Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 8 December 2011 [1]

Case C-533/10

Compagnie internationale pour la vente à distance (CIVAD) SA
v
Receveur des douanes de Roubaix
Directeur régional des douanes et droits indirects de Lille
Administration des douanes

(Reference for a preliminary ruling from the Tribunal d'instance de Roubaix (France))

(Community Customs Code — Regulation imposing anti-dumping duties — Repayment of duties paid under a regulation subsequently declared invalid — Force majeure — Point at which the obligation of the customs authorities to repay duties on their own initiative is incurred — Retroactive effects of a declaration of unlawfulness made in a judgment of the Court of Justice)

1. I am of the view, for reasons which I shall set out below, that the first of the two questions referred — in short, a request for an interpretation of the meaning of '*force majeure*' in Article 236(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [2] — conceals a broader concern to determine whether the three-year time-limit laid down in that provision of the Customs Code is applicable to the repayment or remission of anti-dumping duties found not to be legally owed in a situation such as that which has given rise to this reference for a preliminary ruling. In any event, the subtext to this case is the issue of the effects of the declaration as to the invalidity of Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan [3] made by the Court of Justice in the judgment in *Ikea Wholesale*. [4]

I – Legal context

A – *International rules*

2. On 15 April 1994, the European Community signed the Final Act of the Uruguay Round multilateral trade negotiations, the Agreement establishing the World Trade Organisation ('the WTO') and the Agreements and Understandings contained in Annexes 1 to 4. These include the General Agreement on Tariffs and Trade 1994 ('the GATT 1994') and the Memorandum of Understanding on Rules and Procedures governing the Settlement of Disputes ('the Memorandum of Understanding'). [5]

1 — Original language: Spanish.
2 — OJ 1992 L 302, p. 1; 'the Community Customs Code'.
3 — OJ 1997 L 332, p. 1.
4 — Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723; 'the judgment in *Ikea*'.
5 — OJ 1994 L 336, p. 234.

3. In accordance with the preamble to the Agreement establishing the WTO, the contracting parties entered into 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'.

4. In the words of Article III(2) of that agreement, the WTO constitutes a 'forum for negotiations among its Members concerning their multilateral trade relations …'.

5. Article II(2) of the Agreement states that '[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 … are integral parts of this Agreement, binding on all Members'.

6. For its part, Article XVI(4) of the Agreement provides that '[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.

7. The GATT 1994 states in Article VI(1) that dumping, 'by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'.

8. In this context, anti-dumping measures may be put in place in accordance with the conditions and in the circumstances provided for in the Anti-dumping Agreement, Article 18(4) of which requires each contracting party to adopt 'all necessary steps, of a general or particular character, to ensure … the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement …'.

9. The purpose of the Memorandum of Understanding, in accordance with Article 3(2) thereof, is to 'preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.

10. Article 3(7) of the Memorandum provides that, in the absence of a mutually agreed solution between the parties, the objective of the dispute settlement mechanism is to 'secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements'.

11. Where it is not possible to withdraw the inconsistent measure immediately, Article 21(3) of the Memorandum provides that the Member concerned is to have a reasonable period of time in which to do so. If it fails to do so, Article 22(2) of the Memorandum states that it may enter into negotiations within a given period of time with any of the parties involved in the dispute, with a view to obtaining mutually acceptable compensation. Failing that, any party may request authorisation from the Dispute Settlement Body ('DSB') to temporarily suspend the application of concessions or other obligations to the Member concerned.

B – *Community rules*

1. The Community Customs Code

12. Article 236 of the Community Customs Code provides as follows:

'1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or *force majeure*.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second subparagraphs of paragraph 1 exists, they shall repay or remit on their own initiative.'

2. In particular, Regulation No 2398/97 and its consequences

13. Regulation No 2398/97 imposed a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan.

14. A few months later, following a complaint lodged with the DSB by India on 3 August 1998, a series of consultations were initiated with the Community concerning Regulation No 2398/97.

15. No mutually agreed solution having been reached, on 7 September 1999, India requested the DSB to set up a panel to examine the compatibility of Regulation No 2398/97 with the WTO provisions.

16. That panel, set up on 27 October 1999, issued a report dated 30 October 2000,[6] which concluded, for these purposes, that the Community had acted in a manner incompatible with its obligations under the Anti-dumping Agreement. In particular, it noted, on the one hand, that the Community had infringed Article 2.4.2 of the Anti-dumping Agreement in applying the practice of 'zeroing' negative dumping margins in determining the weighted average margin of dumping, and, on the other hand, that the Community had acted in a manner incompatible with Article 3.4 of the same Agreement, so as to establish the existence of damage to the Community industry, in taking into account information on producers not belonging to the domestic industry as it had been defined by the authority responsible for the investigation and in not evaluating all of the relevant factors influencing the state of that industry.

17. The panel's conclusion was confirmed by the WTO Appellate Body in a report circulated on 1 March 2001.[7] That report was adopted by the DSB on 12 March 2001.

18. Pursuant to Article 19(1) of the Memorandum of Understanding, the DSB requested the Community to bring its measures into line with the Anti-dumping Agreement.

6 — WT/DS141/R European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Panel Report of 30 October 2000.

7 — WT/DS141/AB/R European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Appellate Body Report of 1 March 2001.

19. In accordance with Article 21(3)(b) of the Memorandum, on 26 April 2001, the Communities and India agreed to give each other a period of five months and two days to implement the DSB's recommendations and decisions. That period expired on 14 August 2001.

3. The measures adopted by the Communities further to the DSB report

20. On 23 July 2001, the Council adopted Regulation (EC) No 1515/2001 on the measures that may be taken by the Community following a report adopted by the DSB concerning anti-dumping and anti-subsidy matters.[8] In accordance with Article 1(1), such measures may consist of 'repeal[ing] or amend[ing] the disputed measure' [point (a)] or 'adopt[ing] any other special measures which are deemed to be appropriate in the circumstances' [point (b)], it being possible for both types of measure to be adopted simultaneously.

21. Under Article 3 of Regulation No 1515/2001, '[a]ny measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for'.

22. As regards imports from India, the Council adopted Regulation (EC) No 1644/2001 of 7 August 2001[9] suspending the application of anti-dumping duties on imports originating in India.

23. With respect to imports from Pakistan, Council Regulation (EC) No 160/2002 of 28 January 2002[10] terminated the anti-dumping proceeding with regard to those imports, in so far as the revised calculation showed that no dumping existed for exports of the product concerned made by any companies in Pakistan.

24. Five years later, in its judgment in *Ikea*, cited above, the Court held, on the one hand, that Article 1 of Regulation No 2398/97 was invalid in so far as the Council applied the 'zeroing' practice and, on the other hand, that an importer which has brought an action against the decisions by which the collection of anti-dumping duties is claimed from it under Regulation No 2398/97 is, in principle, entitled to rely on that invalidity in order to obtain repayment of those duties in accordance with Article 236(1) of the Community Customs Code.

II – Facts. The steps taken by CIVAD

25. CIVAD, a public limited company established in France whose business is the sale of goods by mail order, markets cotton-type bed linen originating in Pakistan. From 15 December 1997, it paid the anti-dumping duties laid down in Regulation No 2398/97.

26. Following the adoption of Regulation No 160/2002, CIVAD, by letters of 26 July 2002 and 28 October 2002, sought the repayment of the anti-dumping duties which it had paid on imports of cotton-type bed linen originating in Pakistan between 15 December 1997 and 23 July 1999.

27. Six years later, and after the judgment in *Ikea*, the Direction régionale des douanes et droits indirects de Lille (Regional Directorate of Customs and Indirect Taxes, Lille), by letter of 17 March 2008, turned down CIVAD's applications for repayment of the anti-dumping duties paid on import declarations made between December 1997 and January 1999 and, subsequently, between February 1999 and January 2002. The Direction régionale took the view that the three-year time-limit for

8 — OJ 2001 L 201, p. 10.

9 — Regulation amending Regulation (EC) No 2398/97 and suspending its application with regard to imports originating in India (OJ 2001 L 219, p. 1).

10 — Regulation amending Regulation (EC) No 2398/97 and terminating the anti-dumping proceeding with regard to imports originating in Pakistan (OJ 2002 L 26, p. 1).

repayment laid down in Article 236(2) of the Community Customs Code may be extended only if the person concerned shows that he was unable to submit his application within that period as a result of unforeseeable circumstances or *force majeure*, the annulment of the Community regulation on the basis of which those duties were collected not constituting either of those grounds.

28. The request for reconsideration submitted by CIVAD on 24 April 2008, on the ground that it had not been able to submit its applications for repayment before the termination of the anti-dumping proceeding was published in the *Official Journal of the European Communities*, was dimissed by the customs authorities by letter of 14 August 2008.

29. By document of 2 July 2009, CIVAD brought an action before the Tribunal d'instance de Roubaix (District Court, Roubaix) for the repayment of anti-dumping duties, in accordance with the provisions of Article 243 of the Community Customs Code, against the Receveur des douanes de Roubaix CRD (Collector of Customs, Roubaix Regional Customs Clearance Centre), the Directeur régional de douanes et droits indirects de Lille (Regional Director of Customs and Indirect Taxes, Lille) and the Administration des douanes (Customs Administration).

III – The questions referred

30. It was against this background that the national court decided to refer the following questions:

Question 1:

> 'Does the unlawfulness of a Community regulation, which cannot in fact or in law be challenged by a trader by means of an individual action to have it set aside, amount for that trader to a case of *force majeure* which permits the time-limit provided for in Article 236(2) of the Community Customs Code to be exceeded?'

Question 2:

> 'If the first question is to be answered in the negative, do the provisions of the final paragraph of Article 236 of the Community Customs Code require the customs authorities to repay anti-dumping duties of their own initiative when the unlawfulness of those duties has been found following a challenge to their lawfulness by a Member State of the WTO:
>
> 1. from the time of the first communication of the country concerned contesting the lawfulness of the anti-dumping regulation;
>
> 2. from the time of the panel report finding the unlawfulness of the anti-dumping regulation; or
>
> 3. from the time of the report of the Appellate Body of the WTO which led the European Community to recognise the unlawfulness of the anti-dumping regulation?'

IV – Procedure before the Court of Justice

31. The reference for a preliminary ruling was lodged at the Court Registry on 17 November 2010.

32. Observations have been submitted by CIVAD, the Commission and the Governments of the Czech Republic and the French Republic.

33. At the hearing, held on 6 October 2011, oral argument was presented by the representatives of CIVAD, the French Republic and the Commission. CIVAD's representative produced by way of documentation a letter from the Commission, dated 28 September 2011, concerning the repayment of duties paid pursuant to Council Regulation (EC) No 261/2008 of 17 March 2008 imposing a definitive anti-dumping duty on imports of certain compressors originating in the People's Republic of China. [11] The other parties to the proceedings did not object to the inclusion of that document in the case-file.

V – Arguments

34. CIVAD submits, in essence, that a declaration as to the unlawfulness of a regulation constitutes a case of *force majeure* within the meaning of Article 236(2) of the Community Customs Code, since it is an abnormal, unforeseeable circumstance falling outside the sphere of responsibility of the operators concerned. As for the unlawfulness itself, not only is it the result of a procedure in which private persons are not able to participate, but it did not come to the knowledge of the operators in question until a subsequent regulation (Regulation No 160/2002) had been published, this being the earliest point at which they were able to submit an application for repayment. In any event, CIVAD is of the opinion that, as in other cases, the Commission should have made provision for a time-limit for submitting repayment applications after the unlawfulness of Regulation No 2398/97 was made public. Lastly, it maintains that Article 236(2) of the Community Customs Code imposes on [Member] States an obligation to repay anti-dumping duties on their own initiative from the date of the first WTO panel report (30 October 2000).

35. The Czech Republic, the French Republic and the Commission all contend that the unlawfulness of Regulation No 2398/97 does not constitute a case of *force majeure*, since it is not abnormal, in a community of law such as the European Union (EU), for a regulation to be declared invalid. CIVAD, they submit, did not take the appropriate measures in the light of the possible unlawfulness of that regulation, since it could have sought repayment of the duties, on the basis of the regulation's unlawfulness, from the national authorities at the relevant time and, if appropriate, asked the French courts to make a reference for a preliminary ruling to the Court of Justice.

36. With regard to the second question, both Governments and the Commission submit that the DSB report is not an instrument which empowers the national authorities to stop applying a regulation. Nor could they repay the duties on their own initiative, since Regulation No 160/2002 did not contain any provision on the repayment of duties already paid.

VI – Assessment

37. By its first question, the referring court presents us with the complex situation of a private person which, faced with a Community regulation which was of direct concern to it, (1) could not have responded to that regulation at the relevant time by bringing an action for annulment, and (2) following the declaration as to its unlawfulness years later, would have been able to benefit from that declaration only in part because of the application to the case by the administrative authorities of the time-limit laid down in Article 236(2) of the Community Customs Code. On that basis, what the referring court specifically asks the Court of Justice is whether that situation is capable of constituting a case of *force majeure* within the meaning of the exception to the application of that time-limit for which paragraph 2 itself provides.

38. Understood in this way, the first question raised by the national court can only be given a negative reply, in my view. Depending on the grounds given for it, however, that reply will have very different, not to say opposite, consequences. I shall look now at the various grounds that might be given.

11 — OJ 2008 L 81, p. 1.

A – *The three-year time-limit in Article 236(2) of the Community Customs Code does not apply to a situation in which a regulation is declared unlawful*

39. In my view, the national court starts from an unsound premiss, namely that Article 236 of the Community Customs Code is applicable to the declaration as to the unlawfulness of Regulation No 2398/97, and that that regulation is therefore subject to the three-year time-limit laid down in the Community Customs Code and, possibly, to the *force majeure* exception. I am of the opinion, however, that that premiss is wrong, and that the *force majeure* exception does not therefore apply.

40. In this connection, I should like to ask the Court to reconsider the idea that Article 236 of the Community Customs Code is to be interpreted on the basis of two lines of reasoning, relating, on the one hand, to the appropriate exercise of judicial power by the Court of Justice itself and, on the other hand, to the obligations arising from the right to an effective legal remedy enshrined in Article 47 CFREU. [12]

41. With regard to the first line of reasoning, it is important to bear in mind the principle that declarations of invalidity by the Court of Justice do not as such create or alter the law, with the consequence that their effects extend back to the entry into force of the rule at issue (judgment in *Q-Beef and Bosschaert*). [13]

42. However, an exception may be made to that rule where its application in a given situation could create a risk of serious economic repercussions. [14]

43. An exception to the retroactivity of a declaration of invalidity may none the less be made only by the court which made that declaration. This is indisputably so in the case of direct actions for annulment and is also true, in accordance with the case-law and by an analogous application of Article 264 TFEU, in the case of a declaration of invalidity made in the context of a reference for a preliminary ruling. [15] This means that the Court of Justice is exclusively empowered to modulate the general scope of the effects of a finding upholding a well-founded action, that is to say a declaration that the act contested is 'null and void'.

44. Turning now to examine Article 236 of the Community Customs Code, it is absolutely clear that paragraph 1 of that article requires that import or export duties be repaid and remitted where it is established that the amounts of such duties were 'not legally owed'.

45. In my opinion, this 'lack of a legal basis' unquestionably includes cases where, assuming that the rule under which the import or export duties were charged is valid, that rule was applied incorrectly, that is to say 'unlawfully' by the standard of the rule applied. A different conclusion must be drawn, however, with respect to the unlawfulness of the rule applied itself.

46. Obviously, the declaration as to the invalidity of Regulation No 2398/97 assumed that the duties charged under it were not 'legally owed'. However, they were not unlawful in any ordinary way, that is to say in a sense comparable to that of the former example. Rather, their unlawfulness derives from the very invalidity of Regulation No 2398/97 itself, which invalidity calls into question the rules to which that regulation is subject and which are capable of rendering it invalid, be they the Treaties or other

12 — This is the interpretation adopted in the aforementioned judgment in *Ikea* and also, for example, in Case C-463/98 *Cabletron Systems* [2001] ECR I-3495, paragraph 26.

13 — Joined Cases C-89/10 and C-96/10 [2011] ECR I-7819, paragraph 48.

14 — See to that effect Case C-242/09 *Albron Catering* [2010] ECR I-10309, paragraphs 35 to 37.

15 — See to that effect, inter alia, Case 112/83 *Société de Produits de Maïs* [1985] ECR 719, paragraphs 16 to 18, and Case C-228/92 *Roquette Frères* [1994] ECR I-1445, paragraphs 17 to 20 and 25 to 30. See also in this respect Cremer, W., 'Art. 231, Rn. 6', in Callies/Ruffert, *EUV. EGV Kommentar*, C.H. Beck, Munich, 3rd ed., 2007; and Wegener, W.B., 'Art. 234, Rn. 39-42', in Callies/Ruffert, *EUV. EGV Kommentar*, C.H. Beck, Munich, 3rd ed., 2007.

provisions of secondary law. Furthermore, as I have already pointed out, the effects of a declaration as to the invalidity of a provision of secondary law are governed by Article 264 TFEU and by the case-law that extends the application of that article to declarations of invalidity made in the context of a reference for a preliminary ruling.

47. Consequently, the situations provided for in Article 236 of the Community Customs Code, in particular paragraph 2, are meaningful, in my opinion, only if they are limited to ones in which the lack of a legal basis for charging duty results from the improper application of the legal rule on which that charge is based. The initial assumption, therefore, is always that the rule applied is valid, it being only the lawfulness of its application that is at issue.

48. This understanding of the aforementioned rule — which brings me to the second line of reasoning referred to in point 40 — must also be applied to the rights of individuals.

49. If the 'illegality' referred to in Article 236 of the Community Customs Code is only that resulting from the incompatibility between the legal rule applied and the actual act of charging the import or export duty concerned, then it is an illegality which is apparent from the outset and can therefore be established by means of an immediate challenge to the act applying the rule. In those circumstances, the three-year time-limit laid down in Article 236(2) covers an entirely different situation, since it must then be regarded as a limit, intended to guarantee the tax revenues expected by the authorities, on a right which has been 'exercisable' from the outset.

50. Otherwise, that is to say if that article is understood as also applying to a declaration as to the invalidity of the legal rule on which the charge is based, the three-year limitation period has adverse effects on [legal] certainty and the rights of citizens, since the possibility of obtaining repayment of a duty not owed is made to depend on the advent of a circumstance which may not be readily apparent and which, most importantly, is beyond the control of the persons concerned.

51. After all, the aforementioned interpretation transforms Article 236 of the Community Customs Code into a provision which automatically imposes a maximum time-limit of three years on the right to repayment, irrespective of the point at which that right arose. In a context in which it may take much longer than that to obtain a declaration of unlawfulness, not least because of the difficulties known to be connected with the criterion of individual concern as that condition is interpreted by the Court of Justice,[16] it is clear that the application of Article 236 of the Community Customs Code to the temporal effects of a judicial declaration as to the invalidity of a regulation may, in certain circumstances, give rise to situations which are incompatible with the basic principles of the rule of law. This may explain the use of such extreme solutions as seeking to have classified as a case of *force majeure* the fact that a court declares a legal rule to be invalid.

52. It should be borne in mind, moreover, that the Commission itself appears to have proceeded on the same premiss, since, as is clear from point 33, it has at least occasionally urged the persons concerned to file claims, not subject to a time-limit, for the repayment of duties charged on the basis of regulations which the Court has declared to be unlawful.[17]

16 — See to this effect, inter alia, Haltern, U., *Europarecht. Dogmatik im Kontext*, 2nd ed., Mohr Siebeck, 2007, marginal notes 509 to 543.

17 — See to this effect the judgment in Case T-143/06 *MTZ Polyfilms* v *Council* [2009] ECR II-4133, in which the Court of First Instance declared void Council Regulation (EC) No 366/2006 of 27 February 2006 amending Regulation (EC) No 1676/2001 imposing a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating, inter alia, in India (OJ 2006 L 68, p. 6). Following that judgment, the Commission, among other measures, decided, by means of Notice No 2010/C 131/03 (OJ 2010 C 131, p. 3), to invite the persons concerned to file claims for reimbursement of the duties they had paid as soon as possible, expressly stating that the deadline laid down in the applicable customs legislation would not be applicable. Similarly, in connection with Regulation No 261/2008, produced by CIVAD at the hearing and referred to in point 33, the Commission decided that the duties paid should be reimbursed, even though it was under no obligation to do so pursuant to a judicial declaration of invalidity.

53. In the light of all the foregoing, I conclude that the Court should consider giving a ruling to the effect that the three-year time-limit laid down in Article 236(2) of the Community Customs Code does not apply to situations in which the lack of a legal basis for charging import or export duties results from the very unlawfulness of the provision under which the duty in question was charged.

54. The inevitable consequence of the aforementioned conclusion is that the circumstances in question do not constitute a case of *force majeure* within the meaning of Article 236(2) of the Community Customs Code, inasmuch as the premiss on which the national court has proceeded — that that provision also applies to the unlawfulness of Regulation No 2398/97 itself — must be considered incorrect. Furthermore, if the premiss relating to that rule is incorrect, then the scope of the exception for which it provides — in this case, *force majeure* — is irrelevant in the situation at issue.

B – *In the alternative: A declaration as to the unlawfulness of a regulation does not constitute a case of force majeure within the meaning of Article 236(2) of the Community Customs Code*

55. Even assuming that Article 236 of the Community Customs Code does apply to situations in which a regulation is declared unlawful, and that the three-year time limit is therefore applicable to those situations, I take the view that the *force majeure* exception to that time-limit, laid down in Article 236(2), would not apply in any event. The reason for this is relatively easy to explain.

56. In accordance with the line of argument pursued by the Commission, it is clear that the possibility of a declaration of invalidity by the Court of Justice, however difficult it may or may not be to bring an action before the Court to obtain such a declaration, cannot be regarded as an abnormal, exceptional or unexpected circumstance in a legal system which, like that of the European Union, is built on the rule of law and founded, therefore, on the principle of legality and the guarantee that such legality is open to review by the courts. It is thus *in the very nature* of European Union law that the rules of which it is comprised are capable of being declared invalid.

57. The national court, albeit not very explicitly, appears to take the view that the '*force majeure*' derives from the limitations which have been placed on the ability of the private persons concerned to challenge a regulation which is of direct concern to them. However, while there is no disputing that this is true, it is also clear that, because of its inherently foreseeable nature, the organisation of the legal system, and in particular of its procedural rules, cannot fall within the meaning of '*force majeure*'. If any of the consequences of that organisation posed a problem, the concept of *force majeure* would be unlikely to provide a solution. The argument that the situation at issue constitutes a case of *force majeure* is therefore untenable.

58. In the event that the Court upholds the above proposition, however, I am of the opinion that it should not confine its ruling to that finding alone. After all, I doubt that a reply to that effect would be capable of providing the Tribunal d'instance with sufficient and, most importantly, correct guidance for the decision which it has to give. In other words, it is my view that the Court must ensure that, through an act of omission, as it were, on its part, it does not confirm an interpretation of the provision in question to the effect that, other than in the event of *force majeure*, the time-limit laid down in Article 236(2) of the Community Customs Code must be applied without exception. In fact, it became clear during the course of the hearing that the issue raised by the main proceedings extends beyond the strict determination of whether or not the situation in question constitutes a case of *force majeure*.

C – In the further alternative: A possible interpretation of the determination of the effects of the judgment in Ikea

59. The starting point in this connection must inevitably be the decision by which the Court annulled Regulation No 2398/97, that is to say the judgment of 27 September 2007 in *Ikea Wholesale*, and, more specifically, the way in which that judgment referred to its effects.

60. In that judgment, as I stated in point 24 of this Opinion, the Court held, on the one hand, that Article 1 of Regulation No 2398/97 was invalid in so far as the Council applied the 'zeroing' practice and, on the other hand, with a view to establishing the effects of its ruling, that an importer which has brought an action against the decisions by which the collection of anti-dumping duties is claimed from it under Regulation No 2398/97 is, in principle, entitled to rely on that invalidity in order to obtain repayment of those duties in accordance with Article 236(1) of the Community Customs Code.

61. The first and most important inference to be drawn from the judgment in *Ikea*, as the Commission pointed out in paragraph 36 of its observations, is that the invalidity of Regulation No 2398/97 does not in itself have the consequence of triggering an exception to the conditions laid down in Article 236(2) of the Community Customs Code with respect to the repayment of amounts that were not legally owed at the time when they were paid.

62. After all, in paragraph 67 of that judgment, the Court held that '[i]t is for the national authorities to draw the consequences, in their legal system, of a declaration of invalidity made in the context of an assessment of validity in a reference for a preliminary ruling (Case 23/75 *Rey Soda* [1975] ECR 1279, paragraph 51), which has the consequence that anti-dumping duties, paid under Regulation No 2398/97 are not legally owed within the meaning of Article 236(1) of Regulation No 2913/92 and should, in principle, be repaid by the customs authorities in accordance with that provision, provided that the conditions to which such repayment is subject, *including that set out in Article 236(2)*, [18] are satisfied, this being a matter for the national court to verify'.

63. It is to be noted, however, that the operative part of that judgment does not refer to Article 236(2) of Regulation No 2913/92 but, exclusively, to Article 236(1). What the Court states in operative paragraph 2 is that '[a]n importer, such as that at issue in the main proceedings, which has brought an action before a national court against the decisions by which the collection of anti-dumping duties is claimed from it under Regulation No 2397/97, declared invalid by this judgment, is, in principle, entitled to rely on that invalidity *in the dispute in the main proceedings* [19] in order to obtain repayment of those duties in accordance with Article 236(1) of Council Regulation No 2913/92 ...'.

64. I have highlighted the phrase 'in the dispute in the main proceedings' because it is my view that, in making those two different statements, the Court sought to distinguish between two equally different situations when it came to determining the scope of its retroactive finding of invalidity. These are, on the one hand, the situation of those who, having paid the duties charged under the regulation declared to be unlawful, resigned themselves to its application and did not challenge the acts implementing it before the national authorities; and, on the other hand, the situation of those who, like Ikea and, as we shall see, CIVAD, responded by objecting to the application of the Regulation and, eventually, secured the finding of invalidity given by the Court of Justice. While the former would be subject to the limit laid down in Article 236(2) of the Community Customs Code, the latter, on the other hand, would not be subject to any limit whatsoever on account of the inherent retroactivity of judicial findings of invalidity.

18 — My emphasis.

19 — My emphasis.

65. It is true that the time-limit laid down in Article 236(2) of the Community Customs Code makes it impossible for any claims for the repayment of amounts not owed to be made after the three-year period starting on the date on which those amounts were communicated, the only exception being in cases of *force majeure*.

66. However, that proposition is tenable only in the case of those who did not avail themselves of the legal remedies available to them to respond to the regulation ultimately declared unlawful. It cannot be allowed to apply, on the other hand, to the very persons who made that declaration possible, that is to say those who, by challenging the acts implementing the Regulation, made it possible for the Court to intervene. Other than in the exceptional event of a duly reasoned decision to the contrary by the Court, the latter category of persons should be subject rather to the principle of the retroactivity of judicial findings of nullity. [20]

67. The alternative option, that is to say to restrict the temporal effects of such a finding on the basis of a *dies a quo* time-limit such as that laid down in Article 236(2) of the Community Customs Code, would in this case lead to a result scarcely compatible with the right to an effective remedy (Article 47 CFREU). After all, the difficulties which a private person such as the importer in question is likely to have encountered in obtaining a judicial review of a regulation such as Regulation No 2398/97, [21] would, by some perverse logic, be further compounded by the frustration of not being able to benefit from the material and practical results of that finding of nullity.

68. On my interpretation, therefore, the operative part of the judgment in *Ikea* omitted any reference to Article 236(2) of the Community Customs Code on the assumption that, 'in the dispute in the main proceedings', Ikea could seek the application of the temporal effects ordinarily produced by a declaration of invalidity made in the interlocutory proceedings disposed of by the Court.

69. The same would not be true, however, of those who did not take any form of legal action against the acts implementing Regulation No 2398/97, for whom, in accordance with the Court's findings in paragraph 67 of the judgment in *Ikea*, the time limit laid down in Article 236(2) would be fully operative.

70. What, however, of CIVAD? In my view, if the main proceedings establish that CIVAD's procedural conduct can be regarded as being comparable to that of Ikea in terms of its diligence in responding to Regulation No 2398/97, then the effects of the declaration as to the nullity of that regulation should be no different as between the two of them. [22] The mere fact that, in the case of CIVAD, the national court may not have given the Court of Justice the opportunity to deliver a preliminary ruling on the validity

20 — For the sake of thoroughness, I must nevertheless point out that, as the Commission observes, in an earlier judgment (*Cabletron*), the Court expressly endorses the solution proposed by Advocate General Jacobs, who, in point 115 of his Opinion in that case, stated that he could not 'see any reason for limiting the *ex tunc* effect of the finding of invalidity which I propose should be made. It may in any event be noted that the practical effects of the ruling would concern only the period prior to 1 January 2000 and that Article 236(2) of the Community Customs Code imposes a three-year time-limit on the repayment or remission of customs duties not legally owed'.

21 — Which importer, it would seem, would have been hard put to demonstrate that that regulation was of 'individual' concern to him within the meaning of the case-law. In this regard, see, inter alia, Lenaerts, K., 'Le traité de Lisbonne et la protection juridictionnelle des particuliers en droit de l'Union', *Cahiers de droit européen*, 2009, No 5-6, pp. 711 to 745.

22 — In this regard, it has been possible to adduce some evidence that will contribute towards that process. CIVAD, together with a number of other companies, responded to Regulation No 2398/97 as early as 2 March 1998, when they brought an action for annulment before the Court of First Instance which was dismissed as inadmissible on the ground that there were defects in connection with the representation of the parties to the proceedings (Case T-37/98 *FTA and Others* v *Council* [2000] ECR II-373). In any event, that action was not based on the grounds that would later give rise to the judgment in *Ikea*, since, at the time when it was brought (March 1998), the WTO had not even commenced the consultations initiated following the claim submitted by India (August 1998). Although this first attempt to challenge the Regulation failed (both the Council and the Commission having contended that the action was inadmissible because of a lack of standing to bring proceedings), I am keen to draw attention to it as an expression of CIVAD's interest and diligence in taking legal action against Regulation No 2398/97.

of the implemented regulation [23] cannot operate to its detriment to such an extent that its situation is regarded as being comparable for practical purposes to that of those who resigned themselves to the application of a provision the unlawfulness of which CIVAD responded to as soon as it had an opportunity to do so by availing itself of the remedies available to it in law.

71. In conclusion, I take the view that the answer to the national court's first question should, in the alternative, be that, although the situation at issue does not constitute a case of *force majeure*, a declaration as to the unlawfulness of a regulation, such as that made in the judgment in *Ikea* with respect to Regulation No 2398/97, does not give rise to a right to repayment or remission which is subject to the time-limit laid down in the first subparagraph of Article 236(2) of the Community Customs Code in the specific case of an importer which, like the person concerned in the main proceedings, responded to the aforementioned regulation by claiming it to be unlawful, the issue of entitlement being a matter for the national court to determine.

D – *The second question referred in the alternative by the Tribunal d'instance*

72. I shall turn now to the second question, referred in the alternative in the event that the Court should choose to confine its answer to the first question to a finding that the situation at issue does not constitute a case of *force majeure*. Should the customs authorities have responded as soon as the WTO declared Regulation No 2398/97 to be incompatible with the Anti-dumping Agreement? [24]

73. In my view, the French authorities could not have responded by repaying the duties already paid solely on the basis of the aforementioned declaration. The simple reason for this is that Regulation No 1515/2001 entrusts to the Community the task of adopting the measures that may be taken following a report adopted by the DSB. In accordance with Article 1(1) of that regulation, such measures may consist of 'repeal[ing] or amend[ing] the disputed measure' [point (a)] or 'adopt[ing] any other special measures which are deemed to be appropriate in the circumstances' [point (b)], it being possible for both types of measure to be adopted simultaneously.

74. Any response to a declaration as to the incompatibility of an EU regulation with the Anti-dumping Agreement should therefore come from the EU institutions, so that any national authority which decides to adopt a measure in this regard necessarily encroaches upon a Community competence. Suffice it to say that a repayment granted by the national authorities on their own initiative would be contrary to a regulation which, leaving aside its incompatibility with the Anti-dumping Agreement, is perfectly valid for the purposes of the European Union, as my foregoing submissions show.

75. None of which means that the response due from the European Union must necessarily take the form of repayment of the duties paid. The first reason for this is that, as I have already said, in the context of the WTO, incompatibility with the Anti-dumping Agreement gives rise only to an obligation to consult and negotiate, thus leaving open the possibility that the negotiation process will lead to solutions *not* necessarily involving the repayment of those duties. Secondly, in so far as the options provided for in Regulation No 1515/2001 consist in the repeal or amendment of the Regulation or the 'adopt[tion of] any other special measures which are deemed to be appropriate in the circumstances', it is not inconceivable that, once the situation has been reconsidered in the light of the DSB report, duties which may not be owed for the reasons given in that report will nevertheless be charged on a basis other than that criticised by the WTO.

23 — It should be pointed out that CIVAD itself informed the national authorities that it was advisable to await a ruling from the Court of Justice on the matter.

24 — In its question, the referring court identifies three points during the procedure followed at the WTO which may be relevant for the purpose of determining the compatibility of Regulation No 2398/97 with the Anti-dumping Agreement. As I shall explain at length, neither the conduct of that procedure nor the conclusions to which it led could have constituted a basis in EU law sufficient to support the response which CIVAD claims should have come from the national authorities. I therefore take the view that the distinction between the three points in the procedure picked out by the referring court is irrelevant.

VII – Conclusion

76. Conseqently, I propose that the Court should answer the questions raised as follows:

1. (a) The three-year time-limit laid down in Article 236(2) of the Community Customs Code does not apply to situations in which the lack of a legal basis for charging import or export duties results from the unlawfulness of the rule under which the duty in question was charged.

   (b) Since that time-limit is not applicable, the exception to it on grounds of *force majeure* must likewise be inapplicable.

2.

In the alternative:

The right to repayment or remission as a result of a declaration as to the unlawfulness of a regulation such as that made in the judgment of 27 September 2007 in Case C-351/04 Ikea Wholesale, concerning Regulation No 2398/97, is not subject to the time-limit laid down in the first subparagraph of Article 236(2) of the Community Customs Code in the specific case of an importer which has acted with reasonable diligence. It is for the national court to determine whether CIVAD acted with due diligence for these purposes.

3. In the alternative:

   (a) A declaration as to the unlawfulness of a Community regulation does not constitute a case of '*force majeure*' within the meaning of the second subparagraph of Article 236(2) of the Community Customs Code.

   (b) The third subparagraph of Article 236(2) of the Community Customs Code does not require customs authorities to repay anti-dumping duties on their own initiative solely on the basis of a declaration of incompatibility under the rules of the WTO.