alternatively a standards certificate, which may be refused if the quality is not in accordance with certain provisions laid down by the authority issuing the certificate and which does not give rise to the imposition of any charge, was not incompatible with the Agreement establishing an Association between the Community and Greece concluded on 9 July 1961, or with the Agreement between the Community and Spain concluded on 29 June 1970, or with the Interim Agreement concluded between the Community and Austria on 22 July 1972.

Mackenzie Stuart Pescatore Touffait

Delivered in open court in Luxembourg on 11 October 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 5 JULY 1979 [1]

Mr President,
Members of the Court

1. This case concerns the interpretation of certain provisions on international trade contained in the agreements concluded by the European Economic Community with Greece on 9 July 1961, with Spain on 29 June 1970 and with Austria on 22 July 1972. In essence, the Court is asked to establish whether or not those agreements impose a prohibition on measures equivalent to quantitative restrictions on exports.

The facts out of which the dispute arose may be summarized as follows:

The export to any country of clocks and watches produced in France was until 14 July 1977 conditional on the issue of a licence, or of a standards certificate from Cetehor (Technical Centre for the Watch- and Clock-making Industry), verifying that the goods conformed to certain standards of quality. A case involving the forgery of such a certificate in 1972, in relation to the export of a

1. — Translated from the Italian.

quantity of watches which had not been subjected to quality control, gave rise to criminal proceedings still pending before the Tribunal Correctionnel [Criminal Court], Besançon, against Messrs Bouhelier, Girardet, Zimmermann and Thiery. In the course of those proceedings a reference was made to the Court of Justice in 1976 on the question whether the concept of quantitative restrictions on exports and measures having equivalent effect (EEC Treaty, Article 34) must be understood as also applying to the rules of a Member State which require in respect of the export of certain goods a licence or a standards certificate. By a judgment of 3 February 1977 (Case 53/76, [1977] 1 ECR 197) the Court replied in the affirmative. Following that the French Government provided (by means of a notice to exporters published in the Journal Officiel of 14 July 1977) that neither the licence nor the certificate from Cetehor were required any longer for the export of watches and clocks to other Member States of the EEC.

Taking account of the principle laid down by the Court of Justice, the court in Besançon, by a judgment of 28 September 1978, discharged the accused on the counts of forgery and uttering forged certificates in relation to exports to Member States of the EEC, whilst before ruling on the same charges in relation to exports to non-member countries (namely Greece, Spain and Austria), it found it necessary to make a further reference to the Court of Justice. The three questions submitted by the national court for preliminary rulings this time refer to the three agreements which I mentioned at the beginning, and seek to establish whether those agreements allow a Member State of the EEC to require from its traders exporting to Greece, Spain and Austria an export licence or a certificate in place thereof, where such certificate does not give rise to the imposition of a charge and may be refused only if the quality of the goods does not conform to the standards laid down by the body issuing the certificate. With reference to the Agreements with Spain and Austria, the court in Besançon wishes to know further whether or not the fact of requiring the aforesaid certificate constitutes a means of arbitrary discrimination or a disguised restriction on trade.

2. Article 28 (1) of the Association Agreement with Greece, using an expression almost identical to that found in Article 34 (1) of the EEC Treaty, provides that "quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between the Contracting Parties". However, the second part of the same paragraph provides that "the Member States of the Community and Greece shall, by the end of the transitional period laid down in Article 6 at the latest, abolish between themselves all quantitative restrictions on exports and any measures having equivalent effect". It is clear therefore that the Contracting Parties had until the end of the transitional period, that is to say until 1 November 1974, to abolish between themselves quantitative restrictions on exports and measures having equivalent effect, unless in the meantime the Council of Association were to address to them a recommendation to proceed with the abolition more rapidly, and the Contracting Parties were to decide to act upon such a recommendation (that is the effect of Article 29 of the Agreement). But such an acceleration — which would have had to be compatible with the general economic situation and with the situation in the sector concerned — did not occur: the Council of Association did not before 1 November 1974 make any recommendation to the Contracting

Parties inviting them to abolish the various quantitative restrictions more rapidly. Consequently, the obligation imposed by the said Article 28 (1) applied only as from 1 November 1974; whilst the facts which the national court is called upon to consider arose prior to that date, having occurred between June and October of 1972.

3. In the Agreement with Spain — which of course is much more limited in scope than that with Greece, in that it aims to create a free-trade area not an associate relationship — there are no provisions imposing a prohibition on quantitative restrictions on exports or measures having equivalent effect. However, there is a provision (Article 12) which states that "the provisions of the Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade". It is easy to see that that rule reproduces with very slight amendments Article 36 of the EEC Treaty; that leads to the question whether the two provisions have the same scope. Taking account of the fact that Article 36 is a derogation from the prohibitions imposed by Articles 30 to 34 of the same Treaty, an affirmative reply would suggest that those prohibitions also must be considered to have been incorporated by implication into the agreement in question.

I will say at once that I find such a conclusion absolutely untenable. In the first place, it is unthinkable that prohibitions of such importance should be deducible from a rule which has a different object. In the second place it is significant that, whereas Article 36 of the Treaty begins with the words "the provisions of Articles 30 to 34 shall not preclude ...", Article 12 of the Agreement with Spain merely makes a general reference to the provisions of the Agreement as a whole, beginning with the declaration that "the provisions of the Agreement shall not preclude ...". In fact the respective contexts of the two parallel rules are so utterly different that it would be arbitrary to interpret them in the same way and so to maintain that Article 12 of the Agreement presupposes, like Article 36 of the Treaty, that quantitative restrictions on exports and imports and measures having equivalent effect are prohibited.

In my opinion, the Commission was quite right when it submitted that the instruments of the common commercial policy have their own objectives, on the basis of which they must be interpreted. That obviously implies that even when they are similar in content to certain provisions of the Treaty they are not necessarily identical in meaning. The important consideration is the context of each agreement, which must be interpreted without regard to that of the Community Treaty; in fact, there is no doubt that, as the Court has declared, "... the provisions of the Treaty on commercial policy do not ... lay down any obligation on the part of the Member States to extend to trade with third countries the binding principles governing the free movement of goods

between Member States . . ." (judgments of 15 June 1976, Case 51/75 *EMI Records* v *CBS United Kingdom* [1976] 1 ECR 811, paragraph 17 of the decision; Case 86/75, *EMI Records* v *CBS Grammofon* [1976] 1 ECR 871, paragraph 17 of the decision, and Case 96/75, *EMI Records* v *CBS Schallplatten* [1976] 1 ECR 913, paragraph 10 of the decision).

As far as the Agreement between the EEC and Spain is concerned, I have already pointed out that its object is to establish a free-trade area. In particular Article 1 (1) thereof provides that "the progressive elimination of *obstacles to the main body of trade* between the European Economic Community and Spain shall be brought about in two stages . . ."; Article 1 (3) specifies that "transition from the first to the second stage shall be effected by mutual agreement between the Contracting Parties . . .". That transition has not yet taken place; and for the time being there still exist duties on exports, with the sole limitation of the most-favoured third State system (Article 6). As regards quantitative restrictions, there is a provision in Annex II (Article 4 (1)) which states that "Spain shall refrain from introducing any *new* quantitative restrictions on imports of products originating in the Community other than . . ."; but both the wording of that provision and its limited nature confirm that the Contracting Parties are free to retain the existing restrictions both on imports and on exports.

In view of all the above considerations I find it reasonable to interpret Article 12 as a list of exceptions to the rules in the agreement liberalizing trade, without prejudice to the content of such rules or to their more or less limited scope.

As regards the last sentence of Article 12, it clearly serves to limit the derogations laid down in the first sentence. Its function therefore is not to impose an independent and general prohibition on discrimination and restrictions on trade, but to specify to what point special restrictive measures on the part of States, authorized by the first part of the article, remain justified. In the present case, no special restrictive measure capable of coming within the list contained in the said Article 12 is involved. Moreover, a different interpretation of the last sentence of Article 12 — leading to the conclusion that it implies a general prohibition on arbitrary discrimination and disguised restrictions on trade — would meet with the same objections that I have already expressed in answer to the argument that the prohibition on quantitative restrictions on exports and measures having equivalent effect might be inferred from the wording of Article 12, in view of its similarity with Article 36 of the EEC Treaty. In this regard it should be emphasized once again that prohibitions of considerable scope — such as to affect the whole balance of the agreement — cannot be held to have been laid down by implication; and that there is a difference between a prohibition of a general nature and a limitation on measures which States are authorized to take.

Finally, it should be remembered that a provision such as that contained in Article 12 has been reproduced without amendment in a number of international agreements concluded by the Community: for example, Article 11 of the Association Agreement between the EEC and Malta of 5 December 1970 (Journal

Officiel L 61 of 14 March 1971); Article 20 of the Agreement between the EEC and Austria of 22 July 1972 (Journal Officiel L 300 of 31 December 1972); Article 23 of the Agreement between the EEC and the Portuguese Republic of 22 July 1972 (Journal Officiel L 301 of 31 December 1972); Article 20 of the Agreement between the EEC and the Swiss Confederation of 22 July 1972 (Journal Officiel L 300 of 31 December 1972). That shows that no steps have ever been taken to adapt the content of the provisions in each case according to the varying scope of the individual agreements. In my opinion such a drafting technique deserves to be criticized on account of the confusion which is created by the wording chosen when it is used in a completely different context from the original context of Article 36. However, such confusion will be removed in the end when the rule in question is incorporated into a more integrated system of regulating trade between the Contracting Parties, with the complete attainment of the objectives of the agreement. In the case of the Agreement between the EEC and Spain, that should be achieved at the end of the second stage, but it would in any case depend on a fresh agreement to proceed with integration (unless in the meantime there occurs the expected accession of Spain to the EEC, which would obviously change the nature of the problem).

4. Finally, as regards the Interim Agreement between the EEC and Austria in force at the material time, the national court draws the attention of the Court of Justice particularly to Articles 10 and 16. But in my opinion neither of those provisions prohibits restrictions on exports or measures having equivalent effect.

In fact Article 10, providing that "the Contracting Parties shall refrain from introducing between themselves any new quantitative restrictions or measures having equivalent effect of from increasing existing quantitative restrictions and measures having equivalent effect", in essence does nothing more than lay down a *standstill* rule, which, as such, does not oblige the Contracting Parties to abolish the existing measures, but only prevents them from introducing new ones. Besides, Article 16 corresponds in content and in wording to Article 12 of the Agreement between the EEC and Spain considered above; hence it is not possible to infer from that an obligation to abolish quantitative restrictions on exports, considering that the agreement does not contain any specific provisions requiring such abolition. In this regard I believe that it would be superfluous to repeat the considerations which I set out in relation to the equivalent provision of the Agreement between the EEC and Spain.

5. I therefore propose that the Court should, in reply to the questions submitted by the Tribunal Correctionnel, Besançon, by its judgment of 29 September 1978, declare that:

1. Articles 6, 28 and 29 of the Agreement of Association concluded on 9 July 1961 between the European Economic Community and *Greece* must be interpreted as meaning that until 31 October 1974 it was permissible for a Member State of the Community to require from its traders exporting to Greece an exporting licence or alternatively a certificate.

2. The Agreement concluded on 29 June 1970 between the EEC and *Spain* (in particular Articles 1, 8 and 12 thereof), and the Interim Agreement concluded on 22 July 1972 between the EEC and the *Republic of Austria* (with particular regard to Articles 10 and 16 thereof) must be interpreted as meaning that a Member State of the Community may require from its traders exporting to Spain and Austria an export licence or alternatively a certificate; in particular, in the context of both the Agreements, the requirement of such a certificate is a legitimate State measure, without its being necessary to consider whether it constitutes a means of arbitrary discrimination or a disguised restriction on trade within the meaning of the said Article 12 of the Agreement with Spain and Article 16 of the Agreement with Austria.