OPINION OF ADVOCATE GENERAL GULMANN
delivered on 2 February 1994 *

Mr President,
Members of the Court,

1. The Finanzgericht (Finance Court) Bremen has referred for a preliminary ruling a question raised in the course of a dispute between the German company Ospig Textil-Gesellschaft and the Hauptzollamt (Principal Customs Office) Bremen-Freihafen. That dispute arose as a result of the decision by the customs authorities to include, in the valuation for customs purposes of the goods imported by Ospig, the charges incurred in connection with the acquisition of an export licence ('quota charges').

2. The case is closely connected to the case between the same company and the German customs authorities in which the Court delivered its judgment on 9 February 1984 ('the *Ospig* judgment'). [1]

The *Ospig* judgment concerned the question whether quota charges incurred in connection with the purchase of textile products in Hong Kong, where there was a lawful trade in export licences, could be included in the valuation for customs purposes. The Court ruled that such quota charges could not be included in the valuation for customs purposes of goods imported into the Community within the meaning of the provisions of Council Regulation No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes. [2]

3. The present case concerns the question whether the same result applies to quota charges in respect of imports from Taiwan, where there is no lawful trade in export licences.

4. The question referred in the present case is worded as follows:

'Do quota charges arising from the acquisition of export quotas also not constitute part of the customs value of goods imported into the Community within the meaning of the provisions of Council Regulation (EEC) No 1224/80 of 28 May 1980 (Official Journal 1980 L 134, p. 1) in cases where export licences cannot be the subject of lawful trade

* Original language: Danish.

1 — Case 7/83 *Ospig* v *Hauptzollamt Bremen-Ost* [1984] ECR 609.

2 — OJ 1980 L 134, p. 1, as amended by Regulation No 3193/80 of 8 December 1980 (OJ 1980 L 333, p. 1).

in the relevant country of export (in this case, Taiwan)?'

5. The relevant rules in the regulation on valuation for customs purposes were not amended following the delivery of the *Ospig* judgment. Article 3(1) of the regulation provides that: 'The customs value of imported goods determined under this Article shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted in accordance with Article 8, provided ...'.

Under Article 3(3)(a), 'The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller ...'.

Article 8, to which Article 3(1) refers, provides for the addition to 'the price actually paid or payable' of various expenses which, in the economic sense, are ancillary to the price. Article 8 contains an exhaustive list of the expenses which may be taken into account in the determination of the customs value. Quota charges are not included in that list.

6. Quotas have their origin in the so-called multifibre agreements entered into since the beginning of the 1970s under the GATT arrangements. The background to the agreements lay in the capacity of developing and recently industrialized countries to produce cheap textile products, the export of which represented a threat to textile production in industrialized countries. The object of these agreements was to promote the textile industries of developing countries while at the same time also restricting their exports to industrialized countries to enable the latter to carry out at an appropriate pace the structural reforms necessary in their own textile industries. The principal method used to secure that objective has been bilateral agreements imposing quantitative restrictions on textile imports.

7. The Community has concluded bilateral agreements of this kind with a large number of third countries, including Hong Kong. With regard to Taiwan, the agreement was concluded with the trading organization 'Taiwan Textile Organization'. The agreements specify the quantities of various categories of textiles which may be imported in the course of a year from the third countries in question. The Community's partners in these agreements themselves decide how to divide up their quotas among their national exporters. The Community's import rules

for the period relevant to the present case are to be found in Council Regulation No 4134/86 on the arrangements for imports of certain textile products originating in Taiwan [3] and Council Regulation No 4136/86 on common rules for imports of certain textile products originating in third countries. [4]

8. It was pointed out in the first *Ospig* case that in Hong Kong it is the local chamber of commerce which divides export quotas annually among manufacturers and traders in textile products on the basis of the volume of goods exported in the previous year. The quotas are transferable and their value is determined by supply and demand. Towards the end of the year, when export quotas are almost exhausted, quota charges may amount to considerable sums, whereas they may have been negligible in the previous months. Exporters in Hong Kong who have used up their own quotas and who need to obtain unused quotas in order to apply for an export licence with a view to executing an order from an undertaking in the Community send to the undertaking which placed the order a separate invoice for quota charges.

9. The present case relates to the importation by Ospig in March 1989 of 1 000 jackets of blended fabric. As the value for customs purposes, the company submitted the figure of DM 30 000, an amount representing the net price invoiced to it by the Taiwanese vendor and manufacturer, Bai Lucky Industrial Co. Ltd. The quota charges of DM 7 000, which Ospig had paid directly to the independent agent Taipan Oceanic Co. Ltd, which handled the export transaction, were not included in the figure submitted for the calculation of the customs value. The German customs authorities, which were unable to accept Ospig's exclusion of the quota charges from the figure for calculation of the value for customs purposes, requested the company to pay customs duties amounting to DM 5 187.77, calculated on the basis of the net price of the goods plus the quota charges. Ospig contested the decision of the German authorities by reference, *inter alia*, to the Court's judgment in the *Ospig* case. The German authorities, on the other hand, argued that that decision could be relied on to support the view that such charges could not be included in the calculation of the customs value of the goods in question only in so far as quotas were transferable under the laws of the particular country of export: as it was not possible under the law of Taiwan to transfer quotas, the charges incurred had to be included in the calculation of the value of the goods for customs purposes.

10. As will be clear from the present case and also from the first *Ospig* case, the question whether quota charges are to be included in the calculation of the customs value may be of considerable financial importance to the traders concerned. The level of customs duty on the textile products in question is relatively high and quota charges can, at least at certain periods and in certain circumstances, make up a relatively large part of the total price paid for the goods.

3 — OJ 1986 L 386, p. 1.
4 — OJ 1986 L 387, p. 42.

11. In the first *Ospig* case, it appears that the committee set up to advise on the administration of Regulation No 1224/80 decided in a non-binding opinion that the quota charges which the *Community importer* has paid in purchasing himself the necessary export licence *directly from a third party* could not be included for the calculation of the customs value.

In its judgment in *Ospig*, the Court refused to draw any *a contrario* conclusion from that opinion when it held that 'the solution suggested by the Customs Valuation Committee also applies when *the exporter/vendor who no longer has any quotas obtains some himself from a third party* and invoices them to the purchaser. To hold otherwise would, in fact, create an unjustified disparity between importers in the Community placed in an analogous situation and would therefore be contrary to the fair, uniform and neutral system of customs valuation established by Council Regulation No 1224/80' (paragraph 17, emphasis added).

12. It is clear from the present case and from Case C-340/93 *Thierschmidt* v *Hauptzollamt Essen*, which is still before the Court, that the German customs authorities are proceeding on the basis that the result of the first *Ospig* case applies only where the purchaser or vendor has incurred quota charges by reason of the acquisition from a third party of export licences which are freely transferable under the law of the country of export.

13. The requirement thus imposed is that it must be lawful under the law of the country of export *to transfer the export licences in question*. In addition, *charges can be deducted only in the case of licences acquired from third parties ('external' quota charges)*. This means that there can be no deduction of 'own' quota charges, that is to say, charges which the exporter who has effected the export transaction by using quotas directly allocated to him has incurred in connection with that quota allocation or which he has calculated to cover the generally applicable market value of the licences.

14. The requirement of the customs authorities that the licences should be transferable was endorsed by the Finanzgericht Bremen in a judgment of 12 June 1990. Since then, however, that court has become unsure as to whether that result was the correct one and that is why it has referred the question in the present case for a preliminary ruling.

15. The abovementioned Case C-340/93 *Thierschmidt* was referred by the Finanzgericht Düsseldorf and involves primarily the question whether 'own' quota charges must be included in the calculation of the customs value.

The *Thierschmidt* case, which involves exports from both Hong Kong and Taiwan, as well as both 'own' and 'external' quota charges, also deals, however, with the question whether the result of the judgment in

the first *Ospig* case can be applied to exports from Taiwan. In contrast to the Finanzgericht Bremen, the Finanzgericht Düsseldorf, on the basis of the documentation before it, took the view that trade in export licences is lawful in Taiwan. Its decision none the less to refer the question was attributable to the fact that it was uncertain whether it was relevant to the determination of the customs value that the rules applying to imports from Taiwan (contained in Regulation No 4134/86) differed from the general rules on imports from third countries (contained in Regulation No 4136/86) inasmuch as the former regulation did not provide for any double control as in the case of the latter regulation, that is to say, that Regulation No 4134/86 did not expressly provide that an export licence had to be issued in the country of export and that an import licence issued by the authorities of the country of importation had to be produced in the case of imports into the Community, which presupposed that an export licence had been produced.

16. Thus, the position is that the same basic question, namely whether 'external' quota charges can be included in the calculation of the customs value *in the case of exports from Taiwan*, has been referred by two German finance courts, one of which assumes that trade in quotas is unlawful, while the other takes the opposite view.

In addition, it would appear that the Finanzgericht Bremen does not attach great importance to existing differences in Community supervision rules, while that difference constitutes the background to the questions referred by the Finanzgericht Düsseldorf.

17. In the *Thierschmidt* case, the written observations of, among others, Thierschmidt and the Commission argue that it is unnecessary to stress the different supervision rules, which one can already understand in view of the fact that it would appear that in the situations relevant to the present case the German authorities treat imports from Taiwan in the same way as imports under the common import rules deriving from Regulation No 4136/86.

18. To that extent, it might be appropriate to deal with the two cases together — even as far as my opinion is concerned.

19. However, I have taken the view that the most reasonable course of action would be for me to set out my opinion in the present case now.

20. The question referred is based on the premiss that it is unlawful in the country of export to trade in export licences. The Court must base itself on that premiss in the present case.

21. There is in this case no more detailed information as to the implications of the statement that it is unlawful under the laws of the country of export to trade in export licences or as to whether such unlawful trade may have consequences under private or criminal law, or both. On the other hand, it is clear that the Finanzgericht Bremen has assumed in its order of reference that the case involves 'external' quota charges, that is to say, charges actually incurred by the exporter when purchasing export licences from a third party.

22. In my opinion, the Commission was correct in its argument that there is no reason to restrict the result arrived at in the *Ospig* judgment merely because the trade in that case happened to be lawful.

23. The Court's judgment in *Ospig* contains, in my view, nothing that could support such a restriction.

24. The judgment does not expressly state that the acquisition must be lawful. The grounds on which the Court reached its decision also do not contain anything to support such an assumption. The reasons given by the Court were that 'the system of export and import licences forms part of the Community system of authorization and quantitative limitation of imports into the Community of textile products from certain non-member countries' and that 'those rules, which seek only to control the quantities of textile products imported from certain non-member countries, pursue an entirely different objective from that of Regulation No 1224/80, as amended, whose purpose is to establish a fair, uniform and neutral system of customs valuation of goods for the application of the Common Customs Tariff. The latter regulation must therefore be interpreted without reference to the rules on the system of export and import licences.' (paragraphs 13 and 14). That reasoning does not attach significance to the circumstances under which the trade in export licences is conducted.

25. As the Commission has pointed out, there is no difference in economic terms between cases where trade in export licences is lawful and cases where it is not. Importers are in each case required to pay a certain sum in order to be able to complete the import transaction. The amount of that sum will depend on conditions obtaining on the market in question and for that reason may differ for goods of the same type, depending on the third country in question. Consequently, only the actual value of the goods (transaction value/amount invoiced), which according to the expert report produced in the main proceedings is roughly the same the world over, ought to be used as the customs value. As the Court pointed out in the *Ospig* judgment, any other solution would 'create

an unjustified disparity between importers in the Community placed in an analogous situation'. Different treatment of the goods in question according to the third country from which they were imported would be contrary to the objective of the regulation on valuation for customs purposes, which is to guarantee that the regulation is applied uniformly to imports of all goods. [5]

The grounds to which the Court attached importance in its judgment in *Ospig* therefore do not argue in favour of drawing a distinction between lawful and unlawful trade in quotas.

26. It will obviously be more difficult in some cases to provide proof of actual payment for a quota which may not be sold in the country of export in question. It may be imagined, as the national court making the reference has pointed out, that what are claimed to be quota charges may in fact represent commission or other remuneration paid to intermediaries involved in the export transaction, which must by law be included in the customs value under Article 8 of the regulation on valuation for customs purposes. As the Commission correctly pointed out, however, it is for the importer to prove that the costs in question are in fact quota charges and in cases of doubt the customs authorities will be entitled, by reference to Article 10, to require production of all documents which might be needed to resolve the issue.

27. For the sake of completeness, reference ought to be made to the Court's judgment in Case C-219/88 *Malt* [6] in view of the fact that the Finanzgericht Bremen stated in the judgment making the reference that that decision might be taken as supporting the view that the distinction between lawful and unlawful trade in quotas can be relevant.

28. In its decision in *Malt*, the Court interpreted the regulation on valuation for customs purposes as meaning that amounts paid to the vendor over and above the price of the goods in respect of expenses incurred in connection with the issue of certificates of authenticity needed to secure exemption from duties charged under a Community tariff quota for beef had to be regarded as part of the value for customs purposes. The reason given was that the certificates and the goods in question were 'inseparably connected'. The difference between the certificates of authenticity in that case and export licences was that '[export licences] are not connected with a specific contract of sale but with a specific class of goods and may be sold independently of the goods', whereas a certificate of authenticity could relate only to one specific consignment. The point made by the Court at paragraph 14 of its judgment in that case that 'contrary to what happens under the system for quotas applicable to textiles, certificates of authenticity cannot lawfully be traded separate from the goods to which they relate' refers solely to that difference between the two documents and the comment therefore does not preclude the possibility that the decision in *Ospig* may also be applicable to quota charges arising in connection with potentially unlawful trade in export licences.

5 — See the eighth recital in the preamble to Regulation No 1224/80.

6 — Case C-219/88 *Malt* v *Hauptzollamt Düsseldorf* [1990] ECR I-1481.

Conclusion

29. I would for those reasons propose that the Court reply to the question referred as follows:

Charges incurred in connection with the acquisition of the export licences referred to in this case may not be included in the calculation of the customs value of goods imported into the Community within the meaning of Council Regulation No 1224/80 on the valuation of goods for customs purposes, irrespective of whether or not export licences can be the subject of lawful trade in the relevant country of export.