not prevent the fact that the burden of such charges may have been passed on to the traders or to consumers from being taken into consideration.

However, any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law is incompatible with Community law. This is particularly so in the case of presumptions or rules of evidence intended to place on the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence.

2. The primacy and direct effect of the provisions of Community law — as recognized by the courts of a Member State — do not release the Member State in question from its obligation to remove from its domestic legal order any provisions incompatible with Community law, since the maintenance of such provisions gives rise to an ambiguous state of affairs in so far as it leaves persons concerned in a state of uncertainty as to the possibilities available to them of relying on Community law.

REPORT FOR THE HEARING
delivered in Case 104/86 *

I — Facts and procedure

1. The Commission considers that Article 19 of Decree Law No 688 of 30 September 1982 adopting 'urgent measures in regard to fiscal receipts' (GURI No 270 U of 30 September 1982, p. 7072), converted into Law No 873 of 27 November 1982 (see GURI No 328 of 29 November 1982, p. 8599 for the converting law; for the consolidated version of the Decree-Law together with the converting law, see GURI No 332 of 2 December 1982, p. 8714), is contrary to the provisions of Articles 5, 12 and 95 of the EEC Treaty, Council Regulation No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (Official Journal 1979, L 175, p. 1) and the Court's case-law on repayment of national charges and taxes levied in breach of Community law.

2. According to Article 19 of the Decree-Law:

'A person who has paid import duties, manufacturing taxes, taxes on consumption or State taxes which have been unduly levied, even prior to the entry into force of this decree, is entitled to the repayment of the sums paid if he produces documentary evidence establishing that the charge in

* Language of the Case: Italian.

question has not been passed on in any way whatsoever to other persons, except in cases of substantive error.

The documentary evidence referred to in the preceding paragraph must also be produced if the goods in respect of which payment was made have been transferred after working, processing, assembly, fitting or adaptation.

The goods are presumed to have been transferred in the cases provided for in Article 53 (1) and (2) of Decree No 633 of the President of the Republic of 26 October 1972. The repayment of sums paid as value-added tax continues to be governed solely by the provisions concerning that tax.'

3. By letter of 21 December 1984 the Commission informed the Italian authorities that in its view that provision was contrary to Community law and asked them to submit their comments within a month.

4. By telex message of 10 May 1985, the Italian authorities informed the Commission that 'the matter in question is the subject of proceedings before the Constitutional Court; it is essential to await that court's judgment in order to be able to provide a comprehensive reply'.

5. On 17 July 1985 the Commission delivered a reasoned opinion to which the Italian authorities replied in a telex message of 23 July 1985 referring to and repeating the contents of that of 10 May 1985; it was followed by an undated telex message received on 26 July 1985 asking for an extension of the time-limit laid down in the reasoned opinion.

6. The Commission's application was lodged at the Court Registry on 2 May 1986. The procedure followed the normal course.

7. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

8. The *Commission* claims that the Court should:

(1) Declare that by imposing on the taxpayer the onus of proving that national charges and taxes which were unduly paid, as they were contrary to Articles 9 *et seq.* and 95 of the EEC Treaty, have not been passed on to other persons, by accepting only documentary proof in that regard and by giving retroactive effect to the national provisions concerned, the Italian Republic has failed to fulfil its obligations under Articles 5, 9 *et seq.* and 95 of the EEC Treaty;

(2) Declare that by laying down rules governing the repayment of Common Customs Tariff duties and import and export charges under the common agricultural policy the Italian Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty and Regulation (EEC) No 1430/79;

(3) Order the defendant to pay the costs.

9. The *Italian Republic* contends that the Court should 'declare that the alleged failure of the Italian Republic to fulfil its obligations under the Treaty is non-existent'.

III — Submissions and arguments of the parties

10. The Commission claims that in view of the general wording used therein Article 19 covers two categories of charges: charges imposed by national legislation and charges imposed by Community legislation (the Common Customs Tariff, rules on agriculture).

11. With regard to the first category (charges imposed by national legislation), the judgment of 9 November 1983 in Case 199/82 (*Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595) decides that 'any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law'. In this case the Commission considers that the Italian legislation conflicts, in particular, with Article 9 *et seq.* and Article 95 of the Treaty, because it detracts from the effectiveness of those provisions, and with Article 5 of the Treaty because: (a) it shifts on to the taxpayer the onus of proving that national charges unduly paid have not been passed on to other persons; (b) the only means of proof by which it may be established that such taxes have not been passed on is documentary evidence; (c) the retroactivity of Article 19 aggravates the position of traders who paid taxes unduly and also aggravates the infringement of Community law inasmuch as traders have even greater difficulty in producing the evidence required, since they could not have foreseen that the legislation would be amended.

12. With regard to the second category (charges imposed by Community law), the Commission maintains that the contested article is an unlawful interference in an area governed by Community law and in particular by Regulation No 1430/79, and is contrary both to that regulation and to Article 5 of the EEC Treaty. The Commission argues that Circular No 5346 of 17 November 1982 (GURI No 151 of 2 June 1984, p. 4594) which states that Article 19 is not to be applied to Community charges, does not eliminate the infringement because it provides an interpretation which is contrary to the wording of Article 19 and which is not binding on the judicial authorities.

13. The Italian Government considers that, independently of its effects in the domestic legal order, Article 19 cannot have effects contrary to Community law, in view of the radical innovation introduced into the Italian internal legal order by two judgments of the Constitutional Court, which made it possible for national courts not to apply a national rule which conflicts with Community rules. In particular, judgment No 170 of 8 June 1984 of the Constitutional Court recognized the primacy of Community law and held that in the event of a conflict between a provision of national law and Community law, the power to treat the national provision as inapplicable was not confined to the Constitutional Court. Judgment No 113 of 23 April 1985, which was concerned with the constitutionality of Article 19 of the very Decree-Law at issue in this case, extended the mandatory effect of Community rules to situations resulting from judgments of the Court of Justice. The Italian Government adds that those judgments are now followed by the Corte di Cassazione (Court of Cassation) and other courts. Indeed they have treated as inapplicable the provisions of Article 19 on the ground that they are contrary to the principles laid down in the judgment in the *San Giorgio* case. The judgments of the courts have even gone beyond the objective pursued by declaring

domestic rules to be inapplicable even where it would have sufficed to interpret them consistently with the Community legal order. The Italian Government considers therefore that there is no question of the presence of Article 19 in the national legal order constituting an obstacle to the direct effect and direct application in the Italian legal order of the relevant Community rules.

14. On the basis of the foregoing considerations, the Italian Government contends that the repayment of charges imposed by national legislation which are contrary to Community rules is subject only to proof that the charge has not been passed on. That requirement is in accordance with the case-law of the Court. In contrast, the national legislature may not fetter the courts' discretion in regard to the concrete verification of whether such charges have in fact been passed on, which may not be the subject of irrebuttable presumptions or restrictions as to certain kinds of evidence.

15. On a correct interpretation of Article 19, the requirement for documentary evidence cannot be interpreted as a requirement (which applies *ex post facto*, since the provision also applies to the past) for a specific document (proving a negative) to have previously been produced. The meaning of that article is that although the onus of proving that the tax has been passed on continues to be borne by the administration (which proof may also be based on presumptions, which are not irrebuttable as far as the court is concerned but which it is free to assess as it sees fit), the arguments and allegations to the contrary put forward by the party claiming repayment must be capable of being verified at least by the normal records which every undertaking must necessarily hold, and not merely on the basis of oral evidence, which is dependent on memory. Thus interpreted, Article 19 is in conformity with Community law.

16. The Italian Government therefore considers that the direct effect of Community provisions which grant traders a right to repayment of taxes unduly paid is fully operative in the Italian legal order, subject to the sole condition (the tax should not have actually been passed on) which according to the case-law of the Court may be relied on against a person claiming repayment.

17. In those circumstances, the Commission's claim to require the national legislature to amend a domestic law which is in conformity with the Community legal order and which injures noone is not merely without foundation but excessive. The Commission's application would lead in fact to a negation of the direct applicability of Community rules and would reintroduce the idea that the implementation of directly applicable rules of Community law may be effected only by adopting domestic legislation. Furthermore, the requirement that legislation should be amended constitutes an undue interference in the national legal order. Finally, the Italian Government adds that the publicity given to the abovementioned judgments of the Constitutional Court precludes any uncertainty on the part of the persons concerned regarding the right to repayment, notwithstanding the existence of Article 19.

18. With regard to the alleged unlawful interference of the national legislature in the area of charges imposed by Community legislation, the Italian Government considers that the Commission's concerns are set to rest by the circular of 17 November 1982, mentioned above, which expressly stated that Article 19 does not apply to the repayment of levies constituting own resources of the Community. In any event, that problem has been resolved in a binding manner by judgment No 170/84 of

the Constitutional Court, which decided that national provisions contrary to Community law are inapplicable. Thus, the co-existence in the Italian legal order of Article 19 of the Decree-Law and the rules laid down in Regulation No 1430/79 does not give rise to a conflict between diverging rules on repayment of own resources, since that area continues to be governed solely by Community legislation. Article 19 cannot be interpreted as being applicable also to repayment of Common Customs Tariff duties and charges under the common agricultural policy because, according to a well-known principle of Italian law, where two interpretations are possible, the one which appears to be in conformity with the Constitution must prevail.

19. Lastly, the Italian Government points out that in judgment No 5129 of 18 October 1985, which referred for the first time to the principles laid down in the judgments of the Constitutional Court (in particular, judgment No 113/85, cited above), the Corte di Cassazione categorically confirmed that Article 19 was absolutely inapplicable on the ground that it was incompatible with Community legislation. Various other judgments have followed that judgment, the most recent being judgment No 2145 of 26 March 1986, which contains new considerations compared with the first judgment cited above but without arriving at solutions acceptable to the administration concerned. For that reason, the Italian Government is awaiting appropriate elucidation from the Court of Justice, which has been sought in the context of Case 378/85 (still pending), for the purpose of providing better guidance for the national courts.

20. In its reply the Commission maintains its position with regard to the infringement. It claims that the adoption of national rules contrary to Community law infringes the latter in at least three respects:

(a) as regards the individual's knowledge of his rights: the conflicting national rule gives rise to confusion and uncertainty, which often leads individuals simply to abandon the attempt to exercise rights recognized at Community level;

(b) as regards the activities of administrative bodies: such bodies tend to give precedence to the conflicting national provision and hence, to make claims on individuals which are contrary to the latter's rights under Community law. Those claims of themselves detract from the full effectiveness of Community law. Furthermore, they may also lead individuals to abandon their rights or force them to go to court, either of which courses of action constitutes an additional disadvantage for the individual;

(c) on the judicial level: the conflicting national rule may be a source of error for the courts, which may oblige individuals to bring proceedings at several levels of the judicial hierarchy before they succeed.

Manifestly, the damage is all the more serious where the legal order in question is not designed fully to recognize the direct applicability of Community law. The case-law of the Constitutional Court cited by the Italian Government has eliminated the latter disadvantage but it is not capable of eliminating all the others.

21. In regard to point (a), Article 19 remains a factor of confusion and uncertainty, as the Italian Government seems to admit. Furthermore, because Article 19 remains in force persons concerned tend

either not to assert their rights or to institute proceedings before the courts.

22. With regard to (b), the Commission maintains that the argument put forward by the Italian Government concerning the onus of proof confirms the existence of the infringement: the upshot is a reversal of the onus of proof, which the Court of Justice rejected in the *San Giorgio* case. In the judgment in that case, it precluded not only irrebuttable presumptions but also rebuttable presumptions. However, as appears from judgment No 2145/86 of the Corte di Cassazione, referred to by the Italian Government, the national administration continues to argue that importers are required to prove that the burden of the tax or charge has not been passed on to the consumer. With regard to the form of evidence, the exclusion of oral evidence, supported by the Italian Government, is contrary to the judgment in the *San Giorgio* case, in which any limitation on the form of evidence to be adduced was declared to be incompatible with Community law.

23. Lastly, in regard to (c), the Commission claims that it appears that in spite of the direct applicability of Community law not only did the Corte di Cassazione have to intervene on numerous occasions but that the Italian Government, which is dissatisfied with its decisions, intends to use the same method again in the hope of bringing about a change in the case-law. That involves sacrifices for the individual. Those sacrifices are the consequence of the rule in question and of the fact that the measures necessary to bring the legislation into line with the principles laid down by the Court of Justice have not been adopted. That omission is a direct source of uncertainty, confusion and potential litigation. The Italian Government itself admits as much when it speaks of problems in the Italian legal order caused by the novelty of the idea of not applying a legal rule. The Commission expresses doubts about that statement and claims that the problems seem to arise more because what is involved is a partial abrogation and because the Italian administration is seeking to give credence to a restrictive interpretation of the Court's case-law and, as a result, to an argument which seeks to preserve as far as possible those parts of the legislation which are open to criticism.

24. In the rejoinder, the Italian Government contends that there is at present no actual disturbance of the functioning of the common market, nor is there any 'confusion' in the public mind concerning the rules to be applied. The cases pending before the Italian courts are part of an earlier dispute and are limited in number. There is no uncertainty or confusion in regard to interpretation. The substance of the present dispute was resolved by the judgment in the *San Giorgio* case, the principles of which are fully accepted by the Constitutional Court, which gave them precedence over the rules of national law. Thirdly, the 'small' group of old cases still in being exists because the principles laid down in the *San Giorgio* case are not yet being correctly applied. However, such cases often come before the Corte di Cassazione, which alone can decide on the question of legality. In those circumstances, the Commission's action is objectively and in substance an intervention in certain specific cases pending before the Italian courts. Finally, the alleged 'uncertainty' regarding the legal position has not been proved by the Commission. In reality the only uncertainty concerns the old cases still pending. The allegation of 'uncertainty at judicial level' is therefore without foundation since there is no uncertainty with regard to the rules to be applied.

25. The Italian Government refers in the second part of its rejoinder, purely in the alternative, to the 'substantive problems' arising in the case. It states that the *scope* of Article 19 of the Decree-Law in question with regard to the condition that the charge must not have been passed on is wide and covers in general the whole area of indirect taxation imposed by national legislation. It does not concern income tax or value-added tax and affects only to a marginal extent the modest national taxes regarded as being 'of equivalent effect'. The scope of the recovery of undue payments is different in relations between individuals — in civil law and commercial law — than in the area of indirect taxation, in revenue law. In the latter area, the 'normal working' of the machinery for the tax paid to be passed on, hence the need for a different rule in order to prevent the right to repayment from amounting in reality to an unjustified enrichment of the persons who paid the tax without suffering any loss thereby. For that reason, the right to repayment is made subject to the condition of proof of payment and in addition of loss arising because the tax has not been passed on, which obviously raises delicate evidential problems. However, what is involved is practical difficulties and not circumstances which are decisive for the purposes of a theoretical reconstruction, nor is it decisive that the difficulties described unfortunately lead the national courts to 'simplify' on the basis of the preconceived notions of a civil-law tradition.

26. As far as the full implementation of Regulation No 1430/79 is concerned, the Italian Government considers that there is no doubt that it has been achieved — apart from the ministerial circular of 17 November 1982, mentioned above, the principles laid down in the judgment in the *San Giorgio* case have been raised to the level of a 'source of law' by judgments Nos 113/85 and 170/84 of the Italian Constitutional Court, with the result that they constitute law applicable in Italy. Since a 'reception' of the regulation into internal law therefore does not seem necessary, the Italian Government considers that there is no need to ask the Italian Parliament to undertake a task which is pointless and detrimental to the direct applicability of Community measures.

IV — Withdrawal

27. After the close of the oral procedure the Commission announced, in a letter received at the Court Registry on 8 February 1988, that it was withdrawing the second head of its application because the circular of 17 November 1982, published in *Gazzetta Ufficiale della Repubblica Italiana* (GURI) No 151 of 2 June 1984, was applicable only to national taxes and charges and not to the Community's own resources.

28. The Commission justified its partial withdrawal from the proceedings on the ground that in this case the abovementioned circular terminated the infringement of Community law in so far as it fulfilled the following three conditions: first, the Community provisions (Regulation No 1430/79) are directly applicable and take precedence over national rules: secondly, in order for the national rules to be applied, action must be taken by the administration, which is bound by the circular, and the rules may not be applied by the courts of their own motion or on the initiative of the public prosecutor's department or of interested third parties; thirdly, the circular has been given sufficient publicity to ensure that the administration will respect the rights which interested parties derive from Community law. There is a fourth factor in this case — that is to say, the fact that there have been no complaints from any interested parties — which, in the Commission's view, confirms that no infringement of Community law arises because of the purely formal survival of the national rules in question.

29. In the letter in question, the Commission stated that it was maintaining all the other claims in its application, including the claim that the defendant should pay the costs.

30. The Court invited the Italian Republic to submit its observations and, in a telex message received at the Court Registry on 8 February 1988, the defendant gave its agreement to the partial withdrawal by the Commission. As far as the part of the proceedings not affected by the withdrawal was concerned, the Italian Government referred to all the arguments set out in the rejoinder.

C. Kakouris
Judge-Rapporteur