OPINION OF ADVOCATE GENERAL DARMON
delivered on 31 March 1993 *

Mr President,
Members of the Court,

1. To what extent must import duties on goods from a third country be reimbursed when the goods are damaged even before the transfer of risk to the buyer? In essence, this is the main question put by the Bundesfinanzhof to the Court.

2. In July 1984 the company Ebbe Sönnichsen GmbH (hereinafter 'Ebbe') imported on fob terms, from Uruguay, into the Federal Republic of Germany a consignment of 440 cases of 'frozen boneless beef'. The customs declaration did not mention any defect in the quality of the product.

3. The Hauptzollamt Hamburg St-Annen (hereinafter 'the Hauptzollamt') fixed the value of the imported goods for customs purposes, in accordance with Ebbe's declaration, on the basis of the price as invoiced and paid.

4. On 11 October 1994 Ebbe claimed a partial refund of customs duties on the ground it was established by an expert report that part of the cargo was spoilt and unfit for human consumption. It is not contested that the meat was already spoilt before the transfer of risk to the buyer. The credit note given to the buyer was not honoured by the seller.

5. According to Article 2(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979, relating to the repayment or remission of import or export duties: [1]

'Import duties shall be repaid or remitted in so far as the competent authorities are satisfied that the amount of such duties entered into the account

...

exceeds for any reason the amount lawfully payable.'

6. According to Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes: [2]

'The customs value of imported goods determined under this Article shall be the transaction value, that is, the price actually paid or

* Original language: French.

1 — OJ 1979 L 175, p. 1.
2 — OJ 1980 L 134, p. 1.

payable for the goods when sold for export to the customs territory of the Community.'

7. The second sentence of Article 4 of Commission Regulation (EEC) No 1495/80 of 11 June 1980, implementing certain provisions in Articles 1, 3 and 8 of Council Regulation No 1224/80 concerning valuation for customs purposes [3] and supplemented by Commission Regulation (EEC) No 1580/81 of 12 June 1981, [4] provides as follows:

'Apportioning the price actually paid or payable shall also apply ... in the case of the loss of part of the consignment or when the goods being valued have been damaged before entry into circulation.'

8. The Hauptzollamt rejected the claim for repayment on the ground that the second sentence of Article 4 was only applicable when goods were damaged *after* the transfer of risk to the buyer. [5] However, the meat was already spoilt at the time of the transfer.

9. The Finanzgericht upheld the claim. It considered that, in accordance with Article 2(1) of Regulation No 1430/79, Ebbe was entitled to a refund of the customs duties paid on the spoilt goods since the amount of duty in question exceeded the amount lawfully payable. Apportionment of the price within the meaning of the second sentence of Article 4 of Regulation No 1495/80, as amended, is also required where imported goods have suffered a partial deterioration before entry into free circulation.

10. The Bundesfinanzhof, before which the matter has been brought as an appeal on a point of law ('Revision'), is asking the Court whether the above provision is applicable when, even *before* the transfer of risk to the buyer, imported goods show defects which diminish their value. Should the reply be in the negative, it asks the Court how their transaction value, within the meaning of Article 3(1) of Regulation No 1224/80, can be determined. [6]

11. Since the latter provision applies, [7] the valuation of the imported goods for customs purposes is established on the basis of the price actually paid or payable by the importer, who in this case had paid the whole of the agreed price.

12. The purpose of Regulation No 1224/80, as stated in the sixth recital in the preamble, is to introduce a fair, uniform and neutral system of customs valuation excluding the use of arbitrary or notional customs values. What must therefore be adopted is the *actual* economic value of the goods.

13. As the Court pointed out in its judgment in *Unifert*, [8] after recalling the terms of that recital,

3 — OJ 1980 L 154, p. 14.

4 — Regulation amending Regulation (EEC) No 1495/80, implementing certain provisions of Articles 1, 3 and 8 of Council Regulation (EEC) No 1224/80 relating to the valuation of goods for customs purposes (OJ 1980 L 154, p. 36).

5 — See the order of the court making the reference, p. 5 of the French translation.

6 — The exact wording of the questions is set out at the beginning of the order for reference.

7 — The exceptions enumerated under (a) to (d) do not apply in this case.

8 — Case C-11/89 *Unifert Hamdels* v *Hauptzollamt Munster* [1990] ECR I-2275.

'That is why unforeseeable reductions in the commercial value of the goods, after they have been purchased but before they have been released for free circulation, must result in a proportional reduction in the price actually paid or payable.' [9]

14. That price may therefore require *adjustment.*

15. Thus the second sentence of Article 4 of Regulation No 1495/80, as amended, provides for apportionment of the price actually paid or payable in the case of partial loss of the consignment, or where the goods to be valued were damaged before entry into free circulation.

16. With regard to a consignment of meat from Argentina which accidentally defrosted while being loaded in an Argentine port, the Court held, even though the above provision did not apply to the facts in the case, which preceded its entry into force, that

'Where the goods to be valued were bought free of defect but have been damaged before their release for free circulation the price actually paid or payable must be reduced in proportion to the damage suffered.' [10]

17. Must the solution be any different when the damage occurred *before* the transfer of risk to the buyer? In other words, can the date of the transfer of risk from seller to buyer have an effect on the valuation of goods for customs purposes?

18. Let me be quite clear, the argument put by the Hauptzollamt before the national court, [11] according to which the second sentence of Article 4 of Regulation No 1495/80, as amended, applies only in the event of damage to the goods occurring *after* the transfer of the burden of risk to the buyer, has failed to convince me.

19. The date to be adopted for the valuation of goods for customs purposes is very precisely defined in Article 1(1) (g) and (i) of Regulation No 1224/80: it is, for goods declared for direct entry into free circulation, 'the date of acceptance by the customs authorities of the declarant's statement of his intention that the goods should enter into free circulation'.

20. As we see, the value for customs purposes must be assessed on the day on which the goods are released for free circulation in the Community. Since their actual value is taken into account, *the state of the goods at the time of entry into the Community* is what matters.

21. In my opinion, the fact that the risk was only transferred to the buyer after the goods were on board ship, because the sale was concluded on fob terms (the buyer bears all

9 — Paragraph 35.

10 — Case 183/85 *Repenning* [1986] ECR 1873, paragraph 18.

11 — The Hauptzollamt did not submit any observations to the Court.

risks relating to the goods once they are on board ship), has no bearing on the determination of the value for customs purposes.

22. The value — and therefore the duties levied by the Community — cannot vary according to conditions under which the goods are imported, whether they be on fob, caf or any other terms.

23. Let us imagine that two identical consignments are imported; one on fob terms, and one on caf terms. Both are damaged in transit under the same conditions. The two consignments having entered the Community in the same state, the value for customs purposes cannot be different on the sole ground that in one case the damage occurred before the transfer of risk and in the second the damage occurred afterwards.

24. Such an interpretation of the second sentence of Article 4 of Regulation No 1495/80 would run counter to the objective of the rules governing the matter; the system of customs valuation, as we have seen, must exclude the use of *arbitrary* or fictitious customs values. [12]

25. My opinion is corroborated by the following factors.

26. Firstly, the wording of the provision itself, which specifies only that the damage must have taken place before release for free circulation, makes no reference to the concept of transfer of risk. No distinction should therefore be made where none is made by the law.

27. Secondly, the Court is not concerned with the question whether the damage occurred before or after the transfer of risk; it only requires, as we have seen, that the damage should have occurred after the purchase and before the release into free circulation of the goods involved.

28. Thirdly, it would be unfair and arbitrary — and hence contrary to the aim of the rules in question — to make the value for customs purposes dependent upon the repayment by the seller of the loss in value. The price paid is only one of the determinants of the *actual* value of the goods, which alone determines the value for customs purposes.

29. We find confirmation of this in the Agreement relating to the implementation of Article VII of GATT. [13] In accepting the Agreement, 'the Community placed itself under an obligation to ensure that its rules concerning customs valuation conform with the provisions of the Agreement'. [14]

30. Thus, Article 3 of Regulation No 1224/80 — adopted in implementation of that Agreement [15] — reproduces word for word the definition of customs value in Article 1 of the Agreement.

31. It therefore follows that Regulation No 1224/80 and Regulation No 1495/80, adopted in implementation of it, must, as far

12 — Sixth recital in the preamble to Regulation No 1224/80.

13 — OJ 1980 L 71, p. 107.

14 — Fifth recital in the preamble to Regulation No 1224/80.

15 — Ibid., second and third recitals.

as possible be given the same interpretation as the Agreement upon which they are based, and which seeks to ensure the uniform application of methods of customs valuation. [16]

32. The Technical Committee on Customs Valuation established by the Customs Cooperation Council to comply with Article 18(2) of the Agreement adopted an Explanatory Note relating to the valuation for customs purposes when the goods are not in conformity with the terms of the contract.

33. The Note distinguishes between goods in this category and damaged goods, and states that, in the second instance, where only part of the goods are damaged, 'it is possible to treat as transaction value the price represented by the proportion of the total price corresponding to the quantity of undamaged goods in relation to the whole'. Again, there is no attempt to distinguish according to the actual time when the damage occurred, whether it precedes or follows the transfer of risk to the buyer.

34. It should be noted, furthermore, that where goods are refused by the importer because they are defective or because they do not conform to the contract, *for whatever reason*, customs duties will be reimbursed or remitted. [17] I do not see why an importer who did not refuse delivery, because he only discovered the damage afterwards, should be treated differently.

35. The interpretation of Article 4, second sentence, given by the Bundesfinanzverwaltung confirms this opinion: when part of the goods are damaged before the valuation for customs purposes, the price set must be corrected in proportion to the damage suffered. [18]

36. In my opinion, the first question should be answered in the affirmative. The second question becomes, as a result, irrelevant.

37. I therefore propose that the Court give the following ruling:

In applying Article 4, second sentence, of Commission Regulation (EEC) No 1495/80 of 11 June 1980, as amended by Commission Regulation (EEC) No 1580/81, no distinction is to be made according to whether the deterioration which decreases the customs value occurs before or after the transfer of risk to the buyer.

16 — See the preamble to the Agreement and the third recital in the preamble to Regulation No 1224/80.

17 — Article 5 of Regulation (EEC) No 1430/79.

18 — *Vorschriftensammlung*, Zollwertrecht Fachteil, Z 5314, 11. Lieferung, 19 January 1990.