

OPINION OF ADVOCATE GENERAL JACOBS
delivered on 7 November 1991 *

My Lords,

1. This case has been referred to the Court under Article 177 of the EEC Treaty by the Tribunal de Paix, Papeete, French Polynesia. The plaintiff in the main action, Mr Leplat, claims the repayment of various charges he was required to pay when, on 26 July 1988, he imported into the territory of French Polynesia a Mercedes car manufactured in the Federal Republic of Germany. The case turns on the effect in these circumstances of Article 133 of the Treaty.

Background

2. Before addressing the issues raised by the referring court, it will be convenient to consider the relationship between the Member States and territories such as French Polynesia. The seventh recital of the preamble to the EEC Treaty records the intention of the Member States 'to confirm the solidarity which binds Europe and the overseas countries' and their desire to ensure the development of the prosperity of those countries, 'in accordance with the principles of the Charter of the United Nations'. Article 3(k) of the Treaty accordingly includes among the activities of the Community 'the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development'. The

special arrangements for association envisaged by these provisions are set out in Part Four of the Treaty (Articles 131 to 136a) and the overseas countries and territories to which those arrangements apply are listed, pursuant to Article 227(3), in Annex IV to the Treaty. One of those territories is French Polynesia.

3. According to the second paragraph of Article 131, 'The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole'. One of the ways in which this objective was to be achieved was by the liberalization of trade between the countries and territories and the Member States. This was to take place on a non-discriminatory basis, each country or territory applying 'to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the European State with which it has special relations' (Article 132(2)).

4. The abolition of customs duties in trade between the Member States and the countries and territories is dealt with in Article 133, which provides as follows:

'1. Customs duties on imports into the Member States of goods originating in the countries and territories shall be completely

* Original language: English.

abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty.

2. Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be progressively abolished in accordance with the provisions of Articles 12, 13, 14, 15 and 17.

3. The countries and territories may, however, levy customs duties which meet the needs of their development and industrialization or produce revenue for their budgets.

The duties referred to in the preceding subparagraph shall nevertheless be progressively reduced to the level of those imposed on imports of products from the Member State with which each country or territory has special relations. The percentages and the timetable of the reductions provided for under this Treaty shall apply to the difference between the duty imposed on a product coming from the Member State which has special relations with the country or territory concerned and the duty imposed on the same product coming from within the Community on entry into the importing country or territory.

4. Paragraph 2 shall not apply to countries and territories which, by reason of the particular international obligations by which

they are bound, already apply a non-discriminatory customs tariff when this Treaty enters into force.

5. The introduction of or any change in customs duties imposed on goods imported into the countries and territories shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States.'

5. The detailed arrangements for the association of the countries and territories with the Community were, for the first five years after the entry into force of the Treaty, laid down in an Implementing Convention annexed to the Treaty in accordance with the first paragraph of Article 136. Thereafter, those arrangements have been renewed periodically by a series of Council decisions adopted under the second paragraph of Article 136, which provides: 'Before the Convention referred to in the preceding paragraph expires, the Council shall, acting unanimously, lay down provisions for a further period, on the basis of the experience acquired and of the principles set out in this Treaty.'

6. The decision in force at the material time was Decision 86/283 of 30 June 1986 (Official Journal L 175, p. 1). That decision deals differently with, on the one hand, imports from the countries and territories into the Community and, on the other hand, imports from the Community into the countries and territories. Thus, Article 70(1) of the decision provides that 'Products originating in the countries and territories shall be imported into the Community free of customs duties and charges having equi-

valent effect.' As regards imports from the Community into the countries and territories, however, the third recital of the preamble to that decision recognizes that 'the development needs of the countries and territories and the needs related to the promotion of their industrial development justify maintaining the possibility of levying customs duties and imposing quantitative restrictions'. Accordingly, Article 74(1) of the decision states that 'The relevant authorities of a country or territory may retain or introduce, in respect of imports of products originating in the Community or in other countries or territories, such customs duties or quantitative restrictions as they consider necessary in view of the present development needs of that country or territory.'

The facts

7. The sum which Mr Leplat was required to pay on importing his car into French Polynesia amounted in total to 1143 525 French Pacific Francs (FCP), which are worth about one twentieth of a French Franc. That sum was made up as follows:

- (a) FCP 892 000 by way of import revenue duty ('droit fiscal d'entrée'). These duties are imposed on all imported goods, regardless of their origin, under the same conditions as customs duties proper;
- (b) FCP 223 000 by way of the new social welfare solidarity tax ('taxe nouvelle de solidarité pour la protection sociale'). This tax is imposed on certain goods imported into French Polynesia and is

collected by the customs authorities. The proceeds from the tax are used to finance the Fonds d'Action Sanitaire, Sociale et Familiale and the Office Territorial de l'Action Sociale et de Solidarité;

- (c) FCP 27 875 by way of harbour tax ('droit de péage'). This levy is used to finance the services provided by the port of Papeete, which, as the French Government explains, is responsible for the distribution of imports among the 125 islands forming five archipelagos scattered over four million square kilometres of ocean which make up the territory of French Polynesia;
 - (d) FCP 650 by way of statistical tax ('taxe de statistique'), which is imposed on all goods produced in French Polynesia as well as on all goods imported into the territory or exported from it. This tax is used to finance the local statistical service.
8. Mr Leplat has not submitted any observations to the Court, but in the main action he seems to have conceded that these charges are not customs duties in the strict sense. He maintains instead that they constitute charges having an effect equivalent to customs duties. This classification appears to have been accepted by the referring court. Those who have submitted written observations, insofar as they have addressed the issue, have therefore proceeded on the basis that the disputed charges are not customs duties in the strict sense but charges having equivalent effect. For reasons which will become apparent, it is not necessary for me to express a view on the proper classification of the contested charges.

9. According to the order for reference, Mr Leplat argues that Article 133 prohibits the imposition by the authorities of French Polynesia of charges having an effect equivalent to customs duties on imports from the Member States which exceed the level of the customs duties imposed on imports from metropolitan France when the Treaty entered into force. It appears that at that time imports from metropolitan France were not subject to any such duties, although it is not suggested that there is now any discrimination between imports into French Polynesia from metropolitan France and imports from elsewhere in the Community. Although Article 133 only refers expressly to customs duties, Mr Leplat maintains that it must be taken by implication to embrace charges having equivalent effect as well. To the extent that Article 74(1) of Decision 86/283 purports to authorize the countries and territories to introduce such charges after the entry into force of the Treaty, Mr Leplat claims that that provision is invalid, as it is in his view inconsistent with Article 133.

10. The Tribunal de Paix has therefore referred the following questions to the Court for a preliminary ruling:

(1) Do the provisions of Article 133(2) and (3) of the EEC Treaty apply to measures having an effect equivalent to customs duties?

(2) If so, may the overseas countries and territories associated with the Community levy such duties or charges

on imports of products originating in the European Economic Community?

(3) If so, what are the obligations imposed on the overseas countries and territories by the objective of reducing customs duties which is mentioned in Article 133(3) of the Treaty?

(4) If not, are the decisions of the Council of the European Communities on the association of the overseas countries and territories which authorize those countries and territories to retain or introduce customs duties on products imported from the Community, in particular Article 74 of Decision 86/283 of 30 June 1986, valid in the light of Articles 133 and 136 of the Treaty?

Preliminary issues

11. At the time the reference was made, there was some doubt whether the courts and tribunals of French Polynesia were entitled to make use of the facility established by Article 177 of the EEC Treaty. It is clear from the Court's judgment of 12 December 1990 in Joined Cases C-100 and C-101/89 *Kaefer and Procacci v France*, however, that the referring court's power to invoke Article 177 is no longer open to question.

12. The Court also held in *Kaefer and Procacci* that any provisions of Decision 86/283 which were unconditional and sufficiently precise would produce direct effect

in the countries and territories. In my view, the same is in principle true of Article 133 of the Treaty although, for the reasons set out below, I do not consider that the issue of direct effect falls to be determined in the present case.

The questions referred to the Court

13. The questions referred to the Court raise two issues. One is the extent to which the countries and territories are permitted to impose customs duties on imports from the Member States after the entry into force of the Treaty. The other is the question whether the expression 'customs duties' in Article 133 embraces charges having equivalent effect.

14. As far as the first issue is concerned, it is in my view clear that the countries and territories are entitled to impose customs duties on imports from the Member States provided that two conditions are satisfied. First, they must not discriminate between the other countries and territories (Article 132(2)) or between the various Member States (Article 132(2) and Article 133(5)). Secondly, any customs duties introduced by the countries and territories must 'meet the needs of their development and industrialization or produce revenue for their budgets' (Article 133(3), first subparagraph). That the countries and territories may both retain and introduce customs duties where these conditions are satisfied is clear from the terms of the first subparagraph of Article 133(3) and from the opening words of Article 133(5), which refer to 'The intro-

duction of or any change in customs duties...' It is evident from these provisions that Article 133 does not impose an absolute prohibition on the imposition by the countries and territories of customs duties on imports from the Member States.

15. I note that there is a small discrepancy between the English version of the first subparagraph of Article 133(3) and some of the other language versions. In the French version, for example, the words 'qui, de caractère fiscal' appear before the equivalent of 'produce revenue for their budgets'. The German version has 'als Finanzzölle' at this point. It seems probable that the English translator regarded the sense of the omitted phrase as implicit in the words 'produce revenue for their budgets'. It will be observed that the English text of Article 17 of the Treaty refers to 'customs duties of a fiscal nature'. Whatever the reason for the discrepancy, the effect of the first subparagraph of Article 133(3) is in my view to permit the countries and territories to impose both protective and revenue-raising customs duties, provided they do not discriminate between the Member States and the other countries and territories.

16. The fact that Article 74 of Decision 86/283 authorizes the countries and territories to retain or introduce customs duties does not therefore affect its validity. However, it will be noted that Article 74 makes no reference to revenue-raising duties. This raises the question whether it was intended to limit the powers conferred on the countries and territories by the first subparagraph of Article 133(3) of the Treaty and, if so, whether the imposition of such a limit was within the Council's powers.

17. The terms of Decision 86/283 may in this respect be contrasted with those of its predecessors. Article 2 of Decision 64/349 (JO of 11 June 1964, p. 1472) and Article 3 of Decision 70/549 (JO 1970 L 282, p. 83) both authorized the countries and territories to retain or introduce customs duties and charges having equivalent effect which met the needs of their development or produced revenue for their budgets. However, Article 5 of Decision 76/568 (Official Journal 1976 L 176, p. 8) and Article 6 of Decision 80/1186 (Official Journal 1980 L 361, p. 1), like Article 74 of Decision 86/283, refer only to customs duties and quantitative restrictions which are considered necessary by the countries and territories in view of their development needs. The provision currently in force, Article 106(1) of Decision 91/482 of 25 July 1991 (Official Journal 1991 L 263, p. 1), is in similar terms.

18. The reference to quantitative restrictions in the later provisions may be disregarded for the purposes of these proceedings and I shall return below to the question whether any significance should be attached to the reference in the earlier measures to charges having an effect equivalent to customs duties. The question I will address at this stage is whether, in the circumstances of the present case, it is relevant that Article 74 of Decision 86/283 does not expressly authorize the countries and territories to retain or introduce revenue-raising customs duties.

19. If that provision had been intended to limit the powers conferred on the countries

and territories by the first subparagraph of Article 133(3) of the Treaty and by Decisions 64/349 and 70/549, one would expect such an intention to have been clearly expressed. No such intention is apparent, however, either from the operative part of Decision 86/283 or from its preamble, the relevant recital of which is quoted at paragraph 6 above. The material provisions of that decision's two immediate predecessors are in similar terms. Indeed, none of the three decisions contains any indication that the economies of the countries and territories had improved sufficiently to justify restricting their right to impose customs duties on imports. The absence of any unequivocal expression of an intention on the part of the Council to produce such a result leads me to conclude that no such result was intended.

20. I therefore interpret Article 74 of Decision 86/283 as authorizing the countries and territories to retain or introduce customs duties which they consider necessary in view of their development needs or which produce revenue for their budgets, on condition that they do not discriminate between Member States and other countries and territories. I do not exclude the possibility that the Council may, acting under the second paragraph of Article 136, limit the freedom of action conferred on the countries and territories by Article 133, but the imposition of any such limit would in any event have to be properly reasoned in accordance with Article 190 of the Treaty.

21. Accordingly, I reach the conclusion that Article 133 of the Treaty entitles the countries and territories to retain or

introduce customs duties, subject to the conditions set out above, and that Article 74 of Decision 86/283 is fully in accordance with Article 133. Moreover, it does not seem to have been suggested that the disputed charges are discriminatory or that they do not either meet the needs of the development and industrialization of French Polynesia or produce revenue for its budget. It follows that, in so far as the disputed charges are to be characterized as customs duties, their legality cannot be contested under Community law. It also follows that, even if Article 133 is interpreted as embracing charges having equivalent effect, the legality of the disputed charges still cannot be contested, since they would in that event also be authorized by Article 133 and by Decision 86/283. It is therefore not strictly necessary to consider whether Article 133 must be so interpreted. However, since, with the exception of the Council, those who have submitted observations to the Court have devoted a considerable amount of attention to the scope of the reference to customs duties in Article 133, it is appropriate for me to express a view on the matter.

22. The Commission and the United Kingdom Government argue that Article 133 is confined to customs duties proper and that it does not extend to charges having equivalent effect. The Commission maintains that, when the authors of the Treaty intended to deal with charges having equivalent effect to customs duties, they did so expressly. The absence of any reference to such charges in Article 133 must therefore be taken as an indication that they were not intended to be covered. Although Article 133(2) refers to a number of Treaty provisions which deal with both customs duties and charges having equivalent effect, the Commission takes the view that that

reference can be understood as limited to what it regards as the scope of Article 133, in other words that the Treaty provisions cited are applicable only in so far as they deal with customs duties in the strict sense.

23. The United Kingdom Government points out that, in Case 26/69 *Commission v France* [1970] ECR 565, 584, Advocate General Roemer stated: 'We can further deduce from Article 133 of the Treaty that it is only a case of abolition of customs duties on imports and that therefore even charges having an effect equivalent to customs duties are not included.' It goes on to argue that the reference in the second subparagraph of Article 133(3) to '[t]he percentages and the timetable of the reductions provided for under this Treaty' is only appropriate in the case of customs duties proper. According to the United Kingdom Government, that reference is to the timetable for the reduction of customs duties laid down in Article 14 of the Treaty. The timetable for the abolition of charges having equivalent effect was to be laid down by Commission directive under Article 13(2) of the Treaty, but in the view of the United Kingdom Government the terms of the second subparagraph of Article 133(3) are inappropriate to refer to such directives.

24. The territory of French Polynesia and the French and Dutch Governments, on the other hand, maintain that Article 133 applies not only to customs duties but also to charges having equivalent effect. They all make the point that the effectiveness of the article would otherwise be considerably reduced. French Polynesia and the French Government argue that this interpretation is

supported by the reference in Article 133(2) to 'Articles 12, 13, 14, 15 and 17' of the Treaty, which require the abolition of both customs duties and charges having equivalent effect. Moreover, the Dutch Government claims that the principle of non-discrimination, which the countries and territories are required by Article 132(2) and Article 133(5) to respect, would be compromised if they remained free to impose charges having an effect equivalent to customs duties on imports from Member States and from the other countries and territories.

25. The drafting of Article 133 is not a model of lucidity, but in my view it must be interpreted as embracing not only customs duties but also charges having equivalent effect. I do not consider the fact that it makes no express reference to the latter decisive: see Joined Cases 37 and 38/73 *Diamantarbeiders v Indiamex* [1973] ECR 1609, especially paragraphs 10 and 13. In my opinion, the expression 'customs duties' is used in Article 133 as shorthand for 'customs duties and charges having equivalent effect'. A similar use of the expression may be found in the heading above Articles 12 to 17 of the Treaty, which reads 'Elimination of customs duties between Member States' even though the articles in question also deal with charges having equivalent effect. If the rules laid down in Article 133 were confined to customs duties, it would be possible to evade them simply by introducing charges which, while not customs duties in the strict sense, nevertheless produced the same effect. Article 133 would thereby be rendered nugatory. The only way of avoiding this result is to construe Article 133 as extending to charges having equivalent effect.

26. Support for this interpretation of Article 133 may be found in the terms of Article 132, which sets out the objectives of association. Article 132(1) provides that 'Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty'. That broad objective is given concrete form by Article 133(1). Although the latter provision only refers expressly to customs duties, it is clear that the Member States are not entitled to impose either customs duties or charges having equivalent effect in their trade with each other. It follows that Article 133(1) can only give effect to the general objective laid down in Article 132(1) if the expression 'customs duties' in the former provision is read as extending to charges having equivalent effect. It is true that the referring court's questions are concerned not with Article 133(1) but with Article 133(2) and (3), but it could not in my view reasonably be suggested that the meaning of the expression 'customs duties' differs from one paragraph of Article 133 to another.

27. The United Kingdom Government contended at the hearing that to read Article 133 as confined to customs duties *simpliciter* does not undermine the effectiveness of that article, but simply respects the rôle attributed to the Council under the second paragraph of Article 136. I do not find that argument convincing, for it does not explain why the authors of the Treaty should have wished to include in Article 133 rules which, while applying to customs duties proper, do not embrace charges having the same effect as customs duties.

28. The approach advocated by French Polynesia and by the French and Dutch Governments has the consequential benefit of making it unnecessary to enter into a sterile debate over the boundary between customs duties and charges having equivalent effect. It is not in my view inconsistent with the terms of Article 133. I am unable to accept the Commission's suggestion that the reference to Articles 12 et seq. of the Treaty in Article 133(2) can reasonably be read as confined to customs duties. The ways in which customs duties and charges having equivalent effect are dealt with in the articles mentioned are closely linked and it would in my view be artificial to seek to disentangle them. Moreover, it will be observed that one of the articles mentioned, Article 13, is divided into two numbered paragraphs, the first of which is concerned with customs duties, the second with charges having equivalent effect. Article 133(2) suggests that both paragraphs are applicable to the countries and territories.

29. Contrary to the argument put forward by the United Kingdom Government, I consider the reference in the second subparagraph of Article 133(3) to '[t]he percentages and the timetable of the reductions provided for under this Treaty' apt to cover both the timetable for the reduction of customs duties laid down in Article 14 and the timetable for the abolition of charges having equivalent effect envisaged by Article 13(2). As I have just pointed out, the latter provision is applicable to the countries and territories by virtue of Article 133(2). The correct interpretation of Article 133(3) cannot depend on whether or not any such directives dealing with charges having equivalent effect imposed by the countries and territories were actually adopted.

30. The United Kingdom Government places some reliance on the contrast between Article 70(1) of Decision 86/283, which, as I have pointed out, refers to charges having an effect equivalent to customs duties, and Article 74 of that decision, which refers only to customs duties. It is argued that the reference in Article 70(1) to charges having equivalent effect supports the view that the expression 'customs duties' in both Decision 86/283 and in Article 133 does not extend to such charges.

31. It will be observed that, like Article 70(1), Article 75(1) of Decision 86/283 also refers to customs duties and charges having equivalent effect. Moreover, the equivalent provisions to Article 70(1) in the predecessors of Decision 86/283 each refer to customs duties and charges having equivalent effect in dealing with the conditions under which products from the countries and territories are to be admitted to the Member States: see Decision 64/349, Article 1(1); Decision 70/549, Article 2(1); Decision 76/568, Article 2(1); Decision 80/1186, Article 3(1). The provisions of those decisions relating to the customs treatment by the countries and territories of products originating in the Community or in other countries or territories do not, however, display the same degree of consistency. Article 2 of Decision 64/349 and Article 3 of Decision 70/549 refer in this context to customs duties and charges having equivalent effect, while Article 5 of Decision 76/568 and Article 6 of Decision 80/1186, like Article 74 of Decision 86/283, only mention customs duties.

32. Once again, there is no explanation in the preambles to the later decisions for the omission, in the provisions dealing with imports into the countries and territories, of any reference to charges having equivalent effect to customs duties. In my view, the terms of Decision 86/283, like those of its predecessors, provide no more than an indication of the way in which the institutions involved may have interpreted Article 133 at the material times. The change of wording when Decision 76/568 was adopted may

simply have reflected a wish to align the terms of that decision with those of the Treaty. Whatever the explanation for the change, the views of the institutions on the correct interpretation of Article 133, even when they can be clearly identified, are no more than persuasive and plainly cannot bind the Court. The terms of the relevant provisions of Decision 86/283 do not therefore affect the conclusion I have reached on the scope of Article 133.

Conclusion

33. I am therefore of the opinion that the questions referred to the Court in this case should be answered as follows:

1. Article 133 of the EEC Treaty must be interpreted as applying both to customs duties and to charges having an effect equivalent to customs duties.
2. The countries and territories to which the special arrangements for association set out in Part Four of the EEC Treaty apply may impose customs duties and charges having equivalent effect on imports from the Member States and from other such countries and territories provided:
 - (a) the duties or charges meet the needs of the development and industrialization of the country or territory concerned or produce revenue for its budget; and
 - (b) the imposition of the duties or charges does not give rise, either in law or in fact, to any direct or indirect discrimination between imports from the various Member States or from the other countries and territories.
3. Consideration of the questions referred has disclosed no factor of such a kind as to affect the validity of Article 74 of Council Decision 86/283/EEC of 30 June 1986.