general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products. It therefore constitutes internal taxation within the meaning of Article 95.

2. The second paragraph of Article 95 of the EEC Treaty precludes the charging of a consumer tax on certain imported fruit where it may protect domestic fruit production, since that provision is intended to cover all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph of Article 95, are nevertheless in competition, even partial, indirect or potential competition, with each other.

3. Article 95 of the Treaty covers all products coming from Member States, including products originating in non-member countries which are in free circulation in the Member States. Any interpretation of Article 95 which precluded it from applying to products in free circulation would lead to a result which would be contrary both to the spirit of the Treaty expressed in Articles 9 and 10 and to the system of the Treaty, under which commercial policy with regard to non-member countries falls within the exclusive competence of the Community, subject to the requisite protective measures which may be taken under the conditions laid down in Article 115.

REPORT FOR THE HEARING
delivered in Case 193/85 *

I — Facts and procedure

Between 2 August and 12 November 1982 the applicant in the main proceedings, hereinafter referred to as Co-Frutta, a cooperative engaged in the ripening of bananas, imported into Italy 1 127 490 kg of bananas originating in Colombia which were in free circulation in the Benelux countries. When the bananas were cleared through customs Co-Frutta had to pay the consumer tax on fresh bananas. That tax was introduced by Law No 986 of 9 October 1964 at an initial rate of LIT 70 per kg, which has been progressively increased so that, at the material time, it amounted to LIT 525 per kg. As a result, Co-Frutta had to pay the sum of LIT 591 932 250 by way of consumer tax in respect of the abovementioned imports of bananas.

Co-Frutta brought an action against the Amministrazione delle Finanze dello Stato (State Finance Administration) ('the defendant') before the Tribunale di Milano (District Court, Milan) seeking repayment of that amount. It argues that the tax in question is incompatible with Articles 9 and 12 of the EEC Treaty and constitutes a charge having equivalent effect to a customs duty in so far as, like a customs duty, it has the effect of altering the price of the

* Language of the Case: Italian.

imported product. In the alternative, in the event that the tax should be regarded as an internal tax, Co-Frutta argues that it is contrary to Article 95 of the Treaty. The defendant maintains that the tax in question cannot be regarded as a charge having equivalent effect to a customs duty and further maintains that the tax is not contrary to Article 95 of the Treaty.

By order of 17 January 1985, the First Civil Division of the Tribunale di Milano decided, pursuant to Article 177 of the EEC Treaty, to suspend the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'(1) Does a charge described as a State consumer tax ('imposta erariale di consumo') which is expressed to be imposed on both imported products and domestic products but in practice applies only to imported products because, as a result of environmental conditions, there is no domestic production of the product in question (in this case bananas) constitute a charge having an effect equivalent to a customs duty, prohibited by Articles 9 and 12 of the EEC Treaty?

(2) Must a charge of that kind be regarded instead as internal taxation within the meaning of Article 95 of the EEC Treaty in view of the fact that, as its name indicates, it is imposed on the consumption of the goods in question and not on the importation thereof, even if it is in fact collected when the goods are cleared through customs and is imposed only on bananas and not on any other kind of fruit?

(3) If it is to be regarded as internal taxation, is the charge in question contrary to the second paragraph of Article 95 and as such prohibited, inasmuch as its purpose is to protect other fruit, in particular all fruit grown in Italy?

(4) If the matter falls to be considered, must Article 95 be applied only to products originating in the Member States of the Community or also to products which are in free circulation?

(5) If Article 95 of the EEC Treaty is held to be inapplicable to products originating in non-member countries, is a charge which is contrary to Article 95 as regards products of the Member States also contrary to Article III of the General Agreement on Tariffs and Trade (GATT) as regards products originating in the territory of the contracting parties to the Agreement?'

The order of the Tribunale di Milano was received at the Court Registry on 21 June 1985.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Co-Frutta, represented by Wilma Viscardini Donà, of the Padua Bar; by the Italian Government, represented by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Sergio Laporta, Avvocato dello Stato; and by the Commission of the European Communities, represented by Johannes Føns Buhl, Legal Adviser, and Enrico Traversa, a member of its Legal Department, acting as Agents.

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

II — Written observations

A — *The first question*

Co-Frutta observes that in order to answer the first question it is necessary also to

consider the second since a tax will normally be classified as a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12 of the EEC Treaty because the other possibilities, and, in particular that of internal taxation within the meaning of Article 95, have been ruled out. The Court has held on numerous occasions that pecuniary charges imposed specifically upon imported products and not on domestic products constitute charges having an effect equivalent to customs duties. However, the Court has never stated that the discrimination must involve identical products; it could also relate to similar products. Moreover, the Court has stated that products coming within the same fiscal, customs or statistical classification are similar; in this context, the applicant refers to the Court's judgment of 4 April 1968 (Case 27/67 *Fink-Frucht GmbH* v *Hauptzollamt München-Landsbergerstraße* [1968] ECR 223). The Court has also held that a charge which is borne by an imported product, when there is no identical or similar domestic product, constitutes internal taxation only if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products (Joined Cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders* [1969] ECR 211; Case 78/76 *Steinike und Weinlig* [1977] ECR 595; Case 90/79 *Commission* v *France* [1981] ECR 283). It is therefore incorrect to say that in order for a charge to have an effect equivalent to a customs duty it must always and necessarily discriminate between imported products and identical domestic products. Co-Frutta points out that it is sufficient for there to be discrimination between products in a single category, citing the Court's judgment of 9 November 1983 (Case 158/82 *Commission* v *Kingdom of Denmark* [1983] ECR 3573).

In this case, Co-Frutta points out, the tax applies indiscriminately to imported bananas and to home-grown bananas. However, there is no domestic production of bananas in Italy. But that is not sufficient justification for classifying the tax at issue as a charge having an effect equivalent to a customs duty if it forms part of a general system of internal dues applied systematically in accordance with objective criteria to all the products in a given customs or tax category. Bananas fall under Chapter 8 of the Common Customs Tariff 'Edible fruit and nuts; peel of melons or citrus fruit'. Within that chapter fruit are subdivided into several tariff headings from No 08.01 to No 08.12, whilst peel of melons and citrus fruit fall within heading No 08.13. Bananas themselves fall under heading No 08.01, which covers all exotic fruit.

For the purposes of the application of VAT, the relevant Italian legislation does not distinguish between the various sorts of fruit. However, the banana is the only fruit in the whole category of 'edible fruit', including fruit falling within the relevant tariff heading, on which the consumer tax is charged. By maintaining a low rate of value-added tax on all fruit, without discrimination (which would be manifestly contrary to Article 95 of the Treaty), and by charging on bananas alone a charge described as a consumer tax, Italy achieves the dual result of not taxing its own fruit excessively, thereby encouraging their sale, and of curbing considerably the importation of bananas. It is clear from a memorandum dated 11 April 1972 from the Italian Permanent Representative that that was the aim of the tax, which was accompanied by an import quota system and systematic recourse to Article 115 of the EEC Treaty.

The tax is described as a 'consumer tax' solely in order to conceal its true nature as a charge levied on importation as such and disguised as internal taxation. The tax is levied at the time of importation irrespective of whether or not the bananas are declared for home use. Bananas have to ripen for some five to six days in special stores. If during that period they spoil and are no longer marketable, the tax is certainly not repaid. Furthermore, since there is no provision for repayment of the tax in the event of re-exportation, it also constitutes a charge having an effect equivalent to an export duty.

Co-Frutta suggests that the Court should answer the Tribunale di Milano in the following terms:

'A charge described as a consumer tax which is expressed to be imposed on both imported bananas and domestic bananas but in practice applies only to imported bananas because, as a result of environmental conditions, there is no domestic production of bananas, and is not charged systematically on all fruit whatever its origin and provenance constitutes a charge having an effect equivalent to a customs duty prohibited by Articles 9 and 12 of the EEC Treaty.'

The *Italian Government* observes that the concept of a charge having an effect equivalent to a customs duty does not cover charges which are levied in the same way within the State on similar or comparable national products, or which, at least, in the absence of such products, form part of a general system of internal taxation. In its judgment of 18 June 1975 (Case 94/74 *IGAV* v *ENCC* [1975] ECR 699) the Court made it clear, however, that a duty applying to domestic and imported products can constitute a charge having an effect equivalent to a customs duty when such duty is intended exclusively to support activities which specifically benefit the taxed domestic product.

In the Italian Government's view, it follows from those principles that the consumer tax cannot constitute a charge having an effect equivalent to a customs duty since it is levied in the same way on imported bananas and home-grown bananas, which are on the market in Italy, albeit in small quantities. Furthermore, the revenue from the consumer tax is not used for a specific purpose, since it constitutes tax revenue just like any other tax revenue and likewise helps to finance the activities of the State generally in every sector. In its view to charge the tax on bananas from non-member countries cannot be regarded as contrary to Article 12 of the Treaty, which relates to trade in products from Member States, or to the common organization of the market in fruit and vegetables since Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables (Official Journal, English Special Edition 1972 (II), p. 437) does not apply to bananas, which fall (together with other exotic fruits) within heading No 08.01 of the Common Customs Tariff (Article 1 (2) of the regulation). The Italian Government suggests that the Court should answer the first question in the following terms: a charge levied in the same way on the consumption of an imported product and of a domestically produced product does not constitute a charge having an effect equivalent to a customs duty but should be classified as internal taxation.

The *Commission* points out that the Court has consistently held that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9 and 12 of the Treaty, even if it

has no discriminatory or protective effect and the product on which the tax is charged is not in competition with a national product. The position is different only if the charge in question is the consideration for a benefit actually provided for the importer representing an amount proportionate to the said benefit or if it relates to a general system of internal dues applied systematically in accordance with the same criteria to domestic products and imported products alike. The Commission points out that the tax charged on bananas in Italy falls into the category of special 'consumer taxes' which form a group within the overall class of indirect taxes. Various products, both imported and domestic, are subject to 'consumer taxes' levied for fiscal and/or budgetary policy reasons at varying rates in the absence of harmonization in this field at the Community level. Bananas are produced in Italy but in absolutely negligible quantities and only in Sicily. The 'consumer taxes' charged in Italy in respect of the consumption of various products, both domestic and imported products, include those on the following tropical products: coffee, cocoa and bananas.

The Commission refers to the Court's judgment of 3 February 1981 (Case 90/79 *Commission* v *France* [1981] ECR 283) in which the Court stated that:

'... even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning of Article 95 of the Treaty if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.'

The Court added that even if domestic production were extremely low that would not mean that the tax in question would necessarily have to be regarded as a charge having an effect equivalent to a customs duty.

In this case, it is no easy matter to determine whether the consumer tax charged in Italy on bananas and banana products must be assessed on the basis of the provisions set out in Articles 9 and 12 of the Treaty or on the basis of Article 95 of the Treaty. On the one hand, the number of tropical products on which a 'consumer tax' is charged in Italy is fairly limited; on the other, the number of tropical products which are imported in substantial quantities and are hence representative is fairly small.

The Commission inclines to the view that the consumer tax on bananas must be assessed on the basis of the prohibition of discriminatory internal taxation set out in Article 95 of the Treaty.

B — *The second question*

Co-Frutta's observations with regard to the second question are incorporated in the summary set out above of its comments on the first question.

The *Italian Government* observes that the observations set out below with regard to the fourth question cover the second and third questions since, as it is impossible to infer from Article 95 a criterion for assessing the compatibility with Community principles of an internal tax charged on products in free circulation, there is no point in asking whether the tax in question is theoretically incompatible with the first and second paragraphs of that article.

However, in the alternative the Italian Government makes the following comments.

The first paragraph of Article 95 cannot be regarded as having been infringed on the ground that other fruit produced in Italy is not subject to the consumer tax.

It appears also to follow from the common organization of the market set up by Regulation No 1035/72, cited above, that no relationship of similarity can be discerned between bananas (which fall within a separate heading of the Common Customs Tariff) and domestic fruit.

The *Commission* considers that the Italian tax on the consumption of fresh or dried bananas constitutes *vis-à-vis* bananas from other Member States which are producers of that fruit — in practice bananas from French overseas departments — taxation which must be assessed in the light of the criteria set out in Article 95 of the EEC Treaty. In the Commission's view, that taxation infringes Article 95.

C — *The third question*

The *Italian Government* considers that its comments set out with regard to the fourth question also cover the third question, as indicated above. However, in the alternative it makes the following observations.

The second paragraph of Article 95 is designed to preclude discrimination between products which are substitutes for each other and which are hence in competition, albeit only potentially, even if objectively speaking they are different. The consumer tax charged on (domestic and imported) bananas cannot benefit only home production of table fruit (apples, pears, etc.) and not the production of such table fruit in other Member States. Consequently, the tax in question falls outside the scope of the prohibition set out in the second paragraph of Article 95 since the charging of a tax on what is in theory a primary product favours Community production generally (not just domestic production) of products which are in theory substitutes for that product.

The *Commission* points out that the tax in question is borne almost exclusively by an imported product. Neither that tax nor any other similar or comparable Italian tax is charged on varieties of fruit grown in Italy. The Commission considers that the different tax treatment of bananas, on the one hand, and other types of fruit, on the other, is contrary to Article 95 of the Treaty in view of the manifest 'similarity' between bananas and other table fruit.

The Commission refers to the Court's case-law and in particular to the judgments of 27 February 1980 [1] as regards the interpretation of 'similar products' for the purposes of the first paragraph of Article 95 of the Treaty. In so far as this case is concerned, it observes that:

(a) bananas and other fruit typically grown in Italy are all agricultural products obtained using the same methods of cultivation, in so far as they are all 'fruit' or vegetative organs resulting from the transformation of the flower following fertilization of the ovules;

(b) bananas and other table fruit have similar characteristics and meet the same needs from the point of view of consumers;

1 — Case 168/78 *Commission* v *France* [1980] ECR 347; Case 169/78 *Commission* v *Italian Republic* [1980] ECR 385; Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417; Case 171/78 *Commission* v *Kingdom of Denmark* [1980] ECR 447.

(c) while not 'absolutely identical' to apples, pears, peaches and other fruit whose production is widespresd in Italy, bananas do constitute analogous or 'similar' products which are certainly 'comparable from the point of view of their use' and indeed 'broadly comparable' to the typically Italian varieties of fruit mentioned above;

(d) even if, like Case 148/77 (judgment of 10 October 1978 *H. Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787), this case concerns a product 'which comes from outside the European climatic zone' (from regions such as, for example, certain French overseas departments), the comparison of bananas and Italian-grown fruit does not seem to give rise to the 'difficult problems regarding similar treatment' to which the Court refers in the judgment in the *Hansen* case, which also entailed a comparison being made between a product typical of the French overseas departments (rum) and analogous alcoholic beverages produced in the Community.

The Commission argues that since the tax in question is charged only on bananas, that is to say on a product which is exclusively imported, it constitutes discrimination contrary to the first paragraph of Article 95 of the Treaty.

D — *The fourth question*

The *Italian Government* maintains that the fourth question should be answered in the following terms: Article 95 applies solely to products originating in Member States of the Community and does not apply to products in free circulation. Article 9 (2) of the Treaty specifies which provisions of Title I (of Part 2 of the Treaty) apply not only to products originating in Member States but also to products from third countries which are in free circulation. But there is no comparable provision of the Treaty to justify extending Article 95 and the other provisions on Community policy contained in Part 3 of the Treaty to cover products which are in free circulation.

Moreover, the Italian Government points out that Article 95 relates to 'domestic products' and to 'products of Member States' and hence to products 'originating' in one of the Member States (given that the Treaty defines a product which comes from one of the Member States but originates in a non-member country as a product in free circulation).

Article 95 is one of the measures designed to ensure that 'competition in the common market is not distorted' (pursuant to Article 3 (f) of the Treaty) as is evidenced, from the point of view of the overall system of the Treaty, by the similarity between Articles 95 to 99 of the Treaty and the rules on competition.

Reference has been made in the Court's case-law to the complementary relationship which exists between the provisions of Article 95 and those of Article 12 on the elimination of customs barriers between the Member States. There is nothing in the Treaty to suggest that it is possible to extend the principle of national treatment to cover products which are in free circulation. Protection of Community products against competition from similar products originating in non-member countries is afforded, on the one hand, by the Common Customs Tariff and, on the other, by bilateral or multilateral agreements concluded by the Community.

In the *Commission's* view, the Treaty does not lay down, as regards trade with non-member countries, any rule on internal

taxation similar to that of Article 95, which is applicable only to products originating in the Member States. Subject to provisions of any agreements in force between the Community and the country of origin of the particular product, Article 95 does not apply to products originating in a non-member country even if the products were in free circulation in a Member State of the Community before being re-exported to another Member State.

E — *The fifth question*

The *Italian Government* refers to the Court's statements to the effect that the provisions of GATT are not capable of conferring on individuals rights which may be relied on in the courts. It points out that some countries (in this case, Colombia) have acceded to GATT by signing a provisional protocol only and can therefore not be included among the contracting parties to which Article III of GATT refers.

The function and scope of Article 95 of the Treaty and Article III of GATT are not co-extensive in view of the different context in which the provisions are intended to apply, in so far as GATT is not a customs union. It is important to stress that Article III (2) of GATT concerns the taxation of 'like products' alone (that is to say, of products similar to domestic products) and contains no provision similar to the second paragraph of Article 95 of the Treaty which can be related to products which are objectively different but which are nevertheless in competition.

The Italian Government states that Article III (2) of GATT reflects a concern to avoid a situation in which, despite formal compliance with the object of general equal treatment of domestic products and like imported products for tax purposes, the latter ultimately suffer discrimination as a result of the way in which internal taxes are actually implemented. However, it relates to 'like' (domestic and imported) products which are in direct competition with each other as is stressed by Article III (2), whose scope and meaning, which differ considerably from those of Article 95 of the Treaty, are clarified by 'explanatory notes' set out in Annex I to GATT. The explanatory notes make it clear that, as far as Article III (2) is concerned, a tax conforming to the requirements of the first sentence of that provision would be considered to be inconsistent with the provisions of the second sentence of that provision only in cases where competition was involved between, on the one hand, the taxed product and, on the other, a directly competitive or substitutable product which was not similarly taxed. The Italian Government suggests that the Court should answer the fifth question in the following terms: internal taxation contrary to the provisions of Article 95 of the Treaty may, nevertheless, be consistent with Article III of GATT as regards products which are not in direct competition with one another.

The *Commission* points out that the Court has consistently held that certain provisions of GATT, and in particular Article III relating to non-discriminatory treatment in the field of internal taxes on products originating in a contracting party to GATT, are not directly applicable. The Court reached that conclusion on the basis of considerations relating to the scheme of GATT and the fact that GATT was based on negotiations undertaken on a reciprocal and mutually advantageous basis and was characterized by the great flexibility of its provisions.

Co-Frutta has not submitted any comments with regard to the third, fourth and fifth questions.

III — Answer to the question put by the Court

At the sitting on 17 June 1986 the Court asked the Italian Government to provide exact figures for the charging of the contested consumer tax on bananas grown in Italy.

The Italian Government answered by letter dated 25 July 1986, which was received at the Court Registry on 31 July 1986.

The Italian Government produced a document showing that from 1982 to 1985 Italy produced some 110 to 120 tonnes per annum.

The Italian Government pointed out that the yield of the contested tax could be readily calculated on the basis of its rate, as laid down in Article 3 of Decree-Law No 688 of 30 September 1982.

T. F. O'Higgins
Judge-Rapporteur