OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 30 June 2005 [1]

I — Introduction

1. Following the judgment in *Foto-Frost*, [2] all the courts of the Member States are required to seek a preliminary ruling from the Court of Justice prior to declaring a Community act invalid. The uncertainty which has arisen in the present case concerns whether that obligation, which is purely a product of case-law and is not laid down in the Treaties, is absolute in nature or whether it may be subject to any exceptions.

2. In Greek mythology, Sisyphus was condemned eternally to the gruelling task of carrying a heavy rock up to the top of a mountain and then, once he had reached the summit, letting it roll down into a ravine, going down to fetch it, and starting to carry it up again, with no concession to his obvious fatigue. [3]

3. The reasons for that dreadful punishment remain shrouded in mystery, but it seems likely that it was due to some audacious behaviour on the part of the hero which the gods took as a challenge to their superiority. [4]

4. Like Sisyphus, the founder and king of Corinth, national courts find that they are constantly forced to seek preliminary rulings on the invalidity of Community acts.

1 — Original language: Spanish.

2 — Case 314/85 [1987] ECR 4199.

3 — Homer's *Iliad* contains a number of references to Sisyphus, the son of Aeolus, God of the Winds, describing him as being 'as cunning a rogue as ever there was' (Homer, *The Iliad*, translated by E.V. Rieu, Penguin Books, 1950, canto VI, line 153). However, the first description of Sisyphus' ordeal can be found in *The Odyssey*, canto XI, lines 593 to 600, during Ulysses' visit to Hades:
'Then I witnessed the torture of Sisyphus, as he tackled his huge rock with both hands. Leaning against it with his arms and thrusting with his legs, he would contrive to push the boulder up-hill to the top. But every time, as he was going to send it toppling over the crest, its sheer weight turned it back, and the misbegotten rock came bounding down again to level ground. So once more he had to wrestle with the thing and push it up, while the sweat poured from his limbs and the dust rose high above his head' (Homer, *The Odyssey*, translated by E.V. Rieu, Penguin Books, 1946).

4 — A possible cause of Sisyphus' misfortune was his indiscretion, since he told Asopus that Zeus had abducted his daughter, the nymph Aegina, with whom Zeus had a passionate romance on an Aegean island. Brunel, P. and Bastian, A., *Sisyphe et son rocher*, Du Rocher (ed.), Monaco, 2004, p. 34 et seq.

5. The present reference for a preliminary ruling is important because it brings together two of the elements which delimit the power of national courts to seek rulings from the Court of Justice pursuant to Article 234 EC.

6. In the light of the facts of the main proceedings, it is questionable whether there is any actual need to seek a ruling from the Court because the reply appears to be patently obvious pursuant to an earlier unequivocal decision.

II — Facts of the main proceedings and the questions referred for a preliminary ruling

7. The facts are of minor importance with regard to the answers to be given to the questions referred for a preliminary ruling, and they may therefore be summarised as briefly as possible.

8. The applicant in the main proceedings, Gaston Schul Douane-Expediteur BV ('Gaston Schul'), an undertaking engaged in customs administration, declared on 6 May 1998 the import of a consignment of raw cane sugar from Brazil at a cif price [5] higher than the trigger price. [6]

9. In the absence of the appropriate request, the competent customs authority calculated the additional duty on the basis of the representative price applicable at that time on the world market.

10. Gaston Schul contested the validity of the calculation first in administrative proceedings and then in court.

11. The College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry; 'College van Beroep'), before which an action was brought and against whose judgments there is no right of appeal under national law, suspended the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a court or tribunal as referred to in the third paragraph of Article 234 EC also required under that provision to

5 — That term indicates the price of the goods, and the costs of insurance and transport (cost, insurance, freight). For customs tariff purposes, it is the same as the fob (free on board) price, which includes the cost of the goods in the country of origin *plus* the actual cost of transport and insurance to the place of entry into the customs territory of the Community.

6 — A threshold price below which the commercial safeguard measures may be applied.

submit to the Court of Justice a question such as that set out below concerning the validity of provisions of a regulation where the Court of Justice has ruled that analogous provisions of another, comparable regulation are invalid, or may it refrain from applying the first-mentioned provisions in view of the clear analogies between them and the provisions declared invalid?

(2) Are Article 4(1) and (2) of Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses invalid inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price referred to in Article 1(2) of Regulation (EC) No 1423/95 and that that duty is established on the basis of the cif import price of the shipment concerned only if the importer so requests?'

III — Legal framework

A — *The obligation to request application of the cif import price*

12. Article 15(3) of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector,[7] as amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations,[8] ('the basic regulation') provides that the import prices to be taken into consideration for imposing an additional import duty shall be determined on the basis of the cif price of the consignment.

13. To that end, those prices are checked against the representative prices for the product concerned on the world market or on the Community import market.

14. It must be noted that the current wording of Article 15(3) of the basic regulation was inserted in the context of the task of adjusting Community legislation to comply with the provisions of the Agreement on Agriculture, which came into being as a result of the Uruguay Round of multilateral trade negotiations and was adopted by the Community pursuant to Article 228 of the EC Treaty (now, after amendment, Article 300 EC).

7 — OJ 1981 L 177, p. 4.
8 — OJ 1994 L 349, p. 105.

15. Article 5(1)(b) of the special safeguard provisions of the Agreement on Agriculture confers on any member of the World Trade Organisation the right to charge additional duty on the import of certain goods, where the price at which those goods enter its customs territory, 'as determined on the basis of the cif import price of the shipment concerned expressed in terms of its domestic currency', is lower than the trigger price.

16. The Commission implemented the basic provisions by means of Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses. [9]

17. In accordance with Article 4(1) and (2) of Regulation No 1423/95, the import price of the consignment to be taken into account for the imposition of an additional duty is the representative price. However, at the request of the importer, the cif import price may be used where that price is higher than the relevant representative price.

18. In such cases, certain documents must be attached to the request (contract of purchase, insurance contract, transport contract or bill of lading, invoice, certificate of origin) to verify the amount declared, and security must be lodged in the amount of the additional duty which would have been paid had that duty been calculated on the basis of the representative price of the goods. The importer recovers that sum if he proves that he placed the consignment on the market in conditions which confirm that the prices are correct.

19. Therefore, it is clear from Article 4(1) that, in the absence of a request in those terms, the representative import price will be taken into account for the purpose of determining the additional duty.

B — *Can an initial failure to lodge a request be rectified?*

20. The provisions applying to the amendment of customs declarations are set out in the Community Customs Code. [10] Subparagraph (c) of the second paragraph of Article

9 — OJ 1995 L 141, p 16.

10 — Adopted pursuant to Council Regulation (EEC) No 2913/92 of 12 October 1992 (OJ 1992 L 302, p 1).

65 provides that no amendment is permitted where authorisation is requested after the customs authorities have released the goods.

21. Under Article 220 of the code, a customs debt may be entered in the accounts subsequently, within two days of the date on which the customs authorities become aware that, at the relevant time, the debt was not entered in the accounts or was so entered at a lower level than the amount legally owed. Subsequent entry in the accounts is not to occur when the amount of duty legally owed has not been entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter, for his part, having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration (Article 220(2)(b)).

IV — Procedure before the Court of Justice

22. The order for reference was received at the Court Registry on 4 November 2003.

23. The Netherlands Government and the Commission have intervened in the proceedings.

24. The case was assigned to the Grand Chamber. However, despite the manifest importance of the issue concerned, no hearing was held.

V — Analysis of the questions referred

25. By the first question referred, the College van Beroep seeks to ascertain whether, in the context of the third paragraph of Article 234 EC, the particular definition of the so-called *acte clair* theory, as laid down in *Cilfit and Others*, [11] is applicable to questions concerning the validity of a Community act.

26. The second question refers specifically to the compatibility of Article 4(1) and (2) of Regulation No 1423/95 with higher provisions of Community law.

27. For the purpose of analysing the questions submitted, it is desirable to reverse

11 — Case 283/81 [1982] ECR 3415.

their order and to begin with the second question, since the resolution of the main proceedings hinges directly on the reply to that question.

A — *The second question*

28. The Netherlands Government, the Commission and the referring court concur that Article 4(1) and (2) of Regulation No 1423/95 are invalid on the ground that it is not possible to identify any relevant material differences between those provisions and Article 3(1) and (3) of Commission Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing additional import duties in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EEC. [12] The latter provisions were declared invalid in *Kloosterboer Rotterdam*. [13]

29. In accordance with Article 4(1) and (2) of Regulation No 1423/95, in the context of the sugar market, the import price of the consignment in question to be taken into account for the imposition of an additional duty is the representative price. Where the cif price of import into the customs territory is higher than the representative price, the former price may be applied only if the interested party has made an application to that effect.

30. Under Article 3(1) and (3) of Regulation No 1484/95, which were declared invalid in *Kloosterboer Rotterdam*, the cif import price is taken into consideration only on condition that the importer submits a formal request to that effect accompanied by certain supporting documents, and in all other cases the price taken into consideration must be the representative price, which was thus taken to be the general rule. [14]

31. As I pointed out at the time, [15] the obligation to make a specific request for the cif price to apply at the time when the additional import duty is established is invalid on two grounds:

— because there is no adequate foundation for it in Council Regulation (EEC) No 2777/75 of 29 October 1975 on the

12 — OJ 1995 L 145, p. 47.

13 — Case C-317/99 [2001] ECR I-9863.

14 — *Kloosterboer Rotterdam*, paragraph 31.

15 — Opinion in *Kloosterboer Rotterdam*.

common organisation of the market in poultrymeat, [16] as amended, and

— because it infringes Article 5(1) of the Agreement on Agriculture concluded during the Uruguay Round. [17]

32. Article 4(1) and (2) of Regulation No 1423/95 are also invalid on two grounds [18] because:

— first, those provisions infringe Article 15 (3) of the regulation on which they are founded, namely, Regulation No 1785/81, as amended, which provides that the import prices to be taken into consideration for imposing an additional import duty are determined on the basis of the cif import prices of the consignment under consideration;

— second, the provisions concerned breach Article 5(1)(b) and (5) of the Agreement on Agriculture, which permit the imposition of an additional duty provided that the price at which imports of the product concerned may enter the customs territory, *as determined on the basis of the cif import price* of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price. [19]

33. Furthermore, the Commission has informed the Court that it has instigated the procedures required to amend the contested provisions.

34. It follows incontrovertibly from the foregoing that Article 4(1) and (2) of Regulation No 1423/95 are void on the same grounds as the contested provisions in *Kloosterboer Rotterdam*. It is therefore appropriate to declare that Article 4(1) and (2) of Regulation No 1423/95 are also invalid.

B — *The first question*

35. Since it has been established that the contested provisions in the main proceedings

16 — OJ 1975 L 282, p. 77.

17 — As included in Annex 1A to the Agreement establishing the World Trade Organisation, approved on behalf of the Community by the first indent of Article 1(1) of Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-94) (OJ 1994 L 336, p. 1).

18 — Those grounds actually amount to a single case of incompatibility with the international agreement to which the basic regulation conforms.

19 — Equal to the average reference price of the product in question.

are invalid, it would be appropriate to refrain from replying to the first question since, strictly speaking, to do so would serve no purpose. To answer the question would risk altering the nature of the Court's role which is to cooperate with national courts in the interests of fostering the uniform application of Community law in the Member States and not to deliver advisory opinions on general or hypothetical questions. [20]

36. However, that approach appears too rigid and is at odds with the educational attitude of the Court, which, in a display of creative decision-making, stipulated the boundaries of its own jurisdiction in references for preliminary rulings. Even if it were held that the referring court does not need to ascertain the scope of the obligation to seek a preliminary ruling on validity where there is no reasonable doubt, owing to the existence of relevant precedents, the issue raised in the main proceedings is not hypothetical. It appears reasonable to suppose that the College van Beroep referred the second question to ensure that it would not be compelled to seek a further preliminary ruling should the Court uphold absolutely the obligation to seek a preliminary ruling on every occasion prior to declaring a Community act invalid. A relaxation of that requirement would lead to a significant procedural economy and a reframing of the Community responsibilities of national courts, and would, therefore, be fully consistent with the principle of the sound administration of justice within the European Union.

37. In short, I believe that the Court must give a ruling on the first question submitted by the referring court, which has acted with commendable courage and responsibility. [21]

38. The Netherlands Government and the Commission argue that the Court of Justice has exclusive jurisdiction to declare an act of a Community institution invalid. The Netherlands Government and the Commission question whether the exemption allowed in the *Cilfit* case extends to questions of validity since, in their view, such an interpretation would create more difficulties than advantages.

39. The Netherlands Government points out that there is a risk that some national courts would adopt very different positions, thereby compromising the unity of the Community legal system and the legal certainty which that system requires. In addition, the Nether-

20 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 60, and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 26.

21 — In that connection, I feel moved to quote the lines with which Baudelaire starts 'Le Guignon', the 11th poem of *Les fleurs du mal*: 'Pour soulever un poids si lourd, Sisyphe, il faudrait ton courage' (Baudelaire, C., *Les fleurs du mal*, XI, Gallimard. La Pléiade, Paris, 1975, p. 17).

lands Government notes that, subject to certain conditions, a national court has the power to adopt interim measures aimed at eliminating the effects of a Community act which it holds to be invalid.

40. The Commission analyses the arguments for and against the amendment of the *Foto-Frost* case-law, [22] and submits that the latter arguments are more convincing.

41. The importance of the question is clear, since an affirmative reply would overturn established case-law and the consequences of that would be far-reaching. An acknowledgement that, in situations such as the one in the main proceedings, national courts may declare certain Community acts invalid would encroach on the exclusive jurisdiction in that regard which the Court attributed to itself in the *Foto-Frost* judgment.

42. Accordingly, the search for an appropriate solution requires an examination of whether the facts and the legal framework of the case brought before the College van Beroep justify an amendment of currently binding principles of case-law which date back to the 1980s, when the geopolitical situation in the European Union was markedly different and much of the work which has defined the structure of judicial cooperation through preliminary rulings had not yet been completed.

43. First of all, it is appropriate to carry out a brief analysis of the case-law before moving on to examine the extent to which the factual and legal context of the case before the Court would justify another derogation from the aforementioned principle of the exclusive jurisdiction of the Court of Justice.

1. Analysis and discussion of the *Cilfit* case-law

44. Article 234 EC governs the system of cooperation between the Court of Justice and the courts of the Member States, providing, in the second paragraph thereof, that the latter may refer questions for a preliminary ruling, and, in the third paragraph, that national courts against whose decisions there is no judicial remedy under national law must bring such matters before the Court of Justice.

45. The disputes brought before it moved the Court to clarify the scope of that

22 — Cited above.

provision. First, the Court restated the characteristics of that apparently absolute duty of national courts of last instance; second, the Court drew a distinction between the rules governing the subject of the preliminary ruling, according to whether it turns on the interpretation or on the validity of a Community act.

46. The case-law of the Court has moderated in a number of ways the strict nature of the obligation of national courts of last instance, by introducing certain exceptions which are set out below to enable a better understanding of the import of the question under consideration.

47. First of all, in *Da Costa en Schaake and Others*, [23] the Court set a limit on that obligation and released national courts from the duty to refer where the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case. [24] That approach is based on the view that, where a Community provision has already been interpreted by the Court, the obligation to refer further questions on the interpretation of the same provision would be deprived of substance. [25]

48. In that connection, that is with a view to limiting the obligation of national courts of last instance to submit questions for a preliminary ruling, particular attention must be paid to the judgment in *Cilfit*, which extended the range of situations in which national courts of last instance are exempt from seeking guidance from the Court of Justice to include cases where the Court has already settled the point of law in question in the proceedings in the context of proceedings of a different nature, 'even though the questions at issue are not strictly identical'. [26] That exemption also applies to cases where a national supreme court considers that a question on interpretation is not relevant [27] and where the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Finally, before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. [28]

49. It is clear from a closer analysis of the practical aspects of the *Cilfit* judgment that if a national court were to interpret strictly the legal reasoning set out therein, it would proceed to undertake an empirical study of

23 — Joined Cases 28/62 to 30/62 [1963] ECR 31.
24 — Ibid., p. 38.
25 — Ibid., p. 38.
26 — *Cilfit*, paragraph 14.
27 — Ibid., paragraph 10.
28 — Ibid., paragraph 16.

the legal systems of the other 24 Member States in order to satisfy itself theoretically that each and every one of its counterparts would confirm the correct application of the Community provision.

50. The *Cilfit* judgment also drew attention to the interpretative requirements inherent in the very nature of Community law since, on the one hand, Community law uses terminology and concepts which are peculiar to it and which do not always accord with the equivalent terminology and concepts in the legal systems of the Member States, [29] and, on the other, every provision must be placed in its context and interpreted in the light of all the other provisions of which it forms part as a whole, the objectives thereof, and its state of evolution. [30]

51. The *Cilfit* judgment also drew attention to the fact that Community legislation, which is drafted in several languages — currently 20 — is multilingual in nature, and acknowledged that the different language versions are all equally authentic. [31]

52. In short, the proposed test was unviable at the time it was formulated, but, in the reality of 2005, it seems preposterous because it does not address the historical concern which gave rise to its adoption, namely the desire to put an end to the misapplication of the *acte clair* theory by certain courts of last instance in the Member States.

53. The fact that there is absolutely no possibility of adopting the *Cilfit* approach helps to explain why, on the few occasions when it has subsequently relied on that judgment, the Court has restricted itself to reminding the referring court of the case-law and to stating merely that the correct application of Community law is so obvious as to 'leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved'. [32] Curiously, on those occasions the Court made no reference at all to the requirement that the national court must be convinced that its counterparts in the other Member States, and the Court of Justice, would interpret the contested provision in exactly the same way.

54. The same omission, which is not due to an oversight, occurs in both the previous and most recent versions of the 'Informative Note on References by National Courts for Preliminary Rulings'. [33] The previous version did not mention that requirement, while

29 — Ibid., paragraph 19.

30 — Ibid., paragraph 20.

31 — Ibid., paragraph 18.

32 — Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 35, and Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 118.

33 — Notes of the Court of Justice of 18 June 1996 and 8 March 2005 respectively.

points 11 to 14 of the new guidelines, which deal with references for a ruling on interpretation, make no reference to it either.

55. Notwithstanding that the purpose of those guidelines is merely informative and that they have no legislative force, it is surprising that the Court continues to take the same stringent approach to the requirement concerned but makes no reference at all to its conditions when providing advice to national courts which is aimed at improving the system of judicial cooperation through preliminary rulings. If the Court did indeed consider that requirement, as laid down in *Cilfit*, to be so important, it seems logical to undertake an analysis of it, all the more so in documents of that kind.

56. It is gratifying to note that other Advocates General concur with my view. In particular, in the Opinion in *Wiener*,[34] Advocate General Jacobs stated that the *Cilfit* judgment could not properly be regarded as requiring the national courts to examine any Community measure in every one of the official Community languages, a method which appears rarely to be applied by the Court of Justice itself, although it has much better resources to do so. In fact, the very existence of many language versions is a further reason for not adopting an excessively literal approach to the interpretation of Community provisions, and for putting greater weight on the context and general scheme of the provisions of the EC Treaty and on their object and purpose.[35]

57. Likewise, in the Opinion in *Lyckeskog*,[36] Advocate General Tizzano supported interpreting *Cilfit* as a recommendation to the national court to exercise particular caution before deciding that there is no reasonable doubt.

58. In the light of those arguments, the Court must accept its responsibilities and amend the *Cilfit* case-law, or at least moderate its terms to adapt them to the demands of the times, since only a less stringent interpretation of the judgment would satisfy the requirements of the principle of judicial cooperation, having regard to the fact that national courts possess a far greater level of knowledge of Community law than they did in 1983. After 22 years as a precedent, it is now time to revise an element of case-law which fulfilled its func-

34 — Case C-338/95 [1997] ECR I-6495.

35 — Point 65 of the Opinion in *Wiener*.

36 — Case C-99/00 [2002] ECR I-4839, in particular point 75 of the Opinion.

tion during a specific period in the history of the Community but which has now been overtaken by the state of evolution of the Community legal system.

59. In addition, the foreseeable increase in cases brought before the Court with the accession of new Member States and the backlog which would result from a strict application of the *Cilfit* judgment are matters which justify the creation of methods of devolving power to the national courts. In fact, a reorganisation of the system of judicial cooperation under Article 234 EC would, in all probability, help to focus the task of the Court of Justice when a point of general importance is raised, which would in turn be beneficial to the case-law of the Court. [37]

2. The *Foto-Frost* case-law

60. The Court qualified the right of the national courts referred to in the second paragraph of Article 234 EC to seek a preliminary ruling, equating it with the obligation incumbent on courts of last instance. In that connection, the *Foto-Frost* judgment, to which I referred above, stripped courts against whose decisions there is a judicial remedy under national law of the power 'to declare acts of the Community institutions invalid'. [38]

61. The grounds of that judgment are so well known that there is no need to repeat them and it will suffice to list them briefly by way of a reminder.

62. The first ground was the risk that divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty; [39] the second was the coherence of the system of judicial protection established by the Treaty, which permits the Court of Justice to review the legality of measures adopted in the European Union; [40] while the last ground was that, under Article 20 of the Protocol on the Statute of the Court of Justice, it is the Court of Justice which is in the best position to decide on the validity of Community acts because that

37 — That is the approach taken in point 62 of the Opinion in *Wiener*.

38 — *Foto-Frost*, paragraph 15.

39 — Ibid.

40 — Ibid., paragraph 16

article confers on the institutions the right to defend the validity of the acts in question [41] in proceedings brought in Luxembourg.

63. It must also be pointed out that, in accordance with the judgment in *Hoffmann-La Roche*, [42] which preceded the *Foto-Frost* decision, a national court or tribunal is not required to refer to the Court a question of interpretation or of validity raised in interlocutory proceedings for an interim order, provided that each of the parties is entitled to institute other proceedings on the substance of the case and that during such proceedings the questions provisionally decided, which were the subject of a reference for a preliminary ruling, may be re-examined. [43] It is important to note that the *Foto-Frost* judgment also allowed that situation as a sole derogation from the obligation to raise questions of validity (paragraph 19), but, unlike the Opinion delivered by Advocate General Mancini, [44] made no reference whatever to the *Hoffmann-La Roche* judgment.

64. The judgment in *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [45] conferred on national courts the right to suspend the enforcement of a national administrative measure adopted in compliance with a Community regulation. There is no question that the conditions which must be satisfied in order to suspend a measure whose legality is in dispute set strict limits on that right by requiring that the national court must entertain serious doubts as to the validity of the Community measure; that there must be urgency and a threat of serious and irreparable damage to the applicant; and that the national court must take due account of the Community's interests. [46]

65. Subsequent case-law further extended the parameters of the situations where an interim order may be made while a preliminary ruling is sought. Thus, in accordance with the judgment in *Atlanta Fruchthandelsgesellschaft and Others (I)*, [47] Article 249 EC does not preclude national courts from granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation the validity of which has been called into question.

3. The main proceedings in the context of the *Cilfit* and *Foto-Frost* judgments

66. Having set down those propositions, it is appropriate to establish whether, since the contested Community measure is manifestly

41 — Ibid., paragraph 18.

42 — Case 107/76 [1977] ECR 957.

43 — *Hoffmann-La Roche*, paragraph 6.

44 — Opinion in *Foto-Frost* ([1987] ECR 4211), in particular the second paragraph of point 6.

45 — Joined Cases C-143/88 and C-92/89 [1991] ECR I-415

46 — Ibid., paragraph 33

47 — Case C-465/93 [1995] ECR I-3761.

void, the College van Beroep is entitled to declare it invalid in accordance with the *acte clair* theory laid down in *Cilfit*, notwithstanding that the College van Beroep is required, pursuant to *Foto-Frost*, to refer a question of validity to the Court of Justice. For that approach, which is supported by a number of academic legal writers, [48] to be upheld, the conditions set out in *Cilfit* must be satisfied without undermining the foundations of the *Foto-Frost* judgment.

67. In principle, it has been demonstrated that the measure before the referring court is one whose subject-matter is identical to, and whose temporal and material context is very similar to, another provision which was declared invalid in *Kloosterboer Rotterdam*. [49] Accordingly, to paraphrase the *Cilfit* judgment, the correct application of Community law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Notwithstanding that the Community measure concerned is technically different, it is possible to invoke the *Da Costa* case-law since the *Kloosterboer Rotterdam* judgment was also delivered in proceedings brought under Article 234 EC.

68. It therefore seems reasonable to maintain that the question concerning the validity of Article 3(1) and (3) of Regulation No 1484/95, raised in *Kloosterboer Rotterdam*, is 'materially identical', within the meaning of the *Da Costa* case-law, [50] with the question concerning the validity of Article 4(1) and (2) of Regulation No 1423/95 raised in the present reference for a preliminary ruling. In accordance with *Da Costa*, the Netherlands court is not obliged to seek a preliminary ruling on the question.

69. Furthermore, the number of similarities between the two cases bolsters the view that, in a comparable situation, no national court would entertain doubts as to the correct application of Community law, particularly since the ground on which the provisions in the two proceedings were declared void, namely, that the Commission acted ultra vires, exceeding its implementing powers, [51] is the same.

70. Accordingly, the final situation referred to in *Cilfit* arises, in that a previous decision of the Court of Justice already ruled invalid a provision identical to the one contested in the main proceedings, thereby satisfying the

48 — See, for example, Couzinet, J.-F., 'Le renvoi en appréciation de validité devant la Cour de justice des Communautés européennes', *Revue trimestrielle de droit européen*, 1976, p. 660 et seq., in particular p. 662.

49 — Cited above.

50 — Referred to in point 47 of this Opinion.

51 — *Kloosterboer Rotterdam*, paragraph 29.

requirement of a stringent interpretation of the *acte clair* theory, the result of which is to exclude any other interpretation. [52]

71. In the case before the Court, the Community provision is invalid in accordance with the parameters laid down in *Cilfit*.

72. However, that factor alone is not a sufficient basis for the national court to declare that provision invalid without seeking a preliminary ruling, since regard must also be had to the *Foto-Frost* precedent.

73. First of all, with regard to guaranteeing the uniform application of Community law, were a national court to make a declaration of invalidity in a case such as the one before the Court, where an analogous decision of the Court exists, such a declaration would be unlikely to lead to a risk of divergence that would place in jeopardy the very unity of the Community legal order.

74. To my mind, having regard to the specific features of this case, which are unquestionably few in number, there is such a clear case of invalidity that no national court would take a different view. Furthermore, the facts of the case reduce to a minimum the risk of conflicting decisions by national courts, even to the point that no such risk exists.

75. Second, as concerns the coherence of the system of judicial protection established by the Treaty, it is clear from paragraphs 16 and 17 of the *Foto-Frost* judgment that the Court gave itself exclusive jurisdiction to declare void an act of a Community institution, and held that, on that basis, the powers conferred on the Court under Article 230 EC must be supplemented by the power to declare an act of a Community institution invalid where the validity of such an act is challenged before a national court. It therefore seems unquestionable that, at that historic moment in 1987, the Court of Justice was unwilling to share that power with the national courts, notwithstanding the wording of Article 234 EC which specifically charged those courts with the task and reserved the obligation to seek a preliminary ruling to courts of last instance in whose case there is a real risk of discrepancies in the application of Community law.

76. Furthermore, the case-law which preceded *Foto-Frost* upheld the presumption that every Community measure is lawful as

52 — On the different interpretations and their degree of stringency in relation to the *Cilfit* judgment see Lenaerts, K., 'L'arrêt CILFIT', *Cahiers de droit européen*, 1983, p. 471 et seq., in particular p. 497.

long as the Court has not declared it void, [53] from which it follows that for a measure to be clearly unlawful a prior ruling to that effect from the Court is required. [54]

77. Third, criticism must be directed to the view that the Court is in the best position to rule on the lawfulness of Community measures on the ground that Article 20 of the Statute of the Court of Justice permits Community institutions whose acts are challenged to participate in the proceedings in order to defend the validity of the acts in question, [55] because there is no indication that national rules of procedure preclude the institution concerned from either taking part in proceedings in which the validity of one of its acts is contested or from being officially summoned to appear.

78. Moreover, were the Court of Justice to confirm the power of a national court to declare a Community act void, it would be wise to make that power conditional on the requirement that the institution by which the act was adopted must have the opportunity to take part in the proceedings. [56]

79. The general impression appears to be that the Court took control of the power to declare Community measures void more out of fear of opening a Pandora's box of questions of validity than because of the risks inherent in a case such as the one before the College van Beroep, and it is therefore appropriate to examine more closely the system of judicial cooperation implemented by the Treaty in order to focus the analysis of whether that power may be conferred on national courts.

4. Observations on the *Foto-Frost* judgment in the light of the system of judicial cooperation under Article 234 EC

80. It is the need to reconsider the *Foto-Frost* case-law which led to the allocation of this case to the Grand Chamber. The implications of the solution eventually adopted are such that it would be worth holding a hearing to examine in more depth the issue raised and to enable the full participation of the Member States and the Community institutions. That would enrich the debate and take it into the realms of a discussion, [57] which is vital when dealing with the issue of the division of judicial powers within the European Union between the Court of Justice and the national courts. [58] That modification of the established procedural format would enable an

53 — Case 101/78 *Granaria* [1979] ECR 623.

54 — That is clear at least from the judgment in Case 66/80 *International Chemical Corporation* [1981] ECR 1191.

55 — *Foto-Frost*, paragraph 18.

56 — Dyrberg, P., 'La aplicación uniforme del derecho comunitario y las sentencias CILFIT y Foto-Frost', *Ordenamiento jurídico comunitario y mecanismos de tutela judicial efectiva*, Vitoria, 1995, p. 247 et seq., in particular p. 255.

57 — Sarmiento, D., *Poder judicial e integración europea*, Garrigues y Thomson Civitas, Madrid, 2004, p. 334, defends that view where cases have a constitutional dimension and argues that, 'in an increasingly constitutionalised EC/EU, it has become essential to establish a judicial system based on the consultative model'.

58 — Isaac, G., in 'La modulation par la Cour de justice des Communautés européennes des effets dans le temps de ses arrêts d'invalidité', *Cahiers de droit européen*, 1987, p. 444 et seq., writes that there is no more necessary or more dangerous task than the one undertaken by the Court of Justice when defining the scope of its own jurisdiction.

attempt at improving the proposed analysis, in the pursuit of a qualified solution reached through the wide-ranging, multiparty dialogue which is inherent in the Community system, thereby creating a climate of confidence in the system of judicial cooperation laid down in Article 234 EC. Furthermore, in the event of the slightest sign of rebellion the Court could always reclaim the power conferred on the national courts, as happened with Sisyphus who, having returned to life, was then led back to Hades by Hermes.[59] The Court did not take that view and, although it is possible that there is insufficient evidence to support overturning established case-law, it would nevertheless be possible to order that a hearing be held.

81. First and foremost, it must be emphasised that, in *Foto-Frost*, the Court conferred on itself a power which has no basis in the wording of Article 234 EC,[60] in that it imposed an *obligation* to seek a preliminary ruling in situations where the drafters of the Treaty provided only for a *power*,[61] thereby conferring on itself the sole jurisdiction to review the validity of Community acts *at the expense of the national courts*.[62] One day things will return to normal and the national courts will reclaim the leading role which it is intended that they share with the Court of Justice in the performance of judicial cooperation through preliminary rulings, thereby relinquishing the role of supporting actors to which they have been relegated as a result of the protective zeal of the Court of Justice.

82. This case is capable of helping to redefine the respective jurisdictions of the Court of Justice and the national courts, provided that the Court demonstrates sufficient maturity to extend to questions of validity the *acte clair* theory accepted in *Cilfit* in the case of a reference for a preliminary ruling on a question of interpretation.

83. In addition, a number of academic legal writers have attempted to read between the

59 — Camus, A., *The Myth of Sisyphus*, translated by Justin O'Brien, Vintage International, 1955, tells how Sisyphus, being near to death, rashly wanted to test his wife's love. He ordered her to cast his unburied body into the middle of the public square. Sisyphus went to the underworld, where, annoyed by an obedience so contrary to human love, he obtained from Pluto permission to return to earth in order to chastise his wife. But when he had seen again the face of this world, enjoyed water and sun, warm stones and the sea, he refused to go back to the infernal darkness. Recalls, signs of anger and warnings were of no avail. He lived for many years facing the curve of the gulf, the sparkling sea, and the smiles of earth. A decree of the gods was necessary. Mercury came and seized the impudent man by the collar and, snatching him from his joys, led him forcibly back to the underworld, where his rock was ready for him. P. Brunel and A. Bastian, op. cit., p. 51, observe that Camus uses Roman terminology in this regard, a fact which they attribute to his sources of information, essentially the Mythologie de Commelin and the *Grand Larousse*; therefore, Camus refers to Pluto rather than Hades and to Mercury rather than Hermes. The same authors, op. cit., pp. 45 and 46, maintain that it was Camus himself who invented the story of the unburied body of Sisyphus because, shortly before his death, he asked his wife not to honour him with funeral rights so that he would then have a pretext to return to the world of the living.

60 — Glaesner, A., 'Die Vorlagepflicht unterinstanzlicher Gerichte im Vorabentscheidungsverfahren', *Europarecht*, No 2/1990, p. 143 et seq.; Barav, A., 'Le renvoi prejudiciel communautaire', *Justices*, No 6, April/June 1997, p. 1 et seq.; and Pertek, J., *La pratique du renvoi prejudiciel en droit communautaire*, Paris, 2001, p. 78, although the latter does not make the point so forcefully.

61 — Barav, A., op. cit., p. 5.

62 — Barav, A., op. cit., p. 6.

lines of that judgment and inferred a meaning other than the one which is clear from a first reading of the text. [63]

84. In fact, although *Cilfit* upheld the *acte clair* theory in the context of questions of interpretation, in the judgment the Court called on the highest national courts to exercise caution when addressing issues arising from the interpretation or application of Community law. [64] In any event, owing to the strict conditions by which it is regulated, the *acte clair* theory is delimited by abstract parameters which restrict it to the realms of theoretical symbolism. [65]

85. Nor are there any reasons to dismiss outright the view advanced prior to the *Cilfit* and *Foto-Frost* judgments to the effect that certain acts are manifestly illegal, [66] as a result of which they may be ruled void or disapplied by national courts without seeking a preliminary ruling, particularly in situations such as the one in the present case.

86. In accordance with the letter and the spirit of the Treaty, the devolution of power to national courts, even where it is restricted to such cases, in other words, the acceptance of the theory of the manifestly void act in the context of questions of validity, would foster judicial dialogue based on the mutual respect of each court's powers. [67]

87. Furthermore, as justification for conferring on itself the exclusive jurisdiction to declare an act of a Community institution invalid, the Court cites, at paragraph 17 of the *Foto-Frost* judgment, the argument that Article 230 EC also confers on it exclusive jurisdiction in actions for annulment. However, the monopoly of the Court to hear such cases has been rightly criticised because it does not follow from the wording of the article. [68] Strictly speaking, if Article 234 EC were interpreted as meaning that national courts are entitled to declare such acts invalid, no reference to the exclusive nature of that jurisdiction of the Court would be required in Article 230 EC.

88. In addition, the retention at all costs of the obligation to seek a preliminary ruling in the context of proceedings of the kind brought by Gaston Schul, where the measure concerned is manifestly void, indicates an

63 — Rasmussen, H., 'The European Court's Acte Clair Strategy in C.I.L.F.I.T. (Or: Acte Clair, of Course! But What does it Mean?)', *European Law Review*, No 10/1984, p. 242 et seq.

64 — Rasmussen, H., op. cit., p. 259.

65 — Lenaerts, K., op. cit., p. 500; and Boulouis, J. and Darmon, M., *Contentieux communautaire*, Paris, 1997, p. 27.

66 — As was pointed out at the time by Couzinet, J.-F., op. cit., p. 659.

67 — Barav, A., op. cit., p. 1.

68 — Dyrberg, P., op. cit., p. 254.

excessively strict adherence to the rules which is incompatible with the principle of the sound administration of justice. The comments made by the College van Beroep on the matter of procedural economy are pertinent in that regard.

89. National courts must not be subjected to an ordeal as futile as that of Sisyphus. Albert Camus, who wrote perhaps the most lucid work on that character, stated that Sisyphus 'is the absurd hero',[69] because there is no more dreadful punishment than a futile and hopeless labour. However, at the end of his essay, Camus reaches the conclusion that Sisyphus is 'superior to his fate. He is stronger than his rock'[70] and he is saved by his conscience.[71] 'The lucidity that was to constitute his torture at the same time crowns his victory.'[72]

90. Finally, it is appropriate to point out that, unlike other initiatives of case-law which have been gradually incorporated into the text of the Treaties, the *Foto-Frost* judgment did not make an impression on the Community legislature which has let pass a number of occasions, in particular the Treaties of Maastricht, Amsterdam, and Nice, and the Treaty establishing a Constitution for Europe, to incorporate that contribution of the Court into the concept of the supralegality of the Union. That silence is extremely eloquent and prompts a reflection on the lack of acceptance of that monopoly which was so artificially created.

91. In the light of those observations, I believe that the reply to the first question referred by the Netherlands court must be that, in a case such as the one before the Court, national courts have the power to set aside a Community act the validity of which has been challenged. My conviction that the solution proposed does not in any way place in jeopardy the unity of Community law is based in the final analysis on the fact that, where there is any uncertainty, national courts will exercise their 'art of prudence'[73] and always opt to seek a preliminary ruling.

69 — Camus, A., op. cit., p. 156.

70 — Camus, A., op. cit., p. 157.

71 — That attribute is conveyed in artistic representations of Sisyphus. The magnificent painting by Titian on display at the Prado in Madrid draws attention to the immense size of the rock and the attempt to carry it by the hero, whose head is difficult to distinguish from the roughness of the rock towards which all his effort is directed. Once again I must turn to Camus (op. cit.): 'A face which toils so close to stones is already stone itself!'. However, in the background of the painting there is a light which illuminates the scene and suggests a certain air of triumph. The sculpture by the German artist Schmidt-Hofer shows the athletic body of Sisyphus worked in bronze, and combines the extreme courage involved in the effort of lifting the rock with the glory of one who accomplishes an important task, in an equilibrium of form and ideas which transmits immediately the full import of the mythological hero.

72 — Camus, A., op cit., adds that '[t]here is no fate which cannot be surmounted by scorn'.

73 — I have taken the liberty of borrowing from the best-known section of the title of the classic work by the Spanish writer Baltasar Gracián (1601-58), *The Courtier's Manual Oracle and the Art of Prudence*, the first edition of which was published in Huesca in 1647. The book itself contains 300 annotated aphorisms, designed to provide the practical knowledge which will lead to the prudence and caution required to confront successfully the challenges of daily life. It is therefore quite different from the *maximes* of François, Duc de La Rochefoucault (1613-80) and from the adages of Francisco de Quevedo (1580-1645), which, although satirical and sarcastic, are just as enjoyable and instructive.

VI — Conclusion

92. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred by the College van Beroep:

'(1) A court or tribunal within the meaning of the third paragraph of Article 234 EC is not required under that provision to refer for a preliminary ruling a question concerning the validity of an act of the institutions, and may refrain from applying such an act, where the Court of Justice has already ruled a comparable act invalid and the act concerned is vitiated by the same ground of invalidity.

(2) Article 4(1) and (2) of Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses are invalid inasmuch as they provide that the additional duty referred to therein is established on the basis of the representative price.'