1. The present case is a reference from the German Bundesfinanzhof (Federal Finance Court). That court has doubts about the validity of the regulation by which the Council suspended, at the time of the war in the former Yugoslavia, the trade concessions provided for by the Cooperation Agreement between the Community and Yugoslavia. The plaintiff and appellant in the main proceedings, A. Racke GmbH&Co. ("Racke"), is a wine importer which imported wine from Serbia and thus benefited from tariff preferences on imports of wine from Yugoslavia until the Council adopted the disputed regulation. Racke claims that the Cooperation Agreement with Yugoslavia did not permit the Council to suspend its operation, and that the decision to do so was not in conformity with certain rules of general international law. The Council Regulation suspending the trade concessions was therefore, according to Racke, invalid. The arguments focus in particular on rules of customary international law which are also contained in the Vienna Convention on the Law of Treaties, including the principle of *pacta sunt servanda* and the rule that a treaty may under certain conditions be terminated by reason of a fundamental change of circumstances (the doctrine of *rebus sic stantibus*). Thus the present case raises the novel issue whether it is possible for a private claimant to invoke rules of general international law against a decision to suspend the operation of an international agreement.

Legal framework

The Cooperation Agreement

2. The Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia (hereafter 'the Cooperation Agreement') was signed in Belgrade on 2 April 1980 and concluded on behalf of the Community by Council Regulation (EEC) No 314/83 of 24 January 1983. It was a so-called mixed agreement, to which the Member States were also parties alongside the Community.

3. According to Article 1 of the Cooperation Agreement its object was to promote overall cooperation between the contracting parties...
with a view to contributing to the economic and social development of the Socialist Federal Republic of Yugoslavia (hereafter 'SFRY') and helping to strengthen relations between the parties. To that end provisions and measures were to be adopted and implemented in the field of economic, technical and financial cooperation, and in the trade and social fields.

4. Title I of the Cooperation Agreement dealt with economic, technical and financial cooperation, Title II with trade, Title III with provisions relating to the Free Zone established by the agreements signed at Osimo, and Title IV with cooperation in the field of labour. Title V consisted of general and final provisions.

5. On the trade side, Article 22 of the Cooperation Agreement provided for preferential tariff treatment of imports of wine of fresh grapes originating in Yugoslavia. The basic provision, as amended by an Additional Protocol to the Cooperation Agreement dating from 1987, 4 was Article 22(4):

'This agreement is concluded for an unlimited period.

Either Contracting Party may denounce this Agreement by notifying the other Contracting Party. This Agreement shall cease to apply six months after the date of such notification.'

By contrast, the Cooperation Agreement did not contain provisions on the suspension of its operation.

7. During the course of 1991 war broke out in Yugoslavia. The Community and its Member States attempted to play an active role in putting an end to the conflict. In November that led to Decision (91/586/ECSC, EEC) of the Council and the Representatives of the Governments of the Member States, meeting within the Council, of 11 November 1991 suspending the application of the Agreements between the European Community, its Member States and the Socialist Federal Republic of Yugoslavia (hereafter 'the Suspension Decision').

9. The preamble further states that:

'...the pursuit of hostilities and their consequences on economic and trade relations, both between the Republics of Yugoslavia and with the Community, constitute a radical change in the conditions under which the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia and its Protocols, as well as the Agreement concerning the European Coal and Steel Community, were concluded; ... they call into question the application of such Agreements and Protocols.'

8. The preamble to the Suspension Decision refers to declarations of the European Community and its Member States, meeting within the framework of European Political Cooperation, taking note of the crisis in Yugoslavia. The preamble also refers to Resolution 713 (1991) of the United Nations Security Council, which expressed concern that the prolongation of the crisis constituted a threat to international peace and security. The preamble further states that the appeal launched by the European Community and its Member States on 6 October 1991, calling for compliance with the cease-fire agreement reached in The Hague on 4 October 1991, was not heeded. That declaration of 6 October 1991 announced the decision to terminate the Agreements between the Community and Yugoslavia if the agreements reached on 4 October 1991 between the parties to the conflict were not observed.

10. Paragraph 1 of the Suspension Decision provides:

'The application of the abovementioned Agreements is hereby suspended with immediate effect.'
The decision was published in the Official Journal on 15 November 1991 and should therefore be regarded as taking effect on that date.

11. The Council also adopted on 11 November 1991 Regulation (EEC) No 3300/91 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia (hereafter 'the Suspension Regulation').

12. The preamble to the Suspension Regulation is almost identical to the preamble to the Suspension Decision. The preamble to the Suspension Regulation adds, however, that the trade concessions granted by, or pursuant to, the Cooperation Agreement shall be suspended with immediate effect, and that provision should be made for the Regulation to avoid affecting exports to the Community of products originating in Yugoslavia made before its entry into force.

13. Article 1 of the Suspension Regulation provides:

'The trade concessions granted by, or pursuant to, the Cooperation Agreement between

the European Economic Community and the Socialist Federal Republic of Yugoslavia are hereby suspended.'

14. Article 2 provides:

'Article 1 shall not apply to products originating in Yugoslavia which are exported before the date of entry into force of this Regulation.'

15. The Suspension Regulation entered into force on the day of its publication in the Official Journal, i.e. on 15 November 1991.

16. On 25 November 1991 the Council adopted Decision 91/602/EEC denouncing the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia. The preamble refers to the provisions of Article 60 of the Cooperation Agreement, and states that the situation prevailing in

7 — Cited in note 1.
Yugoslavia no longer permits the Cooperation Agreement to be upheld. Article 1 provides that the Cooperation Agreement and all related protocols and instruments are denounced. Article 2 provides that the decision shall be published in the Official Journal and notified by the President of the Council to the Socialist Federal Republic of Yugoslavia, and that it shall take effect on the day of its publication. The decision was published on 27 November 1991.

17. On 2 December 1991 the Council adopted Regulation (EEC) No 3567/91 concerning the arrangements applicable to the import of products originating in the Republics of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia. The preamble states that the European Community and its Member States have decided to apply selective positive measures in favour of those parties which contribute to progress towards peace, and that those parties should therefore be granted, by an autonomous decision taken by the Community, the benefit of trade provisions which are equivalent in essence to those of the Cooperation Agreement suspended by the Community. The regulation thus granted the Republics of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia trade concessions equivalent to those of the Cooperation Agreement with effect from 15 November 1991, but those concessions did not cover imports of wine.

18. Similar arrangements were made in 1992, through the adoption of Council Regulation (EEC) No 545/92 of 3 February 1992 concerning the arrangements applicable to the import into the Community of products originating in the Republics of Croatia and Slovenia and the Yugoslav Republics of Bosnia-Herzegovina, Macedonia and Montenegro. The preamble to the regulation again refers to selective positive measures, consisting of the benefit of trade provisions which are equivalent in essence to those of the Cooperation Agreement. It further states that those measures should be maintained for 1992, amplified in respect of certain industrial products and extended to cover certain agricultural products. Article 6 of the regulation provides for the reduction in import duties for wines of fresh grapes, within the limit of an annual tariff quota of 545 000 hectolitres. The regulation was implemented by Council Regulation (EEC) No 547/92 of 3 February 1992 opening and providing for the administration of Community tariff quotas for certain products originating in the Republics of Croatia and Slovenia and the Yugoslav Republics of Bosnia-Herzegovina, Macedonia and Montenegro.


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The Vienna Convention on the Law of Treaties

20. The Vienna Convention on the Law of Treaties (hereafter ‘Vienna Convention’ or ‘Convention’) 13 was opened for signature at Vienna on 23 May 1969, following the successful conclusion of the United Nations Conference on the Law of Treaties. The Convention entered into force on 27 January 1980, following the deposit by Togo of the 35th instrument of ratification or accession. 14 The Community is not a party to the Convention, and indeed could not become a party since accession is open only to States (Articles 81 and 83 of the Convention). Accession by the Community would in any event be fruitless since the Convention applies only to treaties between States (Article 1). It is argued, as will be seen below, that the Convention is none the less relevant as it expresses rules of customary international law binding on the Community. There is a second Vienna Convention, on the Law of Treaties between States and International Organisations, or between International Organisations. 15 That convention has not yet entered into force, and the Community has not signed it. The provisions of that convention are largely identical to those of the 1969 Convention, to which I will mainly confine myself in what follows.

21. Instruments of ratification of or accession to the Vienna Convention have been deposited by all the Member States of the Community except France, Ireland, Luxembourg and Portugal. Of those four Member States only Luxembourg has signed the Convention (but has not yet ratified it).

22. The basic principle of international treaty law is stated in Article 26 of the Vienna Convention, under the heading ‘Pacta sunt servanda’:

‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

23. Part V, Section 3, of the Convention contains provisions on termination and suspension of the operation of treaties. The primary rule is that treaties are terminated or suspended in conformity with their provisions or by consent of all the parties (Articles 54 and 57). Of relevance among the other provisions of that section are Article 61, on ‘Supervening impossibility of performance’, Article 62, on ‘Fundamental change of circumstances’, and Articles 65 to 67, on procedural issues.

24. Article 61(1) provides:

'(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

'A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.'

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

25. Article 62 provides:

'A fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.'
26. Article 65 contains the ‘Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty’. Article 65(1) provides that a party invoking a ground for terminating, withdrawing from, or suspending the operation of a treaty, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor. Article 65(2) provides for a waiting period of not less than three months (except in cases of special urgency), after which the notifying party may, if no party has raised any objection, carry out the proposed measure. If objection is raised, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations (Article 65(3)).

27. Article 66 contains further rules on ‘Procedures for judicial settlement, arbitration and conciliation’. Article 67(1) lays down that the notification provided for under Article 65(1) must be made in writing.

28. I should also refer to Article 73 of the Convention, on ‘Cases of State succession, State responsibility and outbreak of hostilities’, which provides:

‘The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.’

29. It is generally agreed that many provisions of the Vienna Convention codify rules of customary international law. There is however also agreement that to some extent the Convention constitutes a progressive development going beyond established custom. And there appears to be no agreement on precisely which provisions are customary international law and which are not. 16 Both the principle of pacta sunt servanda and the doctrine of rebus sic stantibus (which makes allowance for a fundamental change of circumstances) are however universally recognised as forming part of customary international law. In the Fisheries Jurisdiction cases 17 the International Court of Justice, referring to the principle of termination of a treaty by reason of a fundamental change in circumstances, stated:

‘This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which

16 — See generally Sinclair, op. cit., pp. 5 to 24.
may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.'

The main proceedings

30. Racke imported wines from the Kosovo wine-growing region in the period from 6 November 1990 to 27 April 1992. It had those imports cleared for warehousing in its private customs warehouse and on 7 May 1992 declared the consignments released into free circulation. On that occasion Racke calculated the customs duty at the preferential rate provided under the Cooperation Agreement, which in the meantime had been suspended. The Hauptzollamt (Principal Customs Office) Mainz then raised a supplementary assessment consisting of the difference between the third-country rate of customs duties and the preferential rate, since the wine had been imported from Serbia (tax amendment decision of 27 May 1992, confirmed by decision of 27 August 1993 on the complaint by Racke). Racke disputed that decision before the Finanzgericht (Finance Court) Rheinland-Pfalz. Its action succeeded as regards the supplementary assessment for the wines exported from Yugoslavia before 15 November 1991, but was dismissed as to the remainder. The Finanzgericht based its dismissal of the action on the Suspension Regulation and stated that the suspension by that regulation of the agreed trade concessions, even before the denunciation of the Cooperation Agreement, gave rise to no legal doubt. On the contrary, the unilateral suspension was lawful since a fundamental change of the material circumstances in the former Yugoslavia had taken place. The war in Yugoslavia was a valid ground for the suspension; that ground as a matter of international law permitted withdrawal from a treaty, at least by means of suspension, which appears a lesser interference than the subsequent termination.

31. Racke then appealed against the judgment of the Finanzgericht, on a point of law, to the Bundesfinanzhof. It contested the validity of the Suspension Regulation and asked that the provisions of the Cooperation Agreement be applied until 27 May 1992, the day on which the denunciation of the Cooperation Agreement became effective.

32. In the order for reference the Bundesfinanzhof sets out its doubts about the validity of the Suspension Regulation. It points out that that regulation constituted, at the material time, the legal basis for the supplementary assessment by the Hauptzollamt, since the denunciation of the Cooperation Agreement was not yet effective and trade with Serbia and Montenegro not yet prohibited. It admits that it inclines to the view that the binding character of the Suspension Regulation cannot be called into question on grounds of international law. However, the doubts which exist in that respect, in particular on the lawfulness under international law of the unilateral suspension of the Cooperation Agreement, cannot be brushed aside.

33. The Bundesfinanzhof further reasons as follows. Under the Court's case-law, the
incompatibility of a Community law act with a provision of international law can affect the validity of that act only if the Community is bound by that provision and if the provision is capable of conferring rights on citizens of the Community which they can invoke before the courts. Those conditions appear to be fulfilled with respect to the tariff concessions defined in Article 22 of the Cooperation Agreement, in issue in the present proceedings. That raises the question whether the Cooperation Agreement was validly suspended, a question which cannot be answered in the affirmative without reservations. The Community is bound by the rules of general international law, as they are expressed for example in the Vienna Convention. The Cooperation Agreement did not provide for the possibility of suspension, and suspension on account of a fundamental change, not foreseen by the parties, of the circumstances obtaining when the agreement was concluded (the *rebus sic stantibus* doctrine) is permissible only under narrow conditions: namely that the presence of those circumstances constituted an essential basis for concluding the treaty and that the change of circumstances would radically alter the extent of the obligations still to be fulfilled under the treaty.

35. If the Suspension Regulation is invalid, the question arises of how to treat imports which would have been covered by a Community tariff quota opened for 1992 if the Cooperation Agreement had continued to apply. Since the last annual quota for Yugoslavia was already exhausted for imports at the end of 1991, it might be possible to take as a basis the quota rules in Regulations Nos 545/92 and 547/92 relating to products originating in Croatia, Slovenia, Bosnia-Herzegovina, Macedonia and Montenegro. 18

36. Accordingly, the Bundesfinanzhof referred the following questions to the Court:

1. Is Council Regulation (EEC) No 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia ... valid?

18 — Cited above in notes 10 and 11 respectively.
2. If not, what are the consequences of invalidity ... for the charging of customs duty in early May 1992 on wines originating in Serbia which were imported in the period from mid-November 1991 to April 1992 and cleared for warehousing in a customs warehouse?

Are the quota-related preferential customs duties granted in 1992 for wines from the territory of the former Yugoslavia other than Serbia applicable in that respect?'

37. Before I turn to consider the first question it may be appropriate, in view of the novelty of the issues which are raised and in view of the fact that the validity of a regulation is in issue, to summarise the principal arguments put forward in the observations submitted in the present proceedings. Written and oral submissions were made by Racke, the Council and the Commission.

The principal arguments

38. Racke refers to the universally recognised principle of pacta sunt servanda which, under international law, is limited by the "rebus sic stantibus" exception. It is clear from the Suspension Regulation, which refers to a radical change in conditions, that the Council sought to have recourse to that exception. The "rebus sic stantibus" doctrine is expressed in Article 62 of the Vienna Convention, which imposes strict limits and has to be interpreted restrictively and objectively. The burden of proof rests on the contracting party invoking the exception. The Vienna Convention further contains procedural provisions.

39. Racke argues that the Community is bound by the provisions of the Vienna Convention, since they reflect customary international law. It refers to judgments of the International Court of Justice in the "Fisheries Jurisdiction" cases, cited above. Racke also contends that, according to international law practice and doctrine, the suspension of a treaty must be preceded by attempts to find an agreement.

40. Racke claims that the Suspension Regulation satisfies neither the procedural requirements of the Convention (Articles 65 and 67) nor its substantive requirements (Article 62).

41. At the procedural level Racke submits that the Council suspended the tariff concession without first notifying the SFRY, and suspended it with immediate effect. There
was no case of ‘special urgency’, as required by Article 65(2) of the Convention for an immediate suspension. The Security Council of the United Nations had not yet imposed a trade embargo, and there were no other reasons of special urgency. One can assume that, if the Community had notified its intention to suspend the Cooperation Agreement, the SFRY would have resisted that. Further, it is difficult to see why the Council and the Member States did not confine themselves to denouncing the Cooperation Agreement (and thus further applying the Cooperation Agreement until the end of the six months’ notice). Racke stresses that the procedural provisions of the Vienna Convention are essential rules of international law, whose violation is sufficient to invalidate the Suspension Regulation.

44. The regulation does refer to ‘the pursuit of hostilities’ in Yugoslavia, but that cannot, according to Racke, constitute a fundamental change of circumstances. There are many States in which hostilities occur, including Member States of the Community. The absence of such hostilities did not constitute ‘an essential basis of the consent of the parties’ (Article 62(1)(a) of the Vienna Convention). There was no war with Yugoslavia, indeed there was not even a war inside Yugoslavia, but only conflicts between ethnic groups claiming self-determination.

42. Also at the substantive level Racke maintains that there was no justification for recourse to *rebus sic stantibus*.

45. The Suspension Regulation refers to the consequences of the pursuit of hostilities on economic and trade relations between the Republics of Yugoslavia. For the Community, however, those consequences could not constitute a fundamental change of circumstances.

43. The Bundesfinanzhof in the order for reference refers to the ‘dismembering’ of Yugoslavia. However, under international law, according to Racke, there is no dismembering of Yugoslavia since it continues to exist in reduced form (Serbia and Montenegro). In any event, the Council did not refer to any dismembering in the Suspension Regulation.

46. Next, the Suspension Regulation refers to the consequences on trade and economic relations with the Community. Racke argues that those consequences were very limited at the time. Trade was still possible, as is demonstrated by the imports of wine in issue. The Suspension Regulation does not specify those ‘consequences’, and it is for the Council to show what those objective consequences were, bearing in mind that they should constitute a fundamental change of circumstances which, in turn, constituted an essential basis of the consent of the parties.
47. In Racke's submission the Cooperation Agreement was suspended for political reasons: it was a means of exercising pressure on the parties to the conflict to observe ceasefire agreements. Although understandable from a political point of view, the suspension does not thereby meet the conditions of *rebus sic stantibus*. The latter also requires that 'the effect of the change is radically to transform the extent of obligations still to be performed under the treaty'. Racke claims that no such change occurred. The Cooperation Agreement was in the first place a trade agreement, serving the interests of economic factors, and trade with Yugoslavia continued at the time.

48. Racke thus concludes that none of the procedural and substantive requirements for recourse to *rebus sic stantibus* were satisfied. Concessions. Rather, it is that of an international agreement whose operation was suspended at international level; its provisions had therefore ceased to create rights for individuals when the Suspension Regulation was adopted.

49. The Council argues that the Suspension Regulation is valid. It first recalls the relevant legal framework. The Suspension Regulation was accompanied by the Suspension Decision, adopted by the Council and the Representatives of the Governments of the Member States. That decision precedes the regulation from both a logical and a juridical point of view. The adoption of the Suspension Regulation was required because the tariff concessions provided for in the Cooperation Agreement had been implemented by way of regulations. Thus, the legal framework is not that of an international agreement still in operation and a Community regulation unilaterally suspending the tariff.

50. The Council contends that Racke and the Bundesfinanzhof err in their conception of the relationship between international law and Community law. Even if the Suspension Decision were invalid under international law, it would not follow that the Cooperation Agreement continued to operate. International law does not impose a specific form of reparation; it does not, in particular, impose resumption of the agreement in question. An alleged violation of international law may set in motion a procedure between the parties which may result in a resumption of the agreement, but it may also result in compensation for the injured party, or reversion by the injured party in the form of retaliatory measures. In the present case, no such procedure was started and, even if it had been, the re-application of the Cooperation Agreement would have been an unlikely outcome. Where there is a serious deterioration in the relations between the parties to a treaty, those parties have a measure of legitimate political choice between the various solutions offered by international law. It is therefore not necessary for the Court, when reviewing the validity of the Suspension Regulation, to consider the question whether the suspension of the operation of the Cooperation Agreement was in conformity with international law: the Agreement ceased to apply in any event.
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51. In the alternative, the Council argues that the Suspension Decision was lawful under international law. It considers that the requirements of rebus sic stantibus, as expressed in Article 62 of the Vienna Convention, were satisfied. There was a fundamental change in the circumstances whose existence constituted an essential basis for the consent of the parties. It is clear from the preamble to and Article 1 of the Cooperation Agreement that the existence of the SFRY as a federal, sovereign and peaceful State was an essential condition for initiating and pursuing the cooperation envisaged by the Cooperation Agreement. It is therefore obvious that the events at the time — the seriousness of the situation in Yugoslavia consisting of the breaking-up of the internal order and organisation through the use of armed forces, which the Security Council had characterised as a threat to international peace and security — constituted a change of circumstances affecting the very basis of the cooperation with the Community and its Member States. It is wrong to say that the Cooperation Agreement was a mere trade agreement. The Cooperation Agreement was comparable to other agreements with Mediterranean countries (‘association’ or ‘cooperation’ agreements based on Article 238 of the Treaty). It was concluded both by the Community and by the Member States. It contained essential provisions on financial assistance. It contained important social provisions. And it was situated in a broader political framework expressed in the Final Act of the Conference on security and cooperation in Europe, thus instituting privileged political relations between the Community and the Member States, of the one part, and Yugoslavia, of the other.

52. As to the condition that ‘the effect of the change is radically to transform the extent of obligations still to be performed under the treaty’ (Article 62(1)(b) of the Vienna Convention), the Council refers to the de facto dissolution of Yugoslavia, with the birth of new political entities with effective control over their territories. Because of that situation many provisions of the Cooperation Agreement (on trade and on financial assistance) could no longer be applied. As an example the Council refers to the controversy between Slovenia and the federal authorities on the receipt of customs duties. A potential adaptation of the Cooperation Agreement to the new situation could only be based on negotiation between the parties. The Community sought such a solution, but it could not be achieved. The Council concludes that the Suspension Regulation is valid.

53. The Commission first expresses doubts as to the admissibility of the reference. The Bundesfinanzhof questions the validity of the Suspension Regulation on the basis of the Vienna Convention and rules of customary international law. But the Community is not a party to the Vienna Convention and there is nothing in the Treaty which suggests that general principles of international law are part of the Community legal order. It is true that in Poulsen and Diva Corp. 19 the Court stated that the Community must exercise its competences in conformity with international law, but for the Commission it is not certain that that statement covers the

wide powers of review sought by Racke. The Commission is reluctant to acknowledge those powers as they charge the Court with a function that is normally performed by international tribunals, under dispute resolution rules which are fundamentally different from those governing the procedures before the Court.

54. Next, the Commission doubts whether the answer to the first question is relevant to the second question, which concerns the practical consequences of the alleged invalidity of the Suspension Regulation. The Commission takes the view that such invalidity cannot affect the answer to be given to the second question. The Suspension Regulation concerned the tariff concessions for 1991, and Racke released the goods in issue into free circulation only on 7 May 1992. In 1992, however, there was no tariff quota for wines originating in Serbia. A declaration of invalidity of the Suspension Regulation cannot have the effect of extending the 1992 tariff quota applying to imports from other Republics of the former Yugoslavia to imports from Serbia. The Commission further emphasises that the Bundesfinanzhof does not raise the issue whether Racke could claim a right to the preferences in issue directly on the basis of the Cooperation Agreement. The Court cannot therefore address the latter issue.

55. On the substance, the Commission first expresses its views on the direct effect of the Cooperation Agreement, and in particular of Article 22 providing for the tariff quota for wines. That is a point to which I will revert when considering the second question.

56. The Commission then addresses the question whether it is possible for Racke to rely on rules of general international law. It favours a negative reply to that question. The Commission recalls that the Community is not a party to either of the Vienna Conventions. Those conventions are therefore not an act of the institutions in the sense of Article 177 of the Treaty. Even if one takes the view that the Community is bound by certain principles of the Vienna Convention, inasmuch as they express rules of customary international law, it is questionable whether, and to what extent, that is the case for specific provisions of the Convention.

57. If that problem were to be overcome, there would remain the fact that, by its nature, the Vienna Convention is not apt to create rights in favour of individuals questioning the validity of a Community act. The Commission derives that from the spirit, scheme and provisions of the Convention. The principal objective of the Convention is to regulate contractual relations between subjects of international law. The Convention is further subsidiary in that States can always agree to depart from its rules and in that State practice may create new rules of customary international law superseding those of the Convention. Lastly, the Convention is not exhaustive as questions arising from State succession, State responsibility and the outbreak of hostilities are
not covered (Article 73 of the Convention) and as the Convention is without prejudice to rules of customary international law in fields not covered by it (such as the right to retorsion).

58. In that context, Articles 61 and 62 of the Convention regulate the matter only partly. It emerges for example from the preparatory documents to the Convention that the disappearance of a subject of international law was considered as an essential reason for the impossibility of performing a treaty (Article 61), but that it was decided not to address that issue in Article 61 in order not to pre-judge further negotiations on State succession. 20

59. The Commission thus concludes that the Vienna Convention is not an instrument such as to create rights in favour of individuals disputing the validity of an act of the institutions. In support, the Commission refers to Faust v Commission 21 and Germany v Council, 22 where the Court also refused to examine arguments based on legal relations between the Community and third countries.

60. The Commission subsequently defends the validity of the Suspension Regulation, in the event that the Court were to consider that the legality of the regulation should be reviewed on the basis of rules of general international law. The Commission argues that the Council did not rely on rebus sic stantibus alone when adopting the Suspension Regulation, but also on the impossibility of continuing the performance of the treaty and to the right to retorsion. Taking into account the delicate political assessment which needs to be undertaken where an international agreement is suspended, the Commission contends that the Court should confine itself to examining whether the Community institutions abused their powers. Given that the Community is not bound by the Vienna Convention under Article 228(7) of the Treaty, and given that certain rules of customary international law are decidedly more flexible than the provisions of the Convention, the Community is not obliged to respect each specific provision of the Convention. That also applies to the procedural provisions, whose violation does not under international law render the disputed act void or invalid but only engages the international responsibility of the international law subject involved.

61. The Commission points out that a state of war is not required for reliance on rebus sic stantibus, the impossibility of performance or the right to retorsion. In line with the UN Security Council, 23 the Community took into account the existence of an armed conflict giving rise to bloodshed and destruction. The Security Council considered the conflict a threat to international peace and

security, and that justified the Community’s action.

62. As regards the conditions for recourse to rebus sic stantibus, it is clear from the preamble to and Article 1 of the Cooperation Agreement that the continued peaceful existence of Yugoslavia constituted an essential basis for the Community’s consent to be bound by the Agreement. It is also clear that the conflict in Yugoslavia was such as radically to transform the extent of the Community’s obligations towards the SFRY: the Community was no longer in a position to contribute towards the economic and social development of the SFRY (see again Article 1 of the Agreement).

63. At the time it was impossible to continue to perform the Cooperation Agreement, not necessarily because of ‘the permanent disappearance or destruction of an object indispensable for the execution of the treaty’ (Article 61(1) of the Vienna Convention), but because of the disappearance of the SFRY itself. In that respect the Commission notes that the declarations of independence of Croatia and Slovenia took effect on 8 October 1991.

64. The Commission further submits that at the procedural level also the spirit of the Vienna Convention was respected. As early as 28 August 1991 the Community announced that it would take measures against the parties to the conflict not participating in the peace process. In the declarations of 5, 6 and 28 October, cited in the Suspension Regulation, the Community left no doubt that it would take action against the parties not respecting, at the latest on 7 October 1991, the ceasefire agreement of 4 October 1991, which was signed in the presence of the Presidency of the Council and the President of the Conference on Yugoslavia. Then, too, the Community announced that it would terminate the Cooperation Agreement in the event of non-compliance. The Community also fully informed the international community of its intentions, and it notified the suspension of the tariff preferences to the GATT.

65. Lastly, there is the right to retorsion, which the Commission defines as the right to take action, in itself contrary to international law, but justified by previous illegal action by the other party and intended to incite that other party to revoke its action. Retorsion is limited by the following principles: it shall be announced, it shall observe the principle of proportionality and it shall be such as to permit the return to the pre-existing situation. Applying those principles to the suspension of the Cooperation Agreement, the Commission maintains that the Community was in a position to consider the following acts, on the part of the SFRY, as violations of international law. First, there was the coup in October 1991 by the four pro-Serb members of the collective presidency of the SFRY. Secondly, the Yugoslav federal army had abandoned neutrality by participating in attacking Croat towns (including Dubrovnik). Thirdly, even at that

25 — See EC Bulletin 10-1991, paragraphs 1.4.6, 1.4.7 and 1.4.16.
time the Community insisted on having the perpetrators of war crimes punished on the basis of international humanitarian law; and the mandate of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia since 1991 goes back to 1 January 1991. The Commission thus concludes that the conditions for retorsion were fulfilled.

66. Before examining the validity of the Suspension Regulation I will briefly consider the admissibility of the reference, on which the Commission has expressed doubts.

Admissibility

67. The Commission's doubts as to whether it is possible for an individual to dispute the validity of a Community act on grounds of general international law may have some justification, but it is plainly wrong to suggest that the reference is inadmissible on that basis. Article 177 of the Treaty permits national courts to refer questions concerning the validity of acts of the institutions of the Community. It is not disputed that the Suspension Regulation is such an act and that the Bundesfinanzhof has genuine doubts on its validity. No other requirements are imposed by Article 177, which does not define the concept of validity, and therefore all other issues concerning the alleged invalidity go to the substance of the case. There is nothing in the terms of Article 177 or in the Court's case-law which supports the view that an issue as to whether the validity of a Community act can be reviewed in the light of a particular type of rule or legal provision is an issue of admissibility. On the contrary, in those cases where the Court has declined to review the validity of a Community act in the light of certain types of rules it did not hold the reference inadmissible, but simply decided that no invalidity was established. Examples are Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide, where the Court held that recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law, and International Fruit Company v Produktchap voor Groenten en Fruit, where the Court held that the GATT could not affect the validity of Community regulations because it was not capable of conferring rights on individuals.

68. The second limb of the Commission's doubts on the admissibility of the reference concerns the relevance of the question on the validity of the Suspension Regulation for the proceedings before the Bundesfinanzhof. It is true that in exceptional circumstances the Court can declare a reference inadmis-


29 — See paragraph 54 above.
possible because the questions referred are manifestly irrelevant to the main proceedings. There is however no such manifest irrelevance in the present case. The Commission merely argues that the consequences of a ruling of invalidity on Racke’s claims cannot be of the kind envisaged in the second question referred by the Bundesfinanzhof, namely to extend the 1992 tariff quota applying to imports from other Republics of the former Yugoslavia to imports from Serbia. Again it is clear that the argument goes to the substance of the case. It concerns the reply to be given to the second question, which inquires in general terms about the consequences of the alleged invalidity of the Suspension Regulation. It is of course obvious that the two questions are closely linked. If the invalidity of the Suspension Regulation were found to have no effect whatsoever on Racke’s claim, there would be no point in considering the question of validity. That would still not render that question inadmissible, however; the Court would simply not need to answer it.

The validity of the Suspension Regulation

70. I will state at the outset that I am not convinced by Racke’s arguments as to the invalidity of the Suspension Regulation on grounds of breach of rules of general international law, essentially for the following reasons.

71. First, although I do not wholly exclude the possibility that under certain circumstances individuals could base a Community law claim on rules of customary international law on treaties, I take the view that that should be exceptional in the light of the overall purpose and nature of such rules. I will thus suggest that only manifest violations of the law of treaties can give rise to a ruling of invalidity.

72. Second, in the present case no such manifest violation has been demonstrated. It has not in my view been shown that the Community made an improper use of the rebus sic stantibus doctrine, and it has not been shown that there were no other international law grounds on which the Community could base the decision to suspend the Cooperation Agreement. Also, I do not think that the Suspension Regulation is invalid on procedural grounds that Racke could rely upon (i.e. the alleged lack of prior notification to the SFRY and the suspension with immediate effect).

69. For the reasons set out below, I consider that the invalidity of the Suspension Regulation would affect Racke’s claim. I therefore now turn to examine the validity of the Suspension Regulation.

31 — See paragraphs 102 to 104.
The status of the Vienna Convention and rules of customary international law

73. The Community is not a party to either of the Vienna Conventions, which are therefore not binding on the Community on the sole basis of Article 228(7) of the Treaty, which refers to agreements concluded by the Community. However, it is generally recognised that both Conventions, which in respect of termination and suspension of treaties contain identical provisions, are at least partly an expression of general international law in that they aim to codify rules of customary international law.

74. There are only a few cases where the Court has had occasion to refer to the rules of the Vienna Convention or to rules of general international law. The most significant case is Poulsen and Diva Corp., which concerned the scope of a fisheries regulation. There the Court held, as a preliminary point, that the Community must respect international law in the exercise of its powers and that, consequently, the regulation had to be interpreted, and its scope limited, in the light of the relevant rules of international law. The Court subsequently referred to various international conventions, including the United Nations Convention on the Law of the Sea, many of whose provisions were considered to express the current state of customary international maritime law, as confirmed by several judgments of the International Court of Justice. The interpretation given to the regulation in issue was substantially affected by those rules of general international law.

75. In a recent judgment the Court of First Instance also based its reasoning partly on the binding character of rules of customary international law. In Opel Austria v Council the Court had to rule on the lawfulness of a Council regulation withdrawing tariff concessions granted to the Republic of Austria (before accession). The regulation was adopted a few days before the Agreement on the European Economic Area entered into force, and the applicant argued that it violated the provisions of that agreement. The Court of First Instance held that the legality of the contested measure had to be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted. It then referred to the principle of good faith, according to which, pending the entry into force of an international agreement, the signatories to an international agreement may not adopt measures which would defeat its object and purpose. The Court held that that principle is a rule of customary international law, recognised by the International Court of Justice and codified by Article 18 of the Vienna Convention. It then stated that the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which forms part of the
Community legal order. 36 The Court concluded that: 37

‘In a situation where the Communities have deposited their instruments of approval of an international agreement and the date of entry into force of that agreement is known, traders may rely on the principle of protection of legitimate expectations in order to challenge the adoption by the institutions, during the period preceding the entry into force of that agreement, of any measure contrary to the provisions of that agreement which will have direct effect on them after it has entered into force.’

The Court went on to examine whether the Council regulation in issue was adopted in breach of the EEA Agreement, and found that that was the case. The regulation was consequently annulled.

76. The present case however raises more generally the issue as to the effects of customary international law in Community law. In that respect, the Court is largely in uncharted waters. Poulsen and Opel Austria may provide some indications, but I do not regard those judgments as fully covering the field: in Poulsen the Court went no further than interpreting a Community regulation in the light of rules of customary international law, and in Opel Austria the international law principle of good faith was married to the Community law principle of protection of legitimate expectations. Those are two specific types of effect, but the sort of effect which is sought in the present case is much stronger. Racke is seeking to have a Community regulation declared invalid on the sole basis of an alleged violation of rules of customary international law. It is difficult to envisage any stronger type of effect.

77. In its landmark judgment in International Fruit Company the Court held that there are two preconditions for review of the validity of an act of the institutions on the basis of a provision of international law: the Community must be bound by the provision, and the provision must be capable of conferring rights on citizens. 38 The second condition is crucial for the present case. Are the rules of customary international law such as to create rights in favour of individuals? Are they such as to permit an individual to challenge a political decision by the Community (and the Member States) to suspend the operation of an international agreement?

78. I see two sources of inspiration for finding an appropriate answer to those questions.

36 — See paragraphs 87 to 92 of the judgment in Opel Austria.
37 — At paragraph 94 of the judgment.
38 — Cited in note 28, paragraphs 7 and 8 of the judgment.
One is, for obvious reasons, the Court's own case-law on direct effect of international agreements concluded by the Community. The second is the approach in the legal systems of the Member States towards the effect of customary international law. It seems to me that, if there were some common ground in national legal systems on this question, the Court should take that into account.

79. Turning first to the legal systems of the Member States, it appears that there is little guidance in the case-law of national courts applying provisions of the Vienna Convention. There are some decisions applying the provisions of the Convention to questions of interpretation of treaties, but there appear to be no decisions directly applying the provisions on termination and suspension. In France, which is not a party to the Convention, there is a decision on the doctrine of rebus sic stantibus in relation to the suspension of an agreement with Morocco concerning visa requirements. According to that decision the act of suspending an agreement is an act of government which is not subject to review by the courts. 39 The latter can only check whether the decision to suspend was taken by the competent authority, whether there is such a genuine decision and whether it was published in the Journal officiel. 40

80. As to the status of customary international law generally in the legal systems of the Member States, the picture is rather complex and the results diverse. 41 Nearly all Member States appear to regard customary international law as a source of law. In some Member States that is based on constitutional provisions. In others it is accepted in case-law and legal writing. As to the effects which customary international law may produce, some Member States, for example the Federal Republic of Germany, appear to have a doctrine under which rules of customary international law may override domestic legislation. Article 25 of the German Basic Law states that the general rules of public international law shall be an integral part of federal law, and that they shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory. However, there are few if any court decisions in those Member States giving that sort of effect to customary international law. A recurring objection is that most rules of customary international law do not create rights for individuals and therefore do not have direct effect. In other Member States, for example the United Kingdom, it is accepted that customary international law cannot override domestic legislation. Thus in England a leading decision states: 'The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they


41 — For a survey of the law of 12 of the Member States see L'intégration du droit international et communautaire dans l'ordre juridique national: étude de la pratique en Europe: The Integration of International and European Community Law into the National Legal Order: a Study of the Practice in Europe, edited by Pierre Michel Eisemann (1996), and for an overview see Christian Dominé and François Vodfray, 'L'application du droit international général dans l'ordre juridique interne', at p. 51.
will treat it as incorporated into the domestic law, insofar as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. 42

81. At the expense perhaps of over-simplifying, one could say that national legal systems do attempt to give some effect to rules of customary international law but that they are cautious as to the effect of such rules on the validity of domestic legislation. There is no case, so far as can be seen, in any national court where an effect similar to that claimed by Racke has been recognised.

82. Turning now to this Court's approach to the direct effect of international agreements, it is settled case-law that a provision in an agreement concluded by the Community with non-member countries must be regarded as having direct effect when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. 43 In general the Court has been ready to acknowledge the direct effect of specific provisions of agreements concluded by the Community, but there are exceptions, the most notable one being the GATT. With respect to that agreement the Court has consistently held, on the basis of an analysis of its purpose, spirit, general scheme and terms, that it is incapable of conferring on citizens of the Community rights which they can invoke before the courts. 44 Essentially, the Court takes the view that the provisions of the GATT are characterised by great flexibility, which precludes direct effect.

83. I do not think that the above case-law should be directly transposed to the Vienna Convention. Again it has to be emphasised that that Convention is relevant only in so far as it codifies customary international law — which it does only partly. It would therefore be inappropriate to analyse the purpose, the spirit, the general scheme and the terms of that convention as such. However, the above case-law does make it clear that there are limits to the direct effect of international agreements, and that an obstacle may lie in the overall purpose and nature of international law provisions. It is also clear that the provisions in issue must contain a clear and precise obligation.

84. In the light of those principles, there must also be limits to the effect of rules of customary international law relating to treaties. The overall nature and purpose of the law of treaties is to lay down rules applying in the relations between States (and international organisations). The law of treaties is clearly not intended to create rights for individuals. It is true that its application may have the effect of creating such rights,

42 — Chung Chi Chewng v The King [1939] AC 160 at p. 168 (Privy Council); see further F. A. Mann, Foreign Affairs in English Courts (1986), p. 120 et seq.; H. Fox, P. Gardner and C. Wickremasinghe, in Eisemann (op. cit.) at p. 517 et seq.


44 — International Fruit Company, cited in note 28, paragraphs 20 to 27 of the judgment.
namely in those cases where a domestic legal system accepts that international agreements concluded in conformity with the law of treaties are capable of conferring rights on individuals. However, that is but an indirect effect, by no means intended at the level of international law. It is the provision of the agreement (lawfully concluded) which has direct effect. The overall nature and purpose of the law of treaties would therefore seem not to be conducive to direct effect. (It may be noted in passing that there may be other types of rules of customary international law which do intend to confer rights on individuals, for example rules of international humanitarian law.)

85. In addition, the particular rules in issue must contain clear and precise obligations. In the circumstances of the present case, it is not obvious that that condition is satisfied. The notion of rebus sic stantibus is notoriously difficult and contested; indeed it has often been described as the enfant terrible of international law. Its scope has perhaps been formulated more clearly in Article 62 of the Vienna Convention, but even that provision contains concepts which easily lend themselves to widely diverging interpretations. What is a ‘fundamental change’ of circumstances? What are circumstances which ‘constituted an essential basis of the consent of the parties’? And when does the change in circumstances ‘radically ... transform the extent of obligations still to be performed’? It may therefore be doubted whether the conditions for the application of the doctrine of rebus sic stantibus are sufficiently clear and precise to confer rights on individuals.

86. There are thus good reasons for not allowing individuals to challenge decisions such as the one in issue here on the basis of the law of treaties. I would none the less not wholly exclude such challenges, for the following reasons.

87. A number of agreements concluded by the Community have direct effect, thus creating rights for individuals. Where that is the case, the beneficiaries of such rights may have legitimate expectations as to the correct and proper implementation of the agreement in issue, as was recognised by the Court of First Instance in Opel Austria. To some extent those expectations will extend to the life itself of the agreement. Where, as in this case, an agreement is concluded for an indefinite period, subject to denunciation with six months’ notice, it might be legitimate for an individual to expect that the agreement will not suddenly be suspended without due cause. Or, to take the facts of


47 — Cited in note 35.
**Opel Austria**, where an agreement is due to enter into force in the next few days an individual may legitimately expect that a party to the agreement will not adopt a measure which violates the terms of that agreement. The detriment of the individual concerned. In such cases, there may be a breach of the Community law principle of the protection of legitimate expectations, and the breach of that principle, comporting at the same time a manifest violation of the law of treaties, may give rise to annulment of the Community act in issue, to a declaration of invalidity, or to a claim for damages.

88. The individual’s entitlement to some measure of protection of legitimate expectation is further supported by the strength of the principle of *pacta sunt servanda*, the fundamental tenet of the law of treaties. As the Court has stated: 48 ‘According to the general rules of international law there must be *bona fide* performance of every agreement’. Under international law, exceptions to that principle, such as *rebus sic stantibus*, are in any event, as Racke has correctly emphasised, to be narrowly construed. That is confirmed by the very recent judgment of the International Court of Justice of 25 September 1997 in the *Hungary/Slovakia* case, which makes it clear that, both under customary law and under Article 62 of the Vienna Convention on the Law of Treaties, the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases. 49

90. I consider that by allowing such limited review an appropriate balance is struck between the rights of the individual and the decision-making powers of the Community institutions. There must be a relatively wide margin of discretion for those institutions to take decisions concerning the life of an agreement, in accordance with their powers under the Treaty. It is only logical that the life of an international agreement should be primarily in the hands of the contracting parties. There is moreover an important political dimension to the conclusion and termination of international agreements which does not lend itself readily to judicial review. 50

89. In conclusion, I am of the opinion that individuals can challenge Community acts on the basis of customary international law rules concerning the law of treaties, but that such a challenge can be successful only if there is a manifest violation of such rules to

91. I therefore now turn to examine whether the Suspension Regulation was adopted in manifest violation of the rules of customary international law concerning the suspension and termination of international agreements.

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48 — Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, paragraph 18 of the judgment.

49 — See the judgment of the International Court of Justice (cited at note 17 above), at paragraph 104.

No manifest violation

92. It seems to me that the Council's and the Commission's arguments in defence of the decision to suspend the operation of the agreement are convincing. At the time there was clearly a *prima facie* case for having recourse to the *rebus sic stantibus* doctrine. As the Council points out, the existence of the SFRY as a federal, sovereign and peaceful State was an essential condition for developing the cooperation envisaged by the Cooperation Agreement. In the light of that, the events of 1991 would indeed seem a fundamental change of circumstances affecting the very basis for the cooperation between the Community and the SFRY. I am further satisfied that the Community institutions could reasonably consider that the effect of that change of circumstances was such as radically to transform the extent of obligations still to be performed by the Community and its Member States. In view of the political position adopted towards the breaking-up of Yugoslavia — a position confirmed and supported by the international community through the resolutions of the UN Security Council — there was clearly no point in continuing the economic, financial and trade cooperation provided for in the Cooperation Agreement.

93. Even if one takes the view that the Cooperation Agreement was essentially a trade agreement, I am satisfied that it was not unreasonable to have recourse to *rebus sic stantibus*. It is true that, as Racke states, some trade with Yugoslavia continued, and that the Community could therefore have continued to grant tariff concessions. However, *rebus sic stantibus* does not require an impossibility to perform obligations. Again, it seems to me that there was no point in continuing to grant preferences, with a view to stimulating trade, in circumstances where Yugoslavia was breaking up in a way which was strongly disapproved by the international community.

94. Moreover, in those circumstances, I do not consider that traders based in the Community could reasonably expect, in November 1991, that the Community would continue to grant tariff preferences for imports from Serbia and Montenegro. Indeed, only half a year later, all trade with Serbia and Montenegro was prohibited, 51 in implementation of a decision by the UN Security Council and thus in full compliance with international law.

95. In any event, Racke has not explicitly invoked the principle of protection of legitimate expectations. I will therefore merely note that in my view any justified hopes created by the conclusion and implementation of the Cooperation Agreement did not extend to the type of situation prevailing in 1991. Moreover, under Community law the protection of legitimate expectations may be

51 — By Regulation No 1432/92, cited in note 12.
limited by some overriding public interest,\(^{52}\) which was undeniably present.

96. As to the procedural elements of the suspension of the Cooperation Agreement, including in particular the alleged lack of prior notification to the SFRY, I do not consider that any violation of those requirements of international law, if established, could be of assistance to Racke's claim. Article 65 of the Vienna Convention lays down the relevant procedural requirements but those requirements do not seem precisely to reflect the requirements of customary international law. It seems that, as might be expected, the provisions of the Vienna Convention concerning procedural requirements are more specific and more concrete than the rules of customary international law.\(^{53}\)

97. However, even on the assumption that the Community was under an obligation under international law to notify the other party of its intention to suspend the operation of the Agreement, I do not see how any infringement of that obligation could be relied upon by Racke. A procedural illegality of that kind, committed by a party to a treaty, could be invoked only by another party.

98. Article 65(2) of the Vienna Convention lays down a minimum waiting period of three months but provides for a dispensation from that requirement in cases of special urgency. In my view it was not unreasonable for the Community institutions to consider that there was such urgency. It must be emphasised that the circumstances were very exceptional, since the SFRY was in effect breaking up and the Community was — not unreasonably — unwilling to accept that the so-called rump Yugoslavia lawfully represented all of the Yugoslav republics. Further, the Community was aiming to put pressure on the parties to the Yugoslavia conflict so as to prevent further bloodshed and destruction, an objective surely of manifest urgency.

99. It is thus unnecessary to consider the Commission's arguments concerning other international law grounds for suspending the Cooperation Agreement, such as the impossibility of continuing to perform the agreement and the right to retorsion. I will merely note that those arguments, too, have some force.

100. I therefore conclude that the examination of the issues raised in this case has not revealed any factor of such a kind as to affect the validity of the Suspension Regulation.
The consequences of invalidity

Racke could claim those preferences directly on the basis of the provisions of the Cooperation Agreement. The reply to that question depends on whether those provisions had direct effect.

101. By its second question the Bundesfinanzhof inquires about the consequences of the alleged invalidity of the Suspension Regulation for the charging of customs duties in early May 1992. Since I take the view that the Suspension Regulation has not been shown to be invalid, that question need not be answered. I will however briefly consider the reply to be given if the view were to be taken that the Regulation was invalid.

102. If the Suspension Regulation was invalid for breach of rules of customary international law that would entail that there was no lawful decision in November 1991 to suspend the operation of the Cooperation Agreement. Consequently, the agreement remained in force until 27 May 1992, the day on which its denunciation by the Community became effective. I do not see what other consequences could be drawn.

104. There is to my mind no doubt that those provisions could have direct effect. The Cooperation Agreement is comparable to many other agreements which have already been recognised as having direct effect. And the provisions on preferential tariff treatment in issue in the present case were sufficiently precise and unconditional. The fact that there were no regulations, laying down rules for the implementation of the tariff quota for imports of wine, cannot in my view bar Racke’s rights under the Cooperation Agreement.

103. However, there were no Community regulations in 1992 implementing the tariff concessions provided for in the Cooperation Agreement, at least not in so far as imports from Serbia and Montenegro were concerned. The question thus arises whether

105. However, for the reasons given above, I do not consider that the second question calls for a reply.

Conclusion

106. Accordingly in my opinion the questions referred by the Bundesfinanzhof should be answered as follows:

Examination of the questions referred has disclosed no factor of such a kind as to affect the validity of Council Regulation (EEC) No 3300/91 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia.