diction to declare that acts of Community institutions are invalid.

That conclusion is dictated, in the first place, by the requirement for Community law to be applied uniformly. 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.

Secondly, it is dictated by the necessary coherence of the system of judicial protection established by the Treaty. In Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of an act is challenged before a national court the power to declare the act invalid must also be reserved for the Court of Justice.

That division of jurisdiction may have to be qualified in certain circumstances where the validity of a Community act is contested before a national court in proceedings relating to an application for interim measures.

2. Article 5 (2) of Council Regulation No 1697/79 on the post-clearance recovery of import or export duties, which lays down three specific requirements which must be fulfilled before the competent authorities may waive the post-clearance recovery of duties, must be interpreted as meaning that if all those requirements are fulfilled the person liable is entitled to the waiver of the recovery of the duty in question.

REPORT FOR THE HEARING
delivered in Case 314/85 *

1 — Facts and procedure

A — *Legislative context*

The matter at issue in the main proceedings is the post-clearance recovery of import duties in respect of the purchase by a trader in the Federal Republic of Germany from traders in other Member States of goods manufactured in the German Democratic Republic.

The post-clearance recovery of import duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties is governed by

* Language of the Case: German.

Council Regulation No 1697/79 of 24 July 1979 (Official Journal 1979, L 197, p. 1).

Article 5 (2) of the regulation governs the situation where the duties have not been collected as a result of an error made by the competent authorities themselves. It provides as follows:

'The competent authorities may refrain from taking action for the post-clearance recovery of import duties ... which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.

The cases in which the first subparagraph can be applied shall be determined in accordance with the implementing provisions laid down in accordance with the procedure provided for in Article 10'.

The Commission adopted the relevant implementing provisions in Regulation (EEC) No 1573/80 of 20 June 1980 (Official Journal 1980, L 161, p. 1) on the basis of Article 5 (2) of Regulation No 1697/79 and after consulting the Committee on Duty-free Arrangements pursuant to Article 10 of that regulation.

Regulation No 1573/80 provides that where the amount of the duties involved is equal to or greater than 2 000 ECU the competent authority of the Member State 'shall request the Commission to take a decision on the case, submitting to it all the necessary background information' (Article 4). After consulting a group of experts from the Member States meeting within the framework of the Committee on Duty-free Arrangements, the Commission 'shall decide whether the circumstances under consideration are such that no action should be taken for recovery of the duties concerned' (Article 6). Its decision is to be addressed to the Member State whose competent authority requested the Commission to take a decision on the matter.

B — *Facts*

Heinz Frost, the plaintiff in the main proceedings, is an importer, exporter and wholesaler of photographic goods in the Federal Republic of Germany, where he trades under the name of Foto-Frost.

Between 23 September 1980 and 9 July 1981 Foto-Frost purchased prismatic binoculars made in the German Democratic Republic from traders in Denmark and in the United Kingdom.

The goods were dispatched under the external Community transit procedure (Article 12 *et seq.* of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit, Official Journal 1977, L 38, p. 1) from customs warehouses in Denmark and in the Netherlands. That procedure enables goods coming from a non-member country which are not in free circulation in a Member State to be transported within the Community without renewed customs formalities when the goods cross from one Member State to another.

When Foto-Frost declared the goods for free circulation in the Federal Republic of Germany the competent customs offices, as in the case of previous similar operations, allowed the goods to enter free of duty on the ground that they had been manufactured in the German Democratic Republic.

Following a check, Hauptzollamt Lübeck-Ost took the view that under the German customs legislation the operations in question should give rise to the post-clearance recovery of import duties.

However, the Hauptzollamt considered that Foto-Frost satisfied the requirements laid down in the first subparagraph of Article 5 (2) of Regulation No 1697/79 for the waiver of the post-clearance recovery of duties. Foto-Frost had duly completed its customs declaration and was entitled to believe in good faith that the decision of the customs offices was correct, since similar previous operations had also been exempt from duty.

Since the amount of the duty involved was greater than 2 000 ECU, under Article 4 of the aforementioned implementing regulation (Regulation No 1573/80) the Hauptzollamt itself was not empowered to take the decision not to effect post-clearance recovery of the uncollected duty.

Consequently, the Hauptzollamt referred the matter to the Federal Minister for Finance. By a letter dated 4 February 1983 the Minister requested the Commission to decide under Article 6 of Regulation No 1573/80 whether the post-clearance recovery of the import duties in question could be waived.

On 6 May 1983 the Commission delivered its decision to the Federal Republic of Germany to the effect that post-clearance recovery could not be waived.

In that decision the Commission states in the first place that, in accordance with usual practice, the customs authorities had initially merely accepted Foto-Frost's statements as being correct.

The decision goes on to state as follows:

'Whereas it was found when the declarations were checked subsequently that the binoculars declared for free circulation under the conditions described above did not meet the conditions for duty-free admission under the arrangments for inter-German trade;

Whereas the importer was in a position to consider the circumstances of the import operations in question in the light of the provisions governing inter-German trade, the application of which he was claiming; whereas he could thus detect any error in implementing these provisions; whereas, moreover, it has been established that he did not comply with all the provisions laid down by the rules in force as regards the customs declarations;

Whereas consequently the conditions laid down in Article 5 (2) of Regulation (EEC) No 1697/79 are not met;

Whereas there is therefore no justification for not effecting the post-clearance recovery of import duties in this case'.

On those grounds, the Commission decided that 'the import duties of DM 64 346.53, the subject-matter of the request by the Federal Republic of Germany dated 4 February 1983, shall be the subject of post-clearance recovery'.

Following that decision, Hauptzollamt Lübeck-Ost issued an amendment notice on 22 July 1983 in respect of the import operations in question. In that notice the Hauptzollamt notified Foto-Frost that the Commission had adopted a decision on 6 May 1983 to the effect that the competent authorities in the Federal Republic of Germany could not waive the post-clearance recovery of duty in its case. However, the Hauptzollamt did not specify the grounds for the Commission's decision. Accordingly it claimed payment from Foto-Frost of DM 64 346.53 by way of customs duties on the imports. It also claimed payment of DM 12 786.10 by way of import turnover tax in respect of the same operations.

Foto-Frost did not challenge the Commission's decision before the Court of Justice. It did, however, request the Finanzgericht Hamburg to suspend the operation of the amendment notice issued by the Hauptzollamt.

In an order of 22 September 1983 the Finanzgericht took the view that the effect of the Protocol on German internal trade was to exempt operations which fell within the ambit of German internal trade from import duties. Paragraph 1 of that Protocol provided as follows: 'Since trade between the German territories subject to the Basic Law for the Federal Republic of Germany and the German territories in which the Basic Law does not apply is a part of German internal trade, the application of this Treaty in Germany requires no change in the treatment currently accorded this trade'. In the light of the case-law of both the courts of the Federal Republic of Germany and the Court of Justice the Finanzgericht considered that the operations in question appeared to fall within the ambit of German internal trade. Consequently, it considered that it was appropriate to suspend the amendment notice until it had been established definitively, if necessary after referring a preliminary question to the Court of Justice, whether post-clearance recovery of the import duties was justified in this case.

In addition, Foto-Frost instituted proceedings before the Finanzgericht Hamburg for the definitive annulment of the amendment notice.

C — *The preliminary questions*

In the course of those proceedings, the Finanzgericht Hamburg decided, by order of 29 August 1985, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Can the national court review the validity of a decision adopted by the Commission pursuant to Article 6 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 (Official Journal L 161, p. 1) on whether the post-clearance recovery of import duties should be waived pursuant to Article 5 (2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 (Official Journal L 197, p. 1), which decision held that there was no justification for waiving the recovery of the import duties, and can it, if appropriate, hold in proceedings challenging such a decision that recovery of the duties should be waived?

(2) If the national court cannot review the validity of the Commission's decision, is the Commission's decision of 6 May 1983 (ECR 3/83) valid?

(3) If the national court can review the validity of the Commission's decision, is Article 5 (2) of Regulation (EEC) No 1697/79 to be interpreted as conferring a power to adopt a discretionary decision, which may be reviewed by the Court only as regards abuses of that discretion (and if so, which abuses?) without any possibility of substituting its own discretion, or does it confer the power to adopt a measure of equitable relief, which is fully subject to review by the court?

(4) If the assessment to customs duties cannot be waived pursuant to Article 5 (2) of Regulation (EEC) No 1697/79, do goods originating in the German Democratic Republic which have been introduced into the Federal Republic of Germany via a Member State other than Germany by way of the external Community transit procedure fall within the ambit of German internal trade within the meaning of the Protocol on German internal trade and connected problems of 25 March 1957, with the consequence that when they are imported into the Federal Republic of Germany

they are liable neither to customs duties nor to import turnover tax, or are such charges to be levied as in the case of imports from non-member countries, so that Community customs duties, in accordance with the relevant customs legislation, and import turnover tax, in accordance with Article 2 (2) of the Sixth Council Directive on the harmonization of turnover taxes in the European Communities, are to be levied?'

The Finanzgericht set out the following matters in its request for a preliminary ruling by way of explanation of the questions referred to the Court.

In the first place, in its opinion, the validity of the Commission's decision is doubtful. Foto-Frost's position appears to satisfy the requirements laid down in the first subparagraph of Article 5 (2) of Regulation No 1697/79 (an error by the competent authorities which could not reasonably have been detected by the person liable, good faith on the latter's part and observance of all the provisions laid down as far as the customs declaration is concerned). Since the amendment notice at issue was based on the Commission's decision of 6 May 1983 the Finanzgericht considers that it could not annul the notice unless the decision has been declared invalid first.

The Finanzgericht therefore asks, in the first place, whether it can itself review the validity of the Commission's decision. In its opinion it is for the Court of Justice alone to rule on the validity of the Commission's decision of 6 May 1983, but it nevertheless seeks the Court's ruling on that question.

Secondly, in the event that the Court states that it alone has the power to review the validity of the Commission's decision, the Finanzgericht requests the Court of Justice to review the validity of that decision.

Thirdly, in the event that the Court nevertheless considers that the Finanzgericht itself can decide on the validity of the Commission's decision, it asks whether the application of Article 5 (2) of Regulation No 1697/79 is based upon the exercise of a discretion which the national court may review only as regards an abuse thereof ('Ermessensfehler') or whether, as the Finanzgericht itself believes, it is based upon a measure of equitable relief all aspects of which are open to review.

Fourthly, in the event that it is clear from the answers given to the foregoing questions that it was not possible in this case to waive post-clearance recovery, the Finanzgericht asks whether Foto-Frost did in fact have to pay duty on the operations in question. According to the Finanzgericht this question is concerned to establish whether the operations in question fell within the scope of German internal trade for the purposes of the Protocol on German internal trade. Contrary to the view expressed in the order of 22 September 1983, it considers that those operations did not fall within the scope of that trade. It is now of the opinion that the protocol covers only those transactions which fell within the ambit of German internal trade within the meaning of the German legislation in force at the time when the protocol was adopted. At the time when the protocol came into force, operations of the type with which this case is concerned did not fall within the ambit of German internal trade.

The Finanzgericht's order was received at the Court Registry on 18 October 1985.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted on 6 January 1986 by Hauptzollamt Lübeck-Ost, the defendant in the main proceedings, represented by its Director, Mr Koal, on 14 January 1986 by the Commission of the European Communities, represented by Jörn Sack, acting as Agent,

on 16 January 1986 by the Government of the Federal Republic of Germany, represented by Martin Seidel, acting as Agent, and on 20 January 1986 by Foto-Frost, the plaintiff in the main proceedings, represented by Messrs Modest, Gündisch and Landry, Rechtsanwälte, Hamburg.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. Nevertheless, the Court requested Foto-Frost, the government of the Federal Republic of Germany and the Commission to reply in writing to a number of questions and to produce certain documents. Those requests were acted upon within the period laid down.

2 — Written observations submitted to the Court

The first question (competence of courts against whose decisions a judicial remedy exists under national law to declare a Community act invalid themselves without referring the matter to the Court of Justice under Article 177 of the EEC Treaty)

Foto-Frost interprets Article 177 of the EEC Treaty as meaning that the power to judge the validity of acts of the Community institutions is confined to the Court of Justice. Such a conclusion is necessary in order to ensure uniform application of the relevant provisions of Community law.

The government of the Federal Republic of Germany states, without giving reasons for its view, that the Court of Justice alone has the power to annul an act of a Community institution.

The Commission considers that the second paragraph of Article 177 of the EEC Treaty cannot be interpreted as conferring on a court or tribunal against whose decisions a judicial remedy exists the power to declare Community acts invalid or inapplicable.

In the first place, such an interpretation would detract from the binding effect which Article 189 of the EEC Treaty attributes to acts of the Community institutions. The binding effect of a decision addressed to a Member State extends, moreover, to all the authorities of that State, including its courts, in so far as the Court of Justice has not declared the decision unlawful.

According to the Commission, this case shows that if it were accepted that a national court or tribunal against whose decisions judicial remedies lie has the power to set aside the application of Community acts, the binding effect of those acts could easily be circumvented, specifically in situations of conflict. The Commission's decision does not always correspond to the point of view of the Member State to which it is addressed. If the national court or tribunal were to declare the Community decision invalid, the Member State could refrain from lodging an appeal against the judgment and the decision would therefore be deprived of its binding effect.

Secondly, the distribution of responsibilities between the Court of Justice and national courts in any event requires the power to rule on the validity of Community acts to be confined to the Court.

For reasons relating to the effective legal protection of individuals the Commission accepts a single exception, namely the possibility of granting a suspension in urgent cases, that is to say in connection with an application for interim measures, provided that in the main proceedings a reference is made to the Court of Justice. In that regard the Commission refers to the observations submitted by it in Cases 97/85 *Union Deutsche Lebensmittelwerke GmbH* v *Commission* [1987] ECR 2265 and 249/85 *Albako Margarinefabrik* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2345.

The second question (validity of the Commission's decision of 6 May 1983)

Foto-Frost considers that the decision of 6 May 1983 is invalid. In order to support that view Foto-Frost attempts to show first that the Commission is under a duty to adopt a decision declaring that the situation examined by it is such as to permit the waiver of post-clearance recovery of the duty in question where the requirements laid down in the first subparagraph of Article 5 (2) of Regulation No 1697/79 are satisfied and, secondly, that those requirements were actually satisfied in this case.

Foto-Frost bases its view that the Commission was under a duty to adopt a decision permitting post-clearance recovery to be waived on two arguments.

First, it maintains that the preamble to Council Regulation No 1697/79 expresses a concern to limit post-clearance recovery in the light of the need for legal certainty. In Foto-Frost's view its interpretation of Article 5 (2) is consistent with the objective of legal certainty, since it results in uniform application of the provision in all Member States.

Secondly, Foto-Frost states that even if there is no provision expressly obliging the Commission to adopt a decision permitting post-clearance recovery to be waived where the requirements laid down in Article 5 (2) are satisfied, Article 2 of Commission Regulation No 1573/80 obliges the national authorities, when the question falls to be decided by them, not to take action for post-clearance recovery in such cases. Foto-Frost takes the view that it is possible to infer by analogy from that provision that when the question falls to be decided by the Commission it is bound to adopt a decision permitting post-clearance recovery to be waived in those circumstances.

Foto-Frost then endeavours to show that the requirements laid down in Article 5 (2) were in fact satisfied in this case, in particular that it acted in good faith. In that regard it places particular emphasis on the fact that the Finanzgericht Hamburg itself considered in its order of 22 September 1983 suspending the amendment notice that it was extremely doubtful whether import duty could be levied in respect of the goods in question. Consequently, Foto-Frost, which had no expertise in the matter, could be excused for not having detected the alleged mistake. In addition, previous imports of a similar nature had always been exempted from duty. Finally, it maintains that it completed the customs declarations correctly.

According to Foto-Frost, it follows from the foregoing that the Commission was under a duty to adopt a decision permitting post-clearance recovery of the duty in question to be waived. Consequently, its decision of 6 May 1983 is invalid.

The *government of the Federal Republic of Germany* does not wish to submit any opinion on the second question. However, it points out that the German customs authorities at no time cast doubt on the validity of the decision and, on the contrary, ensured its execution.

The *Commission* contends, in the first place, that the duty in question was in fact payable. It goes on to maintain that the error which led the customs authorities not to claim the duty could have been detected by Foto-Frost.

In order to show that the duty in question was payable the Commission states that the system of trade between the Federal Republic of Germany and the German Democratic Republic, which is regulated by the Berlin Agreement of 20 September 1951 (the version in force at the relevant time was published in the annex to *Bundesanzeiger* No 41 of 28.2.1979), is based on two

essential ideas. First, on account of the contrasting nature of the two economic systems, German internal trade is subject to significant restrictions with regard to quantities and price. Secondly, the system of trade is based on the idea that a single customs territory continues to exist despite the division of Germany, with the consequence that direct economic relations between the Federal Republic of Germany and the German Democratic Republic are exempt from import duty.

With regard more particularly to what are known as triangular operations, such as those at issue in the main proceedings, the Commission accepts that they fall within the ambit of German internal trade. They are therefore subject to certain provisions of that trade system and, in particular, to the restrictions applicable with regard to quantities and price. However, such transactions are not subject to all the rules which generally govern operations falling within the ambit of German internal trade. Thus, they are not exempt from customs duty since that exemption applies only to goods which have not left the single customs territory (Federal Republic of Germany and German Democratic Republic). Moreover, the Protocol on German internal trade does not provide that operations falling within the ambit of German internal trade are necessarily exempt from import duty.

In order to show that the error committed by the customs offices could have been detected, the Commission argues that the position in the Federal Republic of Germany has been settled as described above since a judgment of the Bundesfinanzhof (Federal Finance Court) of 3 July 1958 (*Zeitschrift für Zölle und Verbrauchssteuern*, 1958, p. 373). Since Foto-Frost specialized in trade with the German Democratic Republic it could have obtained that information without difficulty. Since it had not made the relevant inquiries it bore a substantial part of the responsibility for the error which occurred and could not therefore seek to benefit from the first subparagraph of Article 5 (2) of Regulation No 1697/79.

In its view the decision of 6 May 1983 was therefore valid.

The third question (scope of the power of review of the national court in the event that the Court of Justice considers that the national court has the power to declare such a decision invalid itself)

The *government of the Federal Republic of Germany* and the *Commission* consider that in view of the proposed reply to the first question there is no need to reply to the third question.

The fourth question (do the operations in question fall within the ambit of German internal trade for the purposes of the Protocol on German internal trade and hence are not liable to customs duty and turnover tax?)

Foto-Frost states that customs duty was not payable in respect of the operations in question since they fell within the scope of German internal trade within the meaning of the relevant protocol.

In that regard it refers to Paragraph 16 of the Regulation of 1 March 1979 implementing the interzonal trade regulation (*Supplement to Bundesanzeiger* No 47 of 8.3.1979, p. 3) according to which German internal trade includes triangular transactions, defined as follows: 'Operations effected between a person located in the territory of the Federal Republic of Germany and a person located in a country other than the Federal Republic of Germany or the German Democratic Republic on the basis of which goods ... are to be transported from the currency area of the mark of the German Democratic Republic to the territory of the Federal Republic of Germany either directly or via some other country'.

Foto-Frost recognizes that the adoption of that rule is of a later date to the protocol. However, the legislation in force at the time of the protocol's adoption itself gave a very

wide definition to operations falling within the ambit of German internal trade and did not exclude operations such as the ones at issue in this case. In its view that was the reason why the Bundesverwaltungsgericht (Federal Administrative Court) decided in its judgment of 26 June 1981 (*Zeitschrift für Zölle und Verbrauchssteuern*, 1982, p. 55) that German internal trade within the meaning of the protocol also covered triangular transactions. Foto-Frost also refers to the judgment of the Court of Justice of 27 September 1979 in Case 23/79 (*Geflügelschlachterei Freystadt* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 2789, at p. 2802) according to which the sequence of commercial transactions and their forms do not need to be taken into account in determining whether or not a transaction forms part of German internal trade.

With regard to import turnover tax, Foto-Frost refers to the German Government's declaration concerning Article 3 of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes. By that declaration the German Government reserved the right to treat the territory of the German Democratic Republic as forming part of its national territory for the purposes of turnover tax. A circular issued by the Federal Minister for Finance concerning German law on turnover tax states that the importation into the Federal Republic of Germany, within the framework of German internal trade, of goods which are in free circulation in the currency area of the mark of the German Democratic Republic is not subject to import turnover tax.

In their observations concerning the fourth question the *Hauptzollamt*, the government of the *Federal Republic of Germany* and the *Commission* deal only with the question of customs duty since the question of turnover tax does not fall within the Community rules governing post-clearance recovery of import duties.

According to the *Hauptzollamt* it does not follow from the fact that an operation falls within the ambit of German internal trade that it is exempt from import duty. It is clear from the Berlin Agreement of 20 September 1951 that only goods which are imported directly and whose cost is settled by means of a clearing system between the central banks of the two countries in question are exempt from import duty. Since triangular transactions do not give rise to such clearing there is no reason for them to be exempt from customs duty. The Hauptzollamt therefore considers that it is not necessary for the purposes of these proceedings to determine whether or not triangular transactions fall within the ambit of German internal trade.

The *government of the Federal Republic of Germany* considers that the exemption from duty provided for by the protocol applies only to operations which were exempt under the German legislation in force at the time when the protocol was adopted. At the time when the protocol was adopted import duty had to be paid in respect of goods imported into the Federal Republic of Germany by virtue of a triangular operation. The exemption from duty provided for by the protocol does not therefore extend to such operations. The Government states in that regard that since the establishment of the Community it has always levied Community customs duty in respect of triangular operations and has remitted it to the Community.

The *Commission* considers that the fourth question is irrelevant. In its view there is no need to consider whether or not operations such as those at issue in this case fall within the scope of German internal trade. Even if they did fall within the scope of that trade that would not make them exempt from import duty. The protocol refers expressly to 'the treatment currently accorded' German internal trade, that is to say the system in force at the time when the protocol was adopted. At that time import duty was payable in respect of triangular

operations. Consequently, the protocol does not provide a basis for exempting the operations at issue from import duty.

3 — Answers to questions put by the Court

(1) *Foto-Frost* was asked to answer the following two questions:

'(a) Why were the goods whose importation gave rise to the customs duty at issue not imported directly from the German Democratic Republic into the Federal Republic of Germany?

(b) What *was* the final destination of the goods?'

In reply to the *first question* Foto-Frost explained that there were agreements between Firma Carl Zeiss Jena (German Democratic Republic) and Firma Carl Zeiss Oberkochen (Federal Republic of Germany) under which the goods in question had to pass through a third country.

Foto-Frost replied to the *second question* that it had exported those binoculars at issue which it had purchased during 1980 to Italy. Of those which it had acquired during 1981 some were exported to Italy and South Africa and some were sold to two other undertakings established in the Federal Republic of Germany which, to the best of its knowledge, subsequently exported them.

(2) The *Commission* was asked by the Court to state in what manner Foto-Frost had failed to observe all the requirements laid down by the rules in force with regard to customs declarations.

The Commission replied that in its decision of 6 May 1983 it had regarded the question whether or not Foto-Frost had observed all the requirements laid down by the rules in force with regard to customs declarations as being of secondary importance. However, it accepted in its reply to this question that Foto-Frost had completed its customs declaration correctly. The complaint made by the Commission against Foto-Frost in its decision was that the latter had maintained *vis-à-vis* the customs authorities that the goods were exempt from customs duty because they originated in the German Democratic Republic whereas the question was doubtful. The Commission considered that a person liable to pay duty who submits a declaration to the customs authorities cannot act as if he qualifies for some entitlement when the matter is manifestly open to doubt.

(3) The *government of the Federal Republic of Germany* was asked by the Court to explain the system of German internal trade the application of which is protected by the Protocol of 25 March 1957, in order to enable the Court to place the fourth question in the relevant context of primary and secondary legislation.

In its answer to the question the German Government states that the system of German internal trade within the meaning of the protocol is based on the Berlin Agreement of 20 September 1951, various regulations and laws adopted in 1949 and 1950 by the respective governments and military commanders, and implementing regulations subsequently adopted by the legislature of the Federal Republic of Germany.

Under the laws and regulations adopted by the military authorities transactions for the purchase of goods between the Federal Republic of Germany and the German Democratic Republic are, in principle, prohibited.

Nevertheless, the government of the Federal Republic of Germany has the right to provide for exceptions to that prohibition.

Operations authorized pursuant to such derogations are effected by means of a clearing system. That means that they are not paid for in freely convertible currency but are entered in clearing accounts kept on behalf of the Federal Republic of Germany by the Deutsche Bundesbank and on behalf

of the German Democratic Republic by the Staatsbank.

In order that trade relations between the Federal Republic of Germany and the German Democratic Republic are conducted exclusively by means of the clearing system, measures have been adopted to prevent goods originating in the German Democratic Republic from being imported into the Federal Republic of Germany via other countries. The German Democratic Republic is able, by means of such indirect imports, to obtain freely convertible currency and thereby circumvent the clearing system.

The measures in question are contained in the laws and regulations adopted by the military authorities. They established a system of advance authorization and monitoring which is applied very strictly by the government of the Federal Republic of Germany.

The German Government also states that at the time when the protocol was adopted customs duty was payable on triangular operations. The exemption provided for by the protocol does not therefore extend to such operations.

Finally, the German Government states that since triangular operations are subject to import customs duty they are also subject to turnover tax.

R. Joliet
Judge-Rapporteur