Court. In Case 10/61 the Court held that, for the purposes of Article 12 as much as for those of Article 14, it is the customs duty actually applied and not the duty legally applicable which is decisive. This view is founded on the recognition that it would be difficult for the Court to review national law (the legality of the existing customs practice) and also by the fact that the difference between a tariff 'legally applicable' and 'actually applied' frequently occurs in the Treaty, as is shown by Article 19.

I can see no reason to question the principle of that decision. But in this case certain special aspects of the problem have come to light which deserve consideration.

It has been argued that in certain cases a customs duty of only 3% was applied, on the basis of false customs declarations, to the type of products which are the subject matter of the customs decision in dispute. These cases present no difficulties. It seems to me obvious that such a practice must be disregarded in each case, even though we must concern ourselves with the actual practice and not the legally applicable customs duty, because the *ratio legis* according to which, so far as commercial arrangements are concerned, it is the practice of the customs administration which is decisive, cannot protect persons who rely on such practice, but whose conduct has been responsible for the incorrect application of the customs tariff. False customs declarations can never form the basis of an authoritative practice for the purpose of the customs law of the Treaty.

Further the question has arisen what importance should be attributed after the entry into force of the Treaty to the decisions of the Tariefcommissie, which held that a customs duty of 3% and not 10% should be applied to the goods of the type with which we are concerned in these proceedings and that accordingly the practice of the Netherlands Revenue Authorities was illegal. To clarify this problem the Court had submitted to it the written statements by the parties in the oral proceedings. As their content is free of doubt, there is nothing against their use in the present case. They give us the following picture:

According to the statements of the plaintiff in the Netherlands proceedings, the import of pure ureaformaldehyde (that is to say of the product in question) was charged with a customs duty of 3% until September 1956. After September 1956 the customs authorities levied a duty of 10% on the same product. The first change in the customs practice caused the plaintiff to start administrative proceedings which in turn led to the above-mentioned decision of the Tariefcommissie of 6 May 1958. The effect of this decision was

that, for imports subsequent to September 1956, part of the higher customs duty which had been paid was partially refunded, so that the charge remained at 3%. Another effect was that until September 1959 a rate of 3% was applied. At that date there was another change in customs practice, a rate of 10% being applied, which led to new administrative proceedings. On 2 May 1960 the Tariefcommissie gave a second decision, which was identical with that of 6 May 1958. The effect was that there was a partial refund of the duty paid on imports between September 1959 and 1 March 1960 (the entry into force of the new customs tariff).

If all this information is correct, which there is no reason to doubt, it can be established that all imports of urea-formaldehyde made by the applicant, and which, according to its own evidence, constituted the largest amount of this type of import into the Netherlands, was indeed charged provisionally with a duty of 10% but that as a result of judicial decisions a rectification was made which in fact restored the customs charge to 3% up to 1 March 1960.

We must now consider whether, by applying in a consistent manner the principles set out in Case 10/61, the Court can take into account only the customs practice which was in fact carried out until 1 January 1958. In my opinion this is not the case. In fact it must not be forgotten that the prominence given to the part played by customs practice is due primarily to the fact that the Court did not intend to undertake a review of the legality of the practice employed.

In this case the situation was clarified judicially by a *national* court not long after the entry into force of the Treaty. The initiative for clarification was an action brought several months before the Treaty entered into force and the final result was a rectification of the customs practice for the benefit of the economic interests involved, retroactive to 1 January 1958.

Thus as regards the facts of this case there is a distinction which we cannot ignore: The essential aim of the standstill provision of Article 12 is to prevent impediments to trade between Member States. This provision is based on practice, because in general economic transactions are actually geared to administrative practice. In our case the customs practice was for a long time disputed. But the dispute was settled in favour of the importers. Rectification of the practice by reason of the legal situation could not therefore in any way adversely affect commercial transactions.

If, therefore, when Article 12 is applied account is taken of a retroactive change in actual customs practice caused by a judgment given shortly after the Treaty entered into force, such a change cannot be regarded as an infringement of the standstill provision, but as an application of it which conforms to the general spirit of the Treaty.

Finally, there is still the question whether the customs practice of the Netherlands or of all the Benelux countries as at 1 January 1958 is taken as the determining factor. To settle this question, it is in my opinion possible to leave open the question whether in the customs union of the Benelux countries there existed at all any instrument to guarantee uniform customs practice with regard to the Common External Tariff. Likewise one can leave aside the question whether, apart from the Netherlands, there existed in the Benelux countries a practice relating to the product in question, and, if so, whether it developed in a different way, or whether the imports remained limited to the Netherlands. It seems to me that the legal appraisal of the question allows us no latitude. Unlike Article 19, which mentions four customs territories and therefore includes the Benelux territory, Article 12 mentions *Mem-*

ber States. From this the conclusion must be drawn that when interpreting the standstill rule in Article 12, which places the emphasis on the customs *practice* and not the *legal situation,* the factual situation in each Member State is the determining factor. Each of the Member States of the Treaty is answerable to all its partners and to the institutions of the Community for the implementation of the Treaty.

In my opinion, within the framework of Article 177, the Court cannot do more than lay down these guidelines for the interpretation of the second question. But they are sufficient to allow the Dutch court to apply the provisions of the Treaty correctly to its case— provided that it has to consider the direct application of Article 12.

To sum up, the following conclusions should be reached on the second question:

Article 12 has an absolute effect in respect of each individual product; it allows no exception either for the elimination of difficulties connected with a rearrangement of nomenclature, or for the benefit of regional unions within the Community. The question whether the introduction of a new customs tariff brings with it increases of duties must be determined according to the customs tariff applied in fact to each individual product on 1 January 1958. The determinative customs practice must be established without taking into account cases of false customs declarations. On the other hand regard must be had to the compulsory rectification of customs practice in the Netherlands shortly after the Treaty entered into force, resulting from the decision of an administrative court. Finally, the customs practice in each Member State is the determining factor.

IV — Conclusion

I propose that the Court should restrict its judgment to the first question and hold that Article 12 only contains an obligation on the part of the Member States.