Treaty. It is therefore for the Court to lay down guidelines compatible with Article 95 of the Treaty, consistent with the general scheme of the Sixth Directive and sufficiently simple to be able to be applied in a uniform manner throughout the Member States.

2. Where a Member State charges VAT on the importation, from another Member State, of goods supplied by a private person, but does not charge VAT on the supply by a private person of similar goods within its own territory, the VAT payable on importation must be calculated by taking into account the amount of VAT paid in the Member State of exportation that is still contained in the value of the goods at the time of importation in such a way that that amount is not included in the taxable amount and is in addition deducted from the VAT payable on importation.

The amount of VAT paid in the Member State of exportation that is still contained in the value of the goods at the time of importation is equal:

in cases in which the value of the goods has decreased between the date on which VAT was last charged in the Member State of exportation and the date of importation: to the amount of VAT actually paid in the Member State of exportation, less a percentage representing the proportion by which the goods have depreciated;

in cases in which the value of the goods has increased over that same period: to the full amount of the VAT actually paid in the Member State of exportation.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 March 1985 *

Mr President,
Members of the Court,

1. The Hoge Raad der Nederlanden [Supreme Court of the Netherlands] has referred to the Court questions relating to a dispute with which the Court is familiar, since it has already given rise to the Court's ruling of 5 May 1982 in Case 15/81 (*Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, hereinafter referred to as '*Schul I*'). So that the precise scope of the questions referred to the Court by the Hoge Raad may be understood, I shall briefly outline the background to the dispute.

2. The dispute arose out of the importation into the Netherlands by the limited liability company Gaston Schul Douane-Expediteur BV, customs forwarding agents, of a second-hand pleasure and sports boat on the instructions and on behalf of a private person residing in the Netherlands who had bought it in France from another private person (*Schul I*, paragraph 2). On that importation the Netherlands tax authorities charged on the resale price of HFL 172 300 VAT at the rate of 18%, amounting to HFL 31 014, the normal rate which is applied within the country on the sale of goods for valuable consideration.

* Translated from the French.

The problem raised by that assessment, which was the subject of the judgment in *Schul I*, is that VAT is not charged on a similar transaction effected between private persons in the Netherlands.

The Netherlands authorities relied on Article 1 of the Netherlands Law on Turnover Tax, adopted pursuant to Article 2 of the Sixth Council Directive (No 77/388 of 17 May 1977) on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p. 1). Article 2 of that directive provides that:

'The following shall be subject to value-added tax:

...

2. the importation of goods.'

The customs agents challenged the decison of the Netherlands authorities and brought an action before the Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch. In reply to questions submitted for a preliminary ruling by the Gerechtshof, the Court of Justice ruled in particular as follows:

'It is necessary also to take into account the VAT levied in the Member State of exportation for the purpose of determining the compatibility with the requirements of Article 95 of a charge to VAT on products from another Member State supplied by private persons where the supply of similar products within the territory of the Member State of importation is not so liable.'

From that the Court inferred that:

'In so far as such an imported product supplied by a private person may not lawfully benefit from a remission of tax on exportation and so remains burdened upon importation with part of the VAT paid in the Member State of exportation, the amount of VAT payable on importation must be reduced by the residual part of the VAT of the Member State of exportation which is still contained in the value of the product when it is imported.'

The Court added that:

'The amount of this reduction may not, however, be greater than the amount of VAT actually paid in the Member State of exportation.'

3. It is clear from the judgment of the Hoge Raad der Nederlanden that following the judgment of the Court of Justice the parties no longer disputed that, in calculating the VAT payable on importation, account ought to have been taken of the fact that VAT of an amount equivalent to HFL 22 298.91 had already been paid on the goods in France. None the less, certain points remained to be decided as regards the method by which the tax paid should be deducted.

In particular, the parties disagreed first as to whether or not the VAT already paid in respect of the goods in the Member State of exportation should be included in the *taxable amount* used in the calculation of the amount of VAT payable in the importing State, and secondly on the way in which the part of the VAT paid in the exporting State, which was to be regarded as still contained in the value of the goods when it was imported, was to be calculated.

The Gerechtshof, 's-Hertogenbosch, rejected the argument put to it by the Netherlands tax authorities and considered that:

The Netherlands VAT ought to be charged on the sale price of the goods, excluding VAT;

The whole of the VAT paid in France ought to be deducted, without subtracting from it the amount corresponding to its use during the year which elapsed between the original purchase and the resale.

The Staatssecretaris van Financiën [Secretary of State for Finance] lodged an appeal in cassation against that decision, claiming that:

the VAT on importation should be charged on the value of the goods at the time of importation, including the VAT paid in the Member State of exportation; and that

since the goods were used for a certain length of time, the amount to be deducted from the VAT originally paid in the Member State of exportation had to be reduced.

In order to resolve the two problems thus raised, the Hoge Raad der Nederlanden submitted to the Court for a preliminary ruling the following questions:

'1. Where a Member State charges VAT on the importation from another Member State of a product which is supplied by a non-taxable (private) person, but does not charge VAT on the supply of similar products by a private person within its own territory, should that Member State, in order to prevent the tax from constituting internal taxation in excess of that imposed on similar domestic products as referred to in Article 95 of the Treaty, take account of the amount of the VAT paid in the Member State of exportation that is still contained in the value of the product at the time of importation:

(a) in such a way that that amount is not included in the taxable amount for the purposes of VAT payable on importation and is in addition deducted from the VAT payable on importation,

or else

(b) in such a way that that amount is deducted only from the VAT payable on importation?

2. In the case defined in the first question, how should the amount referred to therein be calculated?'

I shall now consider and discuss the observations submitted on each of the preliminary questions in turn.

4. First, as regards the calculation of the amount on which the VAT on importation should be charged, the arguments put before the Court may be summarized as follows:

The Netherlands Government argues that the VAT on importation should be based on the value of the goods at the time of importation, that is to say including all taxes, in accordance with the Netherlands Law on Turnover Tax of 1968 and Article 11 B (3) (a) of the Sixth Directive, which provides that:

'The taxable amount shall include, in so far as they are not already included:

(a) taxes, duties, levies and other charges due outside the country of importation

and those due by reason of importation, excluding the value-added tax to be levied'.

The Netherlands Government further points out that on the domestic market transactions between private persons and taxable persons concerning used goods are subject to the same rules.

That line of argument cannot be accepted, for the following reasons:

The conclusion to be drawn from the Court's observations in *Schul I* is that the VAT paid in the Member State of exportation should not be included in the taxable amount. In that judgment the Court ruled that, in the circumstances of the case (where there was no remission of tax on exportation but VAT was charged on importation even though the same transaction was not subject to VAT within the country), the VAT already burdening the product at the time of importation had to be deducted from the amount of VAT on importation, failing which

'the tax on importation would in fact be *an additional charge* burdening imported products more heavily than similar domestic products' (paragraph 31, emphasis added).

That solution is based especially upon Article 95,

'which prohibits not only the direct *but also the indirect* imposition of internal taxation on products from other Member States in excess of that on similar domestic products' (paragraph 32, emphasis added).

The rule applied by the Court could be described as follows: a tax on a tax is not permissible. The inclusion in the taxable amount of the amount of VAT paid in the Member State of exportation would be inconsistent with that principle and would constitute an 'additional charge', indirectly burdening imported products more heavily than similar domestic products.

As regards the argument based on Article 11 B 3 (a) of the Sixth Directive, it should be pointed out that that directive, except for Article 2 (2), which provides that all imports are subject to payment of VAT (*Schul I*, paragraph 15), does not apply to transactions involving second-hand goods effected by non-taxable persons.

Consequently any argument based on the directive must be treated with caution where it is inconsistent with the principle laid down by Article 95 of the Treaty, as interpreted by the Court (*Schul I*, paragraph 38).

Moreover, as the Court pointed out in *Schul I* (paragraph 10), the Sixth Directive established a system whereby VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly on the various price components. In order for that system to be applied consistently, the taxable amount must be calculated on the same basis at each marketing stage. In that perspective Article 11 B 3 (a) cannot be interpreted as requiring that the VAT paid in the Member State of exportation should be included in the taxable amount on which the VAT on importation is charged. Any other view

would be inconsistent with the essential principle of the neutrality of internal taxation, since imported products would be taxed more heavily than domestic products.

In short, as has been stressed by the plaintiff in the main action, the French Government and the Commission, the inclusion in the value of goods on importation of the VAT paid at the preceding stage would result in *double taxation* since the VAT on importation would be partly based on the VAT paid in the Member State of exportation.

The answer to the first question asked by the Hoge Raad der Nederlanden should therefore be that, in the circumstances of the case, the VAT on importation must be calculated, in accordance with the principle laid down by Article 95 as interpreted by the Court in its ruling of 5 May 1982, on the basis of the value of the product at the time of importation, after deducting from that value the residual part of the VAT paid in the Member State of exportation.

5. The answer to the first question does not resolve the question of how the competent authorities are to determine the

'*residual* part of the value-added tax of the Member State of exportation which is still contained in the value of the product when it is imported' (*Schul I*, last phrase of the second sentence of paragraph 34, emphasis added).

It is essential to establish the residual tax in order to determine the taxable amount and, as the Court has held, to fix the balance of the VAT payable by the importer in the Member State of importation. More precisely, it is clear from the judgment of the Hoge Raad that the problem is to determine the method by which the residual amount may be calculated.

As the Court stated in its ruling in *Schul I*, it is necessary to ascertain 'the proportion of value-added tax' with which the product is *still* burdened on importation, that is to say 'the *part* of the value-added tax paid in the Member State of exportation' with which the product *'remains burdened' or 'the residual part ... which is still* contained' in the value of the product when it is imported (*Schul I*, paragraphs 32 and 34, emphasis added).

Clearly the amount of VAT originally paid in the Member State of exportation when the product was bought must be re-examined, or more precisely brought up to date, at the date of the resale for exportation, since the product has meanwhile been used. The only remaining problem is how the period of use is to be taken into account in calculating the amount of VAT payable.

VAT is a tax on consumption (*Schul I*, paragraph 10); therefore where consumption commenced in one Member State and continues in another Member State, the Member State of importation will normally charge VAT, in accordance with the rules laid down in the Sixth Directive, after remission of the VAT paid in the Member State of exportation; according to that principle, known as the principle of the country of destination, the VAT applicable is that of the country in which the goods are consumed (*Schul I*, paragraphs 13 to 15). In the case of transactions between non-taxable persons, it is therefore necessary to calculate the *proportion* of the VAT that is still contained in the value of the goods

when they are imported. In other words, as the French Government pointed out, it is a question of establishing what part of the VAT paid in the Member State of exportation may be regarded as not having corresponded to the use of the product in that State. To take an example: if the value of goods at the time of importation is much lower than their original value, a deduction equal to the total VAT paid at the time of purchase could exceed the resale price of the goods in question. In such a case, it could not be claimed that the objectives of Article 95 or those of Articles 2 and 3 of the Treaty were being achieved (*Schul* I, paragraphs 26 and 33).

It is this type of problem which is faced by the Hoge Raad der Nederlanden, since in this case, in contradistinction to the example which I have just set out, the value of the goods at the time of importation is *higher* than their original value. The parties to the main action and the interveners have suggested various methods of solving that problem. Three types of solution have emerged, and I will examine them in turn.

6. The first method (hereinafter referred to as the *pro rata temporis* method), supported by the Netherlands Inspecteur der Invoerrechten en Accijnzen [Inspector of Customs and Excise] and by the Netherlands and French Governments and discussed by the Commission, consists in calculating the residual VAT that is still contained in the value of the goods on importation by reference to the proportion which the length of time for which the goods were actually used bears to the total period of use. The latter figure — and here opinions vary — may be calculated either on the basis of the presumed life of the goods (which in this case the Netherlands inspector estimates at 30 years for a boat) or on the basis of a standard depreciation period, estimated at five years by the French and Netherlands Governments.

More precisely, as the boat in question was resold after one year, that method would give rise to a residual VAT equal to the VAT originally paid less one-thirtieth in the first case or one-fifth in the second case.

May I say at once that, in so far as this method is based on the presumed life of the imported goods, it scarcely seems practicable at Community level. As the French Government points out, it will always be a mere assessment, which may vary in the Member States, according to their customs. In order to avoid distortion of competition it is essential that the effect of the system applied within the Community should be as neutral as possible. Of the two *pro rata temporis* methods the standard method seems to me preferable at this stage; however I shall examine later whether it should be adopted.

7. A second method is set out in the Commission's Proposal for a Sixteenth Directive, which is intended to lay down a common system of VAT applicable to transactions between individuals relating to the importation of second-hand goods (Official Journal 1984, C 226, p. 2).

In the second proposal the Commission distinguishes two different methods of calculating the residual VAT, according to whether the value of the goods in question has decreased or increased between the time when the goods were first used and their importation. I shall give a brief account of those methods.

If the goods have depreciated in value, the VAT originally paid in the Member State of importation will be reduced in proportion to the depreciation which has taken place. The Commission states that in practice that result arises from a simple rule of three: first the value of the goods on importation excluding VAT is obtained by multiplying the resale price inclusive of VAT by the constant ratio between the original sale price excluding VAT and the original sale price inclusive of VAT; the residual VAT is then the result of the difference between the gross resale value and the value thus obtained. It seems that the same result may be reached more directly by applying to the amount of VAT originally paid the percentage of depreciation established.

According to the Commission, that method is not applicable where the goods have increased in value, since it would give rise to VAT higher than the amount originally paid. In such a case the Commission therefore proposes to tax only the amount by which the goods have increased in value by comparison with the original sale price, the VAT paid on the original price being retained by the Member State of exportation.

8. The third and final method is that advocated by the applicant in the main action and accepted by the Gerechtshof, 's-Hertogenbosch. Like the previous method, it is based on the change in the value of the goods in question.

If the goods decrease in value, the suggested method corresponds to that put forward by the Commission, which I have just described.

If the value of the goods increases, the applicant in the main action considers that the entire amount of VAT originally paid in the Member State of exportation should be deducted from the VAT payable on importation. In its view that solution follows from paragraph 34 of the Court's ruling in *Schul I*, the last sentence of which states that the amount of residual VAT to be deducted 'may not, however, be greater than the amount of VAT actually paid in the Member State of exportation'. The application of the method proposed for cases in which the goods have decreased in value would, as I have already pointed out, result in the residual VAT being higher than the VAT originally paid.

9. The description of the various possible solutions prompts me to make the following remark. The solution proposed by the Commission in the case of an increase in the value of the goods clearly could not be accepted, as it has itself conceded. As a temporary measure pending the adoption of Community legislation on the matter (cf. the Proposal for a Sixteenth Directive), the appropriate method must be sought along the lines laid down by the Court in its ruling in *Schul I*, which, in accordance with the principle laid down in Article 95 of the Treaty, provides for the deduction of the residual VAT.

I must therefore examine the other two methods described above.

10. There are two advantages to the standard method. First, it is not affected by changes in the value of the goods. Secondly, it may be based on an analogous application of Article 20 of the Sixth Directive on the 'Adjustment of Deductions', which provides as follows:

'2. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured. The annual adjustment shall be made only in respect of one-fifth of the tax imposed on the goods.'

In that connection, as the French and Netherlands Governments point out, if that solution were applied to the transactions covered by this case the rules on depreciation would be standardized regardless of whether the contracting parties were taxable or non-taxable persons.

However, I do not consider it possible to propose the adoption of that method.

As the Commission points out, VAT is in principle based on the *actual* price on importation, which, as the Community rules stand at present, seems to rule out any *standard* method of calculating the residual VAT which would affect the import price. In that connection it must be stressed that the Court refers in its ruling in *Schul I* to the part of the VAT with which the goods *actually* remain burdened upon importation (paragraph 34).

Moreover, it does not seem to me that a standard system fixing the depreciation period at five years for *all* goods and *all* Member States may be based on Article 95.

Lastly, that method has its disadvantages: thus where the goods in question have decreased in value, it may result in the residual VAT being higher than the value of the goods at the time of their importation. Furthermore, its adoption would make it necessary to establish a special system for second-hand goods with a life span of less than five years.

11. Those considerations lead me ultimately to propose that the Court adopt the method applied by the Gerechtshof, 's-Hertogenbosch.

That method has the merit of being practicable:

If the value of the goods has decreased, the VAT paid in the Member State of exportation which is still contained in the value of the goods is calculated on importation by reference to the proportion by which the goods have depreciated, in accordance with the rules which I have already set out; it is therefore the *actual* residue of the original VAT that is taken into account, in accordance with the ruling of the Court in *Schul I*;

If the goods have increased in value, the amount of VAT to be deducted is that originally paid in the Member State of exportation; this second rule takes account of the express reservation contained in the last sentence of paragraph 34 of the ruling in *Schul I.*

It also has the advantage of meeting not only the need for a fair division of tax revenue among the Member States, since the State of origin retains the VAT originally paid and the importing State is entitled to tax the increase in the value of the goods, but also the need to avoid double taxation, in accordance with the principle set forth in Article 95 of the Treaty, since whatever the change in the value of the

goods in question the amount of VAT to be deducted will be that with which the goods remain 'burdened upon importation' (*Schul I*, paragraph 34).

I therefore propose that the answer to the second question should be that the residual VAT still contained in the value of the goods on importation is represented:

Where the imported goods have decreased in value, by the amount of VAT originally paid less a percentage representing the proportion by which the goods have depreciated;

Where the goods have increased in value, by the full amount of VAT originally paid in the Member State of exportation.

12. Accordingly I propose that the questions submitted to the Court by the Hoge Raad der Nederlanden should be answered as follows:

Where a Member State charges VAT on the importation from another Member State of goods supplied by a private person, but does not charge VAT on similar goods supplied by a private person within its own territory, the Member State of importation should, in accordance with the principles laid down by Article 95 of the Treaty, take account of the amount of VAT paid in the Member State of exportation that is still contained in the value of the goods at the time of importation, in such a way that that amount

is deducted from the amount on which VAT is charged on importation,

and is represented

in cases in which the value of the imported goods has decreased, by the amount of VAT originally paid less a percentage representing the proportion by which the goods have depreciated;

in cases in which the value of the goods has increased, by the full amount of VAT originally paid in the Member State of exportation.