

installations for the navigability and maintenance of which the public authorities are responsible.

2. There is no rule which may be relied upon by individuals in order to challenge the application to goods in transit to the Republic of Austria of a charge such as the loading or unloading charge levied in Italy by virtue of Decree-Law No 47 of 28 February 1974, converted into Law No 117 of 16 April 1974.

Mertens de Wilmars	Pescatore	O'Keeffe	Everling
Mackenzie Stuart	Bosco	Due	Bahlmann
			Galmot

Delivered in open court in Luxembourg on 16 March 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 14 DECEMBER 1982 ¹

*Mr President,
Members of the Court,*

A number of proceedings are at present pending before the Italian Corte Suprema di Cassazione [Supreme Court of Cassation] concerning the legality of the imposition of certain charges on crude oil which is imported from non-member countries which are not parties to GATT, discharged in the port of Trieste and pumped through the transalpine oil pipe-line operated by Società Italiana per l'Oleodotto Transalpino, a company governed by

private law [hereinafter referred to as "SIOT"], in part to the Federal Republic of Germany and in part to Austria.

So far as the details of the complicated facts of the case are concerned, I refer to the Report for the Hearing. For an understanding of the questions submitted to the Court it is necessary at this stage merely to give the following brief summary.

Under Italian Law No 82 of 9 February 1963 a State unloading charge was payable in all Italian ports on goods

¹ — Translated from the German.

which came from abroad and were intended for import. In addition in certain ports in which there were legally independent port authorities — allegedly including Trieste, although that is disputed — a charge was payable on goods unloaded, loaded and in transit, regardless of the origin or destination of the affected goods.

In 1974, as the unloading charge had been declared unlawful in the judgment in Case 34/73¹ on the ground that it was a charge having an effect equivalent to a customs duty, the Italian rules on charges on goods carried by sea were amended by Decree-Law No 47 of 28 February 1974. According to its provisions, a "State charge" based on the weight of the goods is levied in all ports on goods loaded and unloaded. In addition the Decree-Law provides that the second charge referred to in the Law of 1963 on goods loaded or unloaded ("port charge") is still to be paid in the ports to which that Law refers. The rate of the State charge is determined for each port by decree of the President of the Republic, having regard to the average cost of providing the services; it appears that the proceeds go into the State Treasury. The rate of the port charge is also fixed by decree of the President; it is allocated in part to the local independent port authorities, and there are detailed rules governing its use. So far as is of interest in these proceedings, the charges were fixed by Decree of the President of the Republic of 13 March 1974, which entered into force on 23 April 1974. According to that decree, the same rates were applicable for both charges and in all ports, with differences only in respect of the type of goods; the revenue from the port charge was to be allocated to the authorities which administered the ports

and was to be used *inter alia* for the construction of new harbour works and the extension of existing ones.

Accordingly SIOT, one of the plaintiffs in the main action, which in particular — for details of its activities I refer to the Report for the Hearing — operates the Italian part of the transalpine oil pipeline, was required by the Trieste customs authority to pay both of the above-mentioned charges in relation to crude oil which was discharged in the port of Trieste and transferred into the transalpine pipe-line between the entry into force of the said decree of the President and 2 April 1975.

SIOT challenged the imposition of those charges on the ground that it was in various respects incompatible with Community law and with the provisions of GATT.

In relation to *Community law*, it considers that:

The charges are charges having an effect equivalent to customs duties, incompatible with Articles 12 and 13 of the EEC Treaty;

Because they were introduced unilaterally after the end of the transitional period, they must be regarded as interfering with the commercial policy of the Community, and they therefore infringe Article 113 of the EEC Treaty;

The port charge, because it must be paid by private undertakings which operate their own similar services, whereas the proceeds of the charge are paid to public undertakings, gives rise to serious

¹ — Judgment of 10 October 1973 in Case 34/73 *Variola SpA v Amministrazione Italiana delle Finanze*, [1973] ECR 981.

distortion of competition contrary to Article 90 (1) of the EEC Treaty;

Finally, the charges must be regarded as incompatible with Regulation No 542/69 of the Council of 18 March 1969 on Community transit (Official Journal, English Special Edition 1969 (1), p. 125) and also with the Agreement between the European Economic Community and the Republic of Austria on the application of the provisions on Community transit, concluded by Regulation No 2813/72 of the Council of 21 November 1972 (Amtsblatt, L 294, p. 86).

In relation to *GATT*, SIOT considers that, because the charges must be regarded as charges having an effect equivalent to customs duties, there is an infringement of Article II (1) (c) and also in particular of Article V (3), which contains the following provision concerning freedom of transit:

"Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation, or those commensurate with administrative expenses entailed by transit or with the cost of services rendered."

The dispute was therefore brought before the courts, first before local court

and then before the Corte d'Appello [Court of Appeal], Trieste. SIOT did not succeed before the Corte d'Appello. In four judgments delivered in April 1977 and February 1978 that court ruled that the contested rules on charges were not incompatible with EEC law or with the provisions of *GATT*. As the charges were levied on domestic and foreign products without distinction, they were in fact *internal* taxes; in addition since the products in question did not originate from countries which were parties to *GATT* or members of the Community, it was to be concluded that the goods were not subject to the rules of *GATT* or to the EEC Treaty.

Appeals in cassation were later brought before the Corte Suprema di Cassazione on several grounds.

The Corte Suprema di Cassazione, having considered the case, also reached the conclusion that the charges were internal taxes, not import levies, because they were levied on *all* goods solely on the basis of loading and unloading. The prohibition of any increase in charges on imports from non-member countries and of the introduction of new charges of that kind therefore did not apply and, having regard to the case-law of the Court of Justice, an interpretation of Article 13 of the EEC Treaty was therefore unnecessary. The same conclusion also applied in relation to Article II of *GATT* on import charges.

On the other hand, the Corte Suprema di Cassazione considered that it was necessary to obtain a ruling on the interpretation of Article V (3) of *GATT* and of other provisions of Community law which the charges were alleged to infringe, namely Regulations Nos 542/69 and 2813/72, cited above, and

also of the principles of competition and the common commercial policy laid down in Articles 90 (1) and 113 (1) of the EEC Treaty.

By order of 21 May 1981, it therefore stayed the proceedings pending before it and referred to the Court of Justice for a preliminary ruling under the third paragraph of Article 177 of the EEC Treaty the following question:

“(A) As a preliminary point:

Since the Community has been substituted for the Member States with regard to the fulfilment of the obligations laid down in GATT, do the provisions of GATT fall within the measures on the interpretation of which the Court of Justice has jurisdiction to give a preliminary ruling under Article 177 of the Treaty, even where the national court is requested to apply them or to interpret them with reference to relations between parties for purposes other than that of determining whether or not a Community measure is valid?

(B) If the foregoing question is answered in the affirmative:

What, if any, are the effects which follow, within the legal order of the Community and within those of the Member States, from the fact that the Community has been substituted for the Member States with regard to the fulfilment of the obligations laid down in GATT? If those effects occur at different times, what is their sequence? In particular, for the purpose of deducing therefrom a basis for the

interpretation or a rule for the application of later national provisions which conflict with the provisions of GATT, is the national court obliged to take the view, having regard to the attribution of jurisdiction under Article 177 of the Treaty, that GATT, with specific reference to the provisions referred to in the following question, operates at the level of a mere international obligation and has no direct effect internally, or else that it does have such effect with regard to relations between parties, and, if the latter is the case, has GATT the same status as, or greater status than, the conflicting national provisions?

(C) If an affirmative reply is given to Question A and whatever the reply to Question B, with a view to providing the national court with guidelines relevant to the interpretation of the national provisions:

In the light of the rules laid down in Article V (3) of GATT in relation to goods originating from countries which are not parties thereto but intended for the market in countries which are parties, is the national legislature prohibited, and if so, within what limits and under what conditions, from providing for the imposition of charges (such as the revenue charge on goods unloaded or loaded in all national sea ports and the port charge on goods unloaded or loaded in some only of those ports, referred to respectively in the first and second paragraphs of Article 2 of Decree-Law No 47 of 28 February 1974, converted into a law by Law No 117 of 16 April 1974) both on domestic products or products treated as such and on imported products, on the occasion

of the unloading or loading of those goods in sea ports of the country belonging to GATT, which charges are levied on the imported product even where, having originated in a country which is not a party to GATT, it is merely in transit through national territory and is bound for the market of another country which is a party to GATT, and even where — particularly with regard to those of the said charges which are laid down for specified ports administered by independent authorities for which the charges are in part intended — the operations of unloading, loading and forwarding to the market for which the goods are finally intended are carried out exclusively by a commercial undertaking using plant and installations constructed, managed and maintained by that undertaking, without the provision of any direct and specific service by the port authority?

(D) Regardless of the replies to Questions A, B and C:

1. In the light of the principles on which the Community system is based regarding the proper role of competition and the common commercial policy, with particular reference to the rules

laid down in Articles 90 (1) and 113 (1) of the Treaty respectively, and in relation to the specific provisions governing Community transit laid down by Regulations (EEC) No 542/69 of the Council of 18 March 1969 and No 2813/72 of the Council of 21 November 1972, is the national legislature prohibited, and if so within what limits, on what conditions and subject to what requirements, including those of a formal nature, regarding the origin of the goods and the transit procedure relating thereto, from providing for the imposition of charges (such as the revenue charge on goods unloaded or loaded in all the national sea ports and the port charge on goods unloaded or loaded in some only of those ports, referred to respectively in the first and second paragraphs of Article 2 of Decree-Law No 47 of 28 February 1974, converted into a law by Law No 117 of 16 April 1974) both on domestic products or products treated as such and on imported products, on the occasion of the unloading or loading of the said goods in sea ports of the member country, which charges are levied on the imported product even where, having originated in a non-member country, it is merely in transit through national territory and is intended for the markets of the Federal Republic of Germany and of Austria, and even where — particularly with regard to those of the said charges which are laid down for specified ports administered by independent authorities, for which the charges are in part intended — the operations of unloading,

loading and forwarding to the market for which they are finally intended are carried out exclusively by a commercial undertaking using installations and plant constructed, managed and maintained by that undertaking, without the provision of any direct or specific service by the port authority?

2. If the imposition of such charges is prohibited, has an individual a right of action before the national courts to recover the sums paid in respect thereof or to oppose the claim for payment made by the State?"

My view on those questions is as follows:

I — With regard to certain reasoning which is evident in the order making the reference, I should like to make a general *preliminary remark*. I refer here to the fact that the Corte Suprema di Cassazione states (at page 22 of the order making the reference) that, after the questions submitted to the Court of Justice have been answered, it may be necessary to examine whether the Italian provisions in question conform to the constitution in accordance with the rules on procedure and jurisdiction laid down for that purpose. According to the information at the Court's disposal, this means that if it were shown that the Italian provisions in question were incompatible with Community law — which predates their adoption — they would not be regarded as inapplicable until the Italian Constitutional Court had declared that they also infringed Article 11 of the Italian Constitution.

SIOT has rightly pointed out that, should it transpire that directly applicable Community law is involved, that would be an incorrect approach. There is in fact already a clear pronouncement by the Court of Justice on that question in its preliminary ruling in Case 106/77.¹ In that case, the Court explained the significance of the direct applicability of Community law for the national courts. According to that case, it must be accepted that national law which is incompatible with Community law is automatically inapplicable and that Community law precludes the valid adoption by the Member States of new legislative measures which are contrary to directly applicable Community law. Accordingly, it is clear in particular that the courts of the Member States must, in the interests of giving full effect to Community law, refuse of their own motion to apply any conflicting national law and that it is therefore unnecessary for that law first to be set aside by legislation or by some other means such as a declaration that the law is unconstitutional according to the prescribed national procedure.

In view of the considerations to be found in the order making the reference, I would strongly urge the Corte Suprema di Cassazione to refer to that unequivocal pronouncement.

II — First question

First it must be decided whether the Court of Justice may *interpret the*

¹ — Judgment of 9 March 1978 in Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

provisions of GATT even if they are not relevant to the assessment of the validity of Community measures.

SIOT, the Ente Autonome del Porto di Trieste [Trieste Independent Port Authority], the Governments of the United Kingdom and Denmark and finally the Commission of the European Communities all consider that that question should be answered unconditionally in the affirmative. On the other hand, the Governments of the Federal Republic of Germany, the Netherlands and Italy consider that certain limitations are appropriate; The Federal Republic and the Netherlands wish to recognize the Court's jurisdiction to interpret GATT only in relation to direct applicable provisions and not in relation to obligations imposed solely on Member States; the Italian Republic considers that because GATT has not been fully incorporated into the Community legal order the Court has jurisdiction to interpret its provisions only in so far as the Community has in fact been substituted for the Member States in the framework of GATT.

This question, since it obviously does not relate to the interpretation of the Treaty within the meaning of Article 177 of the EEC Treaty, involves the determination of the scope of the part of Article 177 which refers to the interpretation of acts of the institutions of the Community. It is already clear from the case-law of the Court of Justice that that provision also covers agreements entered into by the Community. (cf. Cases 40/72,¹ 147/73,²

181/73,³ 87/75,⁴ 52/77,⁵ 65/77,⁶ 179/87,⁷ and 104/81⁸). Since, according to Article 228 of the EEC Treaty, such agreements give rise to obligations under Community law, they must be regarded as forming an integral part of Community law (cf. in particular the judgments in Cases 181/73,³ 87/75⁴ and 104/81⁸). Moreover, the Court has placed no limitations on this whatsoever; in particular it has ruled that it has jurisdiction to interpret agreements not only in cases concerning the validity of Community measures, such as Case 40/72,¹ but also in cases concerning the compatibility of national provisions with Community law, such as Cases 87/75⁴ and 104/81,⁸ in which the Court held certain provisions of such agreements to be directly applicable.

Another important point in my view is that it has already been established in the case-law relating to GATT that the Community is bound by GATT because it has assumed the powers previously exercised by the Member States within the sphere of application of GATT (Joined Cases 21 to 24/72⁹) and that the Community has, so far as fulfilment of the commitments arising from GATT is concerned, replaced the Member States (Case 38/75¹⁰). The main reason for that

1 — Judgment of 7 February 1973 in Case 40/72, *I. Schroeder KG v Federal Republic of Germany*, [1973] ECR 125.

2 — Judgment of 11 December 1973 in Case 147/73, *Carlbeinz Lenzing Kaffee-Tee-Import KG v Hauptzollamt Berlin-Packhof*, [1973] ECR 1543.

3 — Judgment of 30 April 1974 in Case 181/73, *R. & V. Haegeman v Belgian State*, [1974] ECR 449.

4 — Judgment of 5 February 1976 in Case 87/75, *Conceria Daniele Bresciani v Amministrazione delle Finanze dello Stato*, [1976] ECR 129.

5 — Judgment of 30 November 1977 in Case 52/77, *Leonce Cayrol v Giovanni Rivoira & Figli*, [1977] ECR 2261.

6 — Judgment of 24 November 1977 in Case 65/77, *Jean Razanatzimba*, [1977] ECR 2229.

7 — Judgment of 28 March 1979 in Case 179/78, *Procureur de la République v Michelangelo Rivoira and Others*, [1979] ECR 1147.

8 — Judgment of 26 October 1982 in Case 104/81, *Hauptzollamt Mainz v Christian Kupferberg & Cie KG*, [1982] ECR.

9 — Judgment of 12 December 1972 in Joined Cases 21 to 24/72, *International Fruit Company NV & Others v Produktschap voor Groenten en Fruit*, [1972] ECR 1219.

10 — Judgment of 19 November 1975 in Case 38/75, *Zollagent der NV Nederlandse Spoorwegen v Inspecteur der Invoerrechten en Accijnzen*, [1975] ECR 1493.

is that the Community has progressively assumed the powers of the Member States in relation to tariff and trade policy and that since end of the transitional period, according to Article 114 of the EEC Treaty, tariff and trade agreements are to be concluded by the Community alone. As the Court is aware, that has also been recognized in the arrangements adopted in the framework of GATT. The Community now takes part in negotiations in the framework of GATT in its own right and the Community alone concludes the necessary agreements in that framework, in which an important part of trade policy is elaborated.

Accordingly it is reasonable to regard GATT as binding the Community just as if it were an agreement concluded by the Community, and consequently, also to regard the provisions of GATT — in any event in so far as the Community has been substituted for the Member States — as *part of the Community legal order*. However, if that, and hence the Court of Justice's jurisdiction in principle to give an interpretation under Article 177, is accepted, it cannot reasonably be considered necessary to limit that jurisdiction in relation to GATT any more than in relation to other agreements. The decisive factor in this connection is surely the uniformity of the application of rules which apply throughout the Community and which give expression to the common commercial policy. It is therefore undoubtedly impossible to draw a distinction according to whether a provision of GATT is relevant to the appraisal of Community measures — as in all the previous cases concerning GATT — or is to be considered in another connection, for example, in order to determine the scope of a national Law or to assess the compatibility of a national Law with

GATT — in relation to which the only requirement is that the rules should be directly applicable.

The French Government, which on the basis of the relevant judgments of the Court, adopts a restrictive view in this connection — as is apparent from its observations in Joined Cases 267 to 269/81¹ — has surely misunderstood the significance of those judgments. The judgment in Joined Cases 21 to 24/72, cited above, in no way established the principle that an interpretation may be given only of those provisions of GATT which are directly applicable; in those cases it was solely the examination of the validity of a Community measure in the light of GATT which was not undertaken because the provision in question could not — as was then considered indispensable — be regarded as directly applicable.

III — Second question

The second question asks what *effects the provisions of GATT* have in relation to subsequent conflicting national provisions, whether GATT can have direct effect in the national legal orders and whether the provisions of GATT may be regarded as ranking higher than the national provisions.

On this question, the Trieste Independent Port Authority, the Governments of Italy, the United

¹ — Joined Cases 267 to 269/81, *Amministrazione delle Finanze dello Stato v Società Petroliera Italiana and Michelin Italiana*, which I shall deal with subsequently.

Kingdom and Denmark have contended that it cannot be accepted that the provisions of GATT have direct effect; the Commission also seems inclined to take that view and considers quite generally that a cautious approach should be adopted in relation to the question of the direct effect of agreements which are binding on the Community. SIOT, on the other hand, takes the view that it can definitely be accepted that Article V (3), which is the only provision of GATT concerned in the main action, has direct effect.

1. Here again, recourse can be had above all to previous cases. In those cases (Joined Cases 21 to 24/72, cited above and Case 9/73¹), as is well known, similar questions on Articles XI (1) and II (2) of GATT were answered in the negative, and indeed, not on the basis of the particular terms of those provisions but on general grounds which relate to the spirit and general scheme of GATT and are consequently relevant to all provisions of GATT.

The Court of Justice pointed out that it was clear from the preamble that GATT was founded on the principle of negotiations undertaken on a reciprocal basis and that it was important for its application that there should be a balance of advantages and disadvantages for the parties. Its provisions were flexible and allowed for derogation and for measures which might be taken in cases of exceptional difficulty. Also of importance was the method of settling disputes, in which consultations and negotiations played an essential part. In the event of the failure of a contracting

party to carry out its obligations, Article XXIII provides special measures including the consideration of proposals, the issue of recommendations and the authorization of contracting parties whose interests are adversely affected to suspend the application of their own obligations. Finally, there is a power to withdraw from GATT and, in the event of serious damage, unilaterally to suspend obligations.

In view of those considerations, the validity of which obviously has not changed, the present question must also be answered in the negative. Because — as the Commission has rightly argued — GATT is characterized less by a requirement that its rules should be upheld than by the opportunity by means of negotiations of establishing or restoring a comprehensive balance of advantages and disadvantages, it is certainly not possible to regard its provisions as being directly applicable within the meaning of the relevant case-law; direct applicability — which is connected with rigidity — would obviously be out of place in a set of rules characterized by their flexibility.

2. That view, which also appears in legal writing (cf. Kapteyn, *The International Lawyer*, 1974, p. 81; and Jackson, *World Trade and the Law of GATT*, pp. 106 and 187, which refers in particular to the fact that up to now GATT has been only of provisional application), is further reinforced by two supplementary considerations.

First, it is significant that that is the view taken in almost all the Member States of the Community, partly on constitutional grounds connected with the internal effect of GATT. That applies to

¹ — Judgment of 24 October 1973 in Case 9/73, *Karl Schlüter v Hauptzollamt Lörrach*, [1973] ECR 1135.

Belgium, Denmark, the United Kingdom, Ireland, Luxembourg, France and the Federal Republic of Germany. The position in the Netherlands might be different, although there is as yet no relevant case-law. The position is indeed different in Italy, although from the order making the reference it appears that the Corte Suprema di Cassazione is now inclined to reconsider its well-established case-law, according to which GATT is, on the basis of its incorporation in the national legal order by means of a law of ratification, capable of creating individual rights for citizens. Under those circumstances, it scarcely seems justified to assume that the legal position characterized in this way can have changed decisively merely as a result of the fact that the Community has, without the adoption of any express measure, been substituted for the Member States.

Secondly, it is also of significance that the other contracting parties to GATT obviously do not accept that its provisions are directly applicable. If that were so and yet a different position were to be accepted in relation to the Community, not only would the Community's powers of negotiations be impaired and the other contracting parties in some way benefited, but also it would be impossible to continue the practice adopted hitherto of reacting to the infringement of particular provisions by means of special measures of national law, that is to say, an appropriate adjustment of national legislation according to the nature of the infringement.

3. If the view which I have put forward is accepted, it will of course be unnecessary to give special consideration to Article V, which is of particular

relevance in these proceedings. It may then be left open whether at least that article fulfils the conditions for direct applicability, as maintained by SIOT, which states that, because Article V places an absolute prohibition on the imposition of any charges, apart from certain precisely defined exceptions, it is a clear, precise and unconditional obligation which leaves no room for discretion.

I would nevertheless like to make at least two short observations on this point.

First, Article V also contains extremely vague terms such as "unnecessary delays" (*délais inutiles*) or — in relation to charges and regulations imposed by contracting parties — the word "reasonable" (*équitable*). That — rather than the fact that the interpretation of Article V is, as indeed these proceedings have shown, the subject of some dispute — does in fact seem to support the Italian Government's view that Article V is in reality not sufficiently precise to be directly applicable (a view also to be found in Jackson, *op. cit.*, p. 512).

Moreover, it seems that Article V does not fulfil the requirement that it should be unconditional, since in the Protocol on the Provisional Application of Parts I and III of GATT (cf. the Geneva Protocol of 30 October 1947 and the Annecy Protocol of 10 October 1949, by which *inter alia* Italy acceded to GATT) there is a reservation in relation to Part II of GATT, in which Article V is to be found. It is provided that Part II is applicable only to the fullest extent not inconsistent with the existing legislation; the Italian Government has asserted that that may be important in this case

because in Italy there were provisions on port charges long before GATT was set up.

4. Finally, it seems to be appropriate to make two further observations in this connection in relation to certain remarks made in the proceedings.

First, it is certainly impossible to make a different assessment of the question according to whether it is a matter of the validity of a Community measure or the compatibility of national law with the provisions of GATT. If in relation to the former there is a condition — for the matter to be decided by a national court — that the provisions of Community law in question should be directly applicable, the same must surely apply where national law is to be judged in the light of GATT, which — as has been seen — has in a certain sense become part of the Community legal order.

Secondly, I refer to a consideration raised by the Danish Government with regard to the above-mentioned case-law of the Corte Suprema di Cassazione, namely whether the direct application by Italian courts of provisions of GATT to which the Italian State intended to give direct effect is compatible with Community law. In that connection, the judgment of the Court of Justice in Case 38/75, cited above, sets out all the necessary considerations, when it states (see paragraph 16) that, since so far as the commitments provided for by GATT are concerned the Community has replaced the Member States, the mandatory effect in law of those commitments must be determined by reference to the relevant provisions of the Community legal system and not to those by virtue of which they were pre-

viously in force under the national legal systems. In that regard it is necessary to bear in mind in particular the uniformity required in the application of Community law, with which it would scarcely be compatible for rules on charges to be superseded in one Member State on the basis of the direct application of GATT, when in other Member States such a result would be out of the question.

IV — Third question

The third question seeks an *interpretation of Article V (3) of GATT* with regard to charges such as those levied in Italian ports on goods originating from countries which are not parties to GATT and intended for countries which are parties thereto. In relation to the port charges it is stated that the port authority which receives the proceeds of the charge does not provide any direct and specific service to SIOT. This question was asked regardless of the replies to the second question. From that it may be concluded that the court making the reference considers that it may be possible to place an interpretation on the national law which is in conformity with GATT and Community law, and therefore does not assume that there is a conflict of rules the resolution of which — in the sense of the nonapplication of the national rules — would necessitate acceptance of the direct effect of GATT and Community law.

1. This question of interpretation is approached quite differently by the parties to the proceedings. On the one hand, the Commission and the Italian Government argue in favour of a relatively narrow interpretation of the

prohibition contained in Article V. They contend that that provision is intended to cover only charges which are specifically levied on transit or for which transit is at least the causal factor, but is not intended to cover charges which are imposed without distinction on all products which pass through a port. On the other hand, SIOT, the Federal Republic of Germany and also — as is clear from the Federal Republic's observations — the Austrian Government support a wide interpretation of the prohibition. They take the view that it is intended to eliminate any obstruction on transit. It therefore also affects charges which are not levied specifically on transit but which are to be paid merely *on the occasion* of transit; basically, according to that view, only charges on transit in exchange for some service are permissible.

After examining all the arguments put forward in support of the two points of view, I have reached the conclusion that the better view is that in favour of a *wide interpretation* of the prohibition contained in Article V of GATT.

(a) First, *the text* of Article V of GATT — as is well known, only the French and English versions are authoritative — in my view scarcely permits a clear conclusion one way or the other. Indeed, the use of the words “*imposition en ce qui concerne le transit*” (“charges imposed *in respect* of transit”), especially by comparison with certain phrases in Article II (1) (d) (“*droits perçus à l'occasion de l'importation*”; “charges imposed on/or *in connection* with importation”), seems to suggest that Article V does not extend to charges which are

imposed merely on the occasion of transit. On the other hand, however, in this connection — and this is certainly evidence against a narrow interpretation — the expression used is purely and simply “*customs duties*”, therefore without special reference to transit, and it must also be recognized that the interpretation recommended by the Commission and the Italian Government would reveal a pleonasm. I therefore consider that in relation to the interpretation of Article V greater and even decisive weight must be attributed to its apparent spirit and aim.

(b) With regard to the *general scheme*, there is undoubtedly some basis for the view that it may be inferred from the terms of Article V as a whole that it relates solely to obligations in the framework of customs and administrative transactions — which justifies the conclusion that the charges to which Article V refers must display a connection with customs or administrative transactions relating to transit, and that therefore a purely *incidental* connection with transit is insufficient. Thus there is for example a reference to entry at the proper custom house, and also to compliance with applicable customs laws and regulations; mention is also made of regulations imposed on traffic in transit and to regulations and formalities in connection with transit.

Against that, however — and this supports the view that Article V also covers charges which are imposed *not on account of*, but *only on the occasion of*, transit — is the fact that that provision also contains exceptions to the prohibition on charges in relation to services rendered. That clearly cannot

mean that charges on transit for services rendered are permissible if goods are not affected by another provision; for apart from the general wording, which refers simply to charges and not to charges specifically on transit, that would not be compatible with the requirement laid down in Article V (4) that such charges are to be reasonable. Moreover, it is obvious that the exceptions provided for at the end of paragraph (3) would not make sense if it were accepted that Article V covers only charges for which the chargeable event is transit; for in the case of the services referred to in the exception clause, the provision of which, moreover, is not restricted to transit, the basis of the charge is not transit, but the services provided.

(c) The Commission believes that a vital argument in favour of its opinion may also be drawn from Article III of GATT, which deals with the equal treatment of imported and domestic goods, especially in relation to taxation. If, as in this case, charges are imposed on goods in transit and on other goods without distinction, and if a prohibition of taxation in relation to goods in transit were none the less to be inferred from Article V, the "unacceptable" consequence would — according to the Commission — be that goods in transit would enjoy more favourable treatment than the national treatment which, according to Article III, applies in relation to internal taxation and which must be regarded as the highest standard for the purposes of GATT.

However, the Commission overlooks in this regard the fact that Articles III and V pursue different aims, which do not

permit the provisions to be "mixed" in this way. Article III refers exclusively to *imported* goods and therefore governs only the taxation of goods which come on to the domestic market; that is to meet the requirements of competitive neutrality, a consideration which obviously has no application in relation to transit. Article V on the other hand does *not relate to goods coming on to the domestic market* but is intended to cover traffic in transit. In relation to Article III, Article V thus lays down special rules and it is impossible to interpret it by reference to the basic concept underlying Article III. Moreover, since internal taxation as such is not one of the exceptions mentioned in Article V and since there is provision neither there nor elsewhere in GATT for purely national treatment in relation to transit — contrary to the view of the Italian Government, national treatment cannot, in my opinion, be inferred from the requirement of reasonableness laid down in Article V (4) — the idea that it should be ensured that transit is not exempt from general internal taxation cannot in fact be decisive in the interpretation of Article V.

(d) As I have already stated, in determining the scope of Article V in relation to permissible charges on transit, decisive significance is certainly to be attributed to its apparent spirit and purpose; in ascertaining that spirit and purpose, other similar agreements are also useful — such as for example the Barcelona Convention of 20 April 1921, the Convention on International Civil Air Traffic of 7 December 1944, the Havana Charter or New York Convention of 3 July 1965 on transit. The rules in Article V — as is made clear by the title and the words at the beginning of paragraph (2) — are intended to ensure *freedom of transit*, and

not compliance with some form of prohibition of discrimination. However, it is obviously impossible satisfactorily to achieve the first-mentioned aim if goods in transit are subject to internal taxation. SIOT demonstrated this very clearly by reference to a situation where transit was necessary through several countries. If in that case there were cumulative application of several internal tax systems, the obvious consequence would be that the goods concerned would no longer be competitive in the actual country of destination; it would no longer be possible to talk of freedom of transit, which would instead be seriously obstructed, if not paralysed.

Therefore the only meaningful interpretation of Article V is one which not only excludes charges imposed specifically on transit but results in an all-embracing prohibition of charges. Accordingly the only possible charges on goods in transit — and that view also appears in legal writing (cf. Jackson, *op. cit.*, p. 509; Bratschi, *Allgemeines Zoll- und Handelsabkommen*, p. 35) — are those which are expressly referred to as exceptions in Article V, that is to say charges in respect of services rendered (transport, administrative services).

2. In these proceedings, there has been extensive discussion of the position in relation to services rendered in Trieste — which might provide justification for the revenue charge and the port charge — and in relation to the oil transmitted by SIOT.

SIOT has described in detail the plant which it constructed and maintains itself

in a particular area of the port for which a licence fee is payable. It has explained fully which services it provides itself, in particular in relation to the discharge of oil, for which the port has no special installations and which services furnished by other undertakings and installations it pays for directly in addition to the contested charges. From that it draws the conclusion that it receives no services whatsoever from the port nor enjoys the advantages of the general infra-structure of the port, because its own installations for the discharge of oil are situated in an area separated from the port and the entrance thereto is both kept free and protected by SIOT. That the contested charges do not correspond to specific services and are not calculated on the basis of specific services is clear from the fact that the revenue charge is the same amount for all ports, although the Law provides that it is to be determined for each port on the basis of the average cost of providing the services, that it is also payable on goods unloaded in roadsteads and wharves, in which it is certain that no services are provided and that the port charge does not apply in all ports, which shows that it obviously is not connected with specific services.

On the other hand, it was argued in particular by the Italian Government that it was necessary to consider, in addition to the specific services in the form of individual operations, the general advantages enjoyed by every user of the port as a result of the construction and maintenance of general harbour installations. Generally speaking, in ports in which special port charges are payable to the port authorities a wider range of services is provided. In addition, the port of Trieste put forward the view — but not, it would seem, until the oral procedure before this Court — that the

services provided for the actual consignees of goods were of decisive importance and in this regard account was also to be taken of the services provided by the SIOT — which acts as a kind of agent on behalf of the port — for oil users in discharging the oil. On the other hand, in reply SIOT stressed that as a licence-holder it was not to be regarded as a type of agent of the port authority, but since it was a company providing services for the pipeline undertaking it was itself a user of the port, and indeed it was for that reason that it had always been considered liable to pay the charges.

In these proceedings it is certainly unnecessary to clarify that controversy because the Court is only required to give an interpretation of the relevant provisions and not to rule on the *compatibility* of the contested charges with the provisions of GATT and with Community law. The dispute must instead be determined by the national court, which has — as is apparent from the order making the reference — indeed already ascertained that SIOT — and in this respect it is obviously regarded as a user of the port and not as an agent of the port authority — was not provided with any direct and special services by the port authority.

It is perhaps possible to add the quite general observation that advantages resulting from the use of the general infrastructure of a port may be regarded as services rendered for the purposes of Article V of GATT. In addition I agree with the Commission's view that in such a case, if the value of such services cannot be precisely determined, it is sufficient for purposes of the application

of the exception clause in Article V if there is a realistic relationship between the charge payable and the actual benefits derived and if the distribution of the costs incurred among the users appears appropriate and reasonable.

3. Finally, it was also stressed during the proceedings in connection with the third question that Article V of GATT was directly relevant only to the oil transmitted to Austria; moreover, the overriding opinion was that the Community had a responsibility in that regard towards Austria, a party to GATT. On the other hand, the position seemed doubtful in relation to transit through one Member State of the Community to another.

SIOT in particular considered that it was scarcely possible to have recourse to GATT in this connection. That followed from the fact that the EEC Treaty, because its aims were more than that of a mere customs union, had replaced GATT. Support for that conclusion was to be found in Article 234 of the EEC Treaty, which provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand and one or more non-member countries on the other are not to be affected by the Treaty, and also in Article 233, which contains a reservation in relation to the regional unions between Belgium and Luxembourg and between Belgium, Luxembourg and the Netherlands. Also of interest in that regard was the judgment in Case 10/61;¹ in that case a Member State attempted to rely upon an

¹ — Judgment of 27 February 1962 in Case 10/61, *Commission v Italian Republic*, [1962] ECR I.

agreement entered into within the framework of GATT and it was held that, in matters governed by the EEC Treaty, the Treaty took precedence over agreements concluded between Member States before its entry into force. SIOT, therefore sought to show in its written observations that, in relation to transit involving Member States of the Community, an equivalent result may be obtained by a logical interpretation of the term "charges having an effect equivalent to customs duties" and, so far as transit within the Community is concerned, an application by analogy of the prohibition of the imposition of charges having an effect equivalent to export duties, and, in relation to the transit of products imported from non-member countries, by reference to the argument that in this regard the taxation of goods in transit must be regarded as a failure to observe the level of protection prescribed by the Common Customs Tariff. In relation to the details of that argument, which is undoubtedly an impressive one, I refer to SIOT's detailed written observations.

My view on this point — and therefore I will not go into the details of the reasoning developed by SIOT — is that an appropriate result may be arrived at in relation to transit within the Community without an analysis of that kind, as indeed SIOT itself recognized during the oral procedure. Irrespective of whether the view that as between the Member States of the Community GATT no longer has direct effect seems tenable, it must be recognized that even for transit within the Community principles must apply which in essence correspond to the principles contained in Article V of GATT.

In that regard, reference must first be made to Article 36 of the EEC Treaty, which provides that even prohibitions on *goods in transit* are permissible only on certain conditions since they derogate from the principle of the free movement of goods. That brief statement — there is no other reference in the Treaty to transit — makes it clear that the Treaty is based on the *principle of freedom of transit*. It was so obvious that it did not need to be specially mentioned. Since, however, it is so obvious, it may automatically be assumed that the form of the rule corresponds to that which is internationally recognized in GATT.

Moreover, it is important to note that the EEC Treaty — in the framework of GATT — did not merely establish a customs union but a much closer Community with the aim of attaining conditions similar to those within a domestic market. As is stated in the judgment in Joined Cases 37 and 38/73¹ (paragraph 7), the elimination of customs duties and charges having equivalent effect must be sufficiently comprehensive "to include the abolition of all pecuniary, administrative or other obstacles", in order to achieve a unified market between the Member States. However, if the principle of freedom of transit applies between all parties to GATT, it cannot be accepted that, after the relationship obtaining between certain of those parties has intensified to an extent which goes beyond the freedom of trade provided for by GATT, it should — so far as the rules on transit are concerned — fall short of the level provided for in GATT.

¹ — Judgment of 13 December 1973 in Joined Cases 37 and 38/73, *Sociaal Fonds voor de Diamantarbeiders v NV Indiamex and De Belder*, [1973] ECR 1609.

Finally, it is also important that in relation to other parties to GATT the Community is bound by the principle laid down in Article V of GATT, because it has been substituted for the Member States in the sphere of trade. However, on that basis it scarcely seems acceptable that in the internal relations between the Member States of the Community the rules on transit should be less favourable than in relation to non-member countries.

had not been collected only because of an erroneous interpretation of the relevant provisions, which has since already been corrected in court proceedings.

V — Fourth question

Thus it is clear that the principles contained in Article V of GATT apply not only to the goods in transit to Austria but also to transit through Italy to the Federal Republic of Germany; moreover, it can be stated in that regard — should it be relevant to the main action — that the *principle of freedom of transit*, being a *Community principle*, is certainly capable of having *direct effects* in the sense of conferring rights on individuals, since the general considerations relating to GATT which prevent Article V of GATT from having direct effect clearly do not apply in that case. It is unnecessary to determine the date on which that direct effect arose. It certainly existed during the period which is relevant in the main action (1974 to 1975), by which time the Common Customs Tariff had already been in force for some years and the transitional period had expired, whereupon the Community alone had become responsible for implementing the commercial policy. It is therefore unnecessary to consider further the question — which might arise having regard to the case-law on the imposition of charges equivalent to customs duties in relation to non-member countries — whether the port charge — the position regarding the State charge, which was not introduced until 1974, is clear — had in fact already been payable in Trieste in respect of goods in transit since 1963 and

Finally, the fourth question, which consists of four or, possibly, five parts, again seeks an *interpretation of various provisions of Community law* in relation to the imposition of the charges in dispute in the main action on goods in transit. In particular the Court is asked to determine the relevance of Article 90 of the EEC Treaty governing the field of fair competition, Article 113 of the EEC Treaty concerning the common commercial policy and, on the one hand, Regulation No 542/69 of the Council on Community transit and, on the other, of Regulation No 2813/72 of the Council on the conclusion of an agreement between the European Economic Community and the Republic of Austria on the application of the rules on Community transit. In addition, the national court wishes to know whether, in the event of those provisions giving rise to a prohibition of the imposition of charges, individuals may rely upon them in order to claim repayment of the charges before national courts or to contest demands for payment.

A solution of the problems in the main action ought to be possible on the basis of the considerations already set out in relation to the first three questions. It therefore appears strictly unnecessary also to go into the problems set out in

the fourth question. However, I wish to make at least a few observations which show that the provisions referred to cannot contribute to the solution of the dispute in question.

1. The first provision to be considered in this connection is Article 90, which is obviously important only in relation to the port charge.

SIOT considers that Article 90 is applicable on the ground that the relevant Italian provisions provide *aid* for the port authorities. It claims that the aid is unlawfully financed through charges which distort the Common Customs Tariff and is payable by an undertaking which is in competition with the port authority in relation to unloading activities; it must further be accepted that in this case the limits applicable under Article 90 (2), namely that the development of trade is not to be affected to such an extent as would be contrary to the interests of the Community, are exceeded.

Against that argument, it was correctly argued — and this shows that SIOT cannot successfully rely upon Article 90 — that there can be no question of an infringement of Article 92, because the contested assistance does not come from the State. In reality there is no competitive relationship between SIOT and the Trieste Port Authority, because each is concerned with different fields and because it must be accepted that SIOT's activities are conducted under a licence granted by the Port Authority. In addition, in relation to Article 90 (2), which SIOT claims is applicable in this case, it has already been made clear by the judgments of the Court that that provision of the Treaty is not directly applicable (cf. judgment in Case 10/71¹).

2. In relation to Article 113 of the EEC Treaty, which provides that after the transitional period has ended the common commercial policy is to be based on uniform principles, SIOT's case is based solely on the ground that the contested Italian charges, in so far as they apply to transit, should in fact be regarded not as internal taxes but rather as charges which are likely to interfere with the uniform level of protection provided for the Community, in relation to non-member countries, by the Common Customs Tariff.

On the assumption that charges on goods in transit, in so far as they do not correspond to services rendered, must be regarded as charges having an effect equivalent to customs duties, reference may, in the light of the above definition of the problem, be made to the case-law of the court, which states that the Member States may not, subsequent to the establishment of the Common Customs Tariff, introduce in a unilateral manner, *new* charges on goods imported directly from non-member countries or *raise* the level of those in existence at that time (Joined Cases 37 and 38/73, cited above, paragraphs 22 to 25). In relation to imported goods in transit, that leads to the same result as was suggested by the considerations relating to the application, in Community law, of the principle laid down in Article V of GATT, at least if it is accepted that port charges were not levied on goods in transit in Trieste in 1963 but — like the State charges — were introduced in 1974 for the first time. If, however, it must be accepted that the port charges already applied in Trieste in relation to goods in transit at the time when the Common Customs Tariff entered into force, it would, according to the judgment cited above, be possible for them to continue to apply unaltered, because no Com-

¹ — Judgment of 14 July 1971 in Case 10/71, *Ministère Public of Luxembourg v Madeleine Hein, née Muller, and Others*, [1971] ECR 723.

munity measure has been adopted concerning them.

3. Finally, with regard to *Regulation No 542/69* and the *Agreement between the European Economic Community and the Republic of Austria* concerning the application of the rules on Community transit, on the assumption that the latter — as may be inferred from Article 1 (2) thereof — also covers transit through Member States to the Republic of Austria, it must be stated that its purpose is obviously — as is made clear in the recitals to the preamble — to avoid several successive customs procedures in individual States and thus to simplify the *formalities*. In reality its object is not the

abolition of obstacles which arise from the imposition of charges; that is dealt with elsewhere, as is made clear, for example, by Article 27 of Regulation No 542/69 on the guarantee for duties and other taxes. The regulations cited therefore — as is shown by the preamble — merely supplement the provisions on the elimination of customs duties and quantitative restrictions and also charges and measures having equivalent effect. Accordingly, they may perhaps be said to pre-suppose and in a way confirm the principle of freedom of transit in the sense of exemption from charges; however, they are certainly of no assistance so far as the definition of that principle, in relation to the imposition of charges, is concerned.

VI — On the basis of all the considerations set out above, I propose in conclusion that the questions submitted to the Court by the Corte Suprema di Cassazione should be answered as follows:

1. In so far as the Community has been substituted for the Member States in relation to GATT and the obligations under GATT have become obligations of Community law, the Court of Justice has jurisdiction to interpret the rules of GATT, even if it is not a question of the determination of the validity of Community measures.
2. The provisions of GATT do not have direct effect in the national legal orders so as to give rise to rights on which individuals may rely in order to challenge national law which is incompatible with GATT.
3. Article V of GATT must be interpreted as meaning that the transit of goods intended for States which are parties to GATT may not be obstructed and in particular may not be subjected to charges, unless those charges correspond to specific services and advantages provided by the State through which the transit occurs.

A corresponding principle also applies as a principle of Community law in relation to transit within the Community and in the case of the import of goods from non-member countries into a Member State, where the territory of another Member State must be crossed.