law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable thereto, the fact nevertheless remains that those conditions may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law.

3. Community law does not prevent a national legal system from disallowing the repayment of charges which have been unduly levied where to do so would entail unjust enrichment of the recipients. There is nothing in Community law therefore to prevent courts from taking account, under their national law, of the fact that the unduly levied charges have been incorporated in the price of the goods and thus passed on to the purchasers. Thus national legislative provisions which prevent the reimbursement of taxes, charges and duties levied in breach of Community law cannot, in principle, be regarded as contrary to Community law where it is established that the person required to pay such charges has actually passed them on to other persons.

4. 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, even if repayment of a substantial number of, or even all, the national taxes, charges and duties levied in breach of Community law is subject to the same restrictive conditions.

That is so particularly in the case of presumptions or rules of evidence intended to place upon 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. Once it is established that the levying of the charge is incompatible with Community law, the national court must be free to decide whether or not the burden of the charge has been passed on, wholly or in part, to other persons.

In Case 199/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the President of the Tribunale, Trento (Italy), for a preliminary ruling in the proceedings pending before that court between

AMMINISTRAZIONE DELLE FINANZE DELLO STATO [State Finance Administration]

and

SPA SAN GIORGIO, a dairy in Locate Triulzi, whose registered office is in Milan,

on the principles of the EEC Treaty relating to the repayment of national charges levied in breach of Community law and on the interpretation of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, having regard to national legislation laying down certain conditions for the recovery of health inspections charges unduly levied.

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, O. Due and U. Everling, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Article 32 of Royal Decree No 1625 of 27 July 1934, according approval to the consolidated version of the health laws

(supplement to the Gazzetta Ufficiale [Italian Official Gazette] No 186 of 9 August 1934), instituted in Italy health inspections for imported animals, meat and animal products and residues and for exported cattle.

A fixed charge, payable by exporters or importers and calculated in accordance with a scale annexed to the consolidated version, is made for such health inspections carried out at the frontier.

The scale of health inspection charges has been amended and supplemented on several occasions, in particular by Law No 1239 of 30 December 1970 (Gazzetta Ufficiale No 26 of 1 February 1970).

The sole provision of Law No 1239 and the scale of health inspection charges were declared unconstitutional by Order No 163 of the Corte Costituzionale [Constitutional Court] of 19 December 1977 (Gazzetta Ufficiale No 4 of 4 January 1978), inasmuch as they provided for the collection of health inspection charges on products covered by Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) and Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187).

On the basis of that order, on 19 May 1982, SpA San Giorgio, a dairy in Locate Triulzi, with its registered office in Milan, brought an action before the Tribunale di Trento for the recovery of sums which it had been obliged to pay, from 1974 to 1977, as health inspection charges on the importation of dairy products from Member States of the EEC.

On 4 June 1982, the President of the Tribunale di Trento made an order against the State Finance Administration for the repayment of LIT 65 160 585 to SpA San Giorgio; he authorized the provisional enforcement of the order.

The State Finance Administration appealed against the order of the President of the Tribunale di Trento and, on 16 July 1982, lodged an application for the suspension of the provisional enforcement of that order. In support of that application, it relied on Article 10 of Decree-Law No 430 of 10 July 1982 laying down provisions relating to manufacturing taxes, the movement of petroleum products, direct taxes, value-added tax and related charges (Gazzetta Ufficiale No 190 of 13 July 1982).

Under that provision:

"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 not entitled to the repayment of the sums paid when the charge in question has been passed on in any way whatsoever to other persons, except in cases of substantive error.

The charge is presumed to have been passed on whenever the goods in respect of which the payment was effected have been transferred, even after processing, transformation, erection, assembly or adaptation, in the absence of documentary proof to the contrary.

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."

By order of 23 July 1982, the Presidente Istruttore [judge presiding over the preparatory inquiry] of the Tribunale di Trento, stayed the proceedings, pursuant to Article 177 of the EEC Treaty, pending a preliminary ruling of the Court of Justice on the following questions:

"1. Would the Court, in order to clarify and, if appropriate supplement its previous decisions, in particular its judgment of 27 March 1980 in Case 61/79 *(Amministrazione delle Finanze dello Stato* v *Denkavit* [1980] ECR 1205) and its judgments of 10 July 1980 in Case 811/79 *(Amministrazione delle Finanze dello Stato* v *Ariete* [1980] ECR 2545) and in Case 826/79 *(Amministrazione delle Finanze dello Stato* v *MIRECO* [1980] ECR 2559), explain:

(a) Whether a national law which, by way of exception to the general provisions concerning the recovery of undue payments, provides that certain charges (including, in particular, health and inspection charges) unduly levied contrary to certain provisions of Community law, inasmuch as they are charges having an effect equivalent to customs duties, may be repaid only if it is proved that the charges have not been passed on to other persons, but does not subject the repayment of any other tax, charge or duty wrongly levied to the same condition, is to be regarded as discriminatory, contrary to the principles of Community law; and whether it is significant that the charges covered by the above-mentioned provision have been wrongly levied solely inasmuch as their collection conflicts with a rule of Community law;

(b) Whether the requirement of negative documentary proof, the sole condition to which the aforesaid national law subjects the repayment of charges unduly levied, renders 'the exercise of rights which national courts are under a duty to protect virtually impossible'.

2. Would the Court state whether, as from 1 July 1980, the date of the entry into force of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, which, according to the terms of Article 1 (2), applies to customs duties and *charges having equivalent effect,* a Community system was introduced for the first time governing the repayment of charges unduly levied, without however providing for any exception where the charges are passed on to other persons; and whether that system takes precedence over any previous or subsequent national law."

The order of the President of the Tribunale di Trento was registered at the Court of Justice on 5 August 1982.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 6 October 1982 by the Commission of the European Communities, represented by Sergio Fabro, a member of its Legal Department, on 8 October 1982 by SpA San Giorgio, represented by Nicola Catalano of the Rome Bar, and on 29 October 1982 by the Government of the Italian Republic

represented by Arnaldo Squillante, Head of the Department for Contentious Diplomatic Affairs, Treaties and Legislative Matters, assisted by Sergio Laporta, Avvocato dello Stato.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without a preparatory inquiry. However, it requested the Italian Government and the Commission to submit written replies to certain questions; their replies were submitted within the prescribed period.

Decree-Law No 430, which was applicable when the President of the Tribunale di Trento decided to refer the case to the Court of Justice for a preliminary ruling, did not become law, because, at its sitting on 4 August 1982, the Chamber of Deputies found that the conditions of necessity and urgency which must first be established for the adoption of decree-laws under Article 77 (2) of the Italian Constitution were not satisfied.

The provisions of Decree-Law No 430 were inserted, in the form of amendments tabled by the government, in Article 1 of a bill to convert into a law Decree-Law No 486 of 31 July 1982 introducing urgent revenue measures; however, that bill was never passed because the debate in the Chamber of Deputies could not be concluded before the expiry of the period set aside for that purpose.

Provisions which were almost identical to those of Article 10 of Decree-Law No 430 were reproduced in Article 19 of Decree-Law No 688 of 30 September 1982, introducing urgent revenue measures (Gazzetta Ufficiale No 270 of 30 September 1982). According to that provison:

"Any 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 repayment of the sums paid if he provides documentary proof that the charge in question has not been passed on in any way whatsoever to other persons, except in cases of substantive error.

The documentary proof referred to in the preceding paragraph must also be provided when the goods in respect of which the payment was effected have been transferred after processing, transformation, erection, assembly or adaptation.

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 relating to that tax."

Decree-Law No 688 was converted into a law by Law No 873 of 27 November 1982 (Gazzetta Ufficiale No 328 of 29 November 1982).

II — Written observations submitted to the Court

SpA San Giorgio considers that the questions referred to the Court retain their significance despite the fact that Decree-Law No 430 is no longer in force as a result of the failure to convert it into a law. In proceedings under

Article 177 of the Treaty the Court may not rule on the compatibility of national provisions with the Community system but must confine itself to interpreting the rules and principles of that system. Thus it is left to the national courts to decide whether the national provision at issue is compatible with the principles and provisions of Community law as interpreted by the Court. Moreover, Decree-Law No 688 introduced purely procedural amendments to the rule adopted in Decree-Law No 430, so that the questions submitted to the Court remain relevant in connection with the new text.

The first question

(a) Previous decisions of the Court establish that a provision of national law which, in connection with the repayment of charges unduly levied, takes into account the fact that such charges could have been passed on is not, in itself, incompatible with the Community system. However, its requirements may not be less favourable than those relating to national actions of a similar nature and must not render it impossible in practice for natural and legal persons to exercise the rights conferred on them by Community law.

(b) As regards the dispute in the main proceedings, it would be sufficient for the Court to confirm those decisions and to state that the treatment reserved for certain charges, to the exclusion of others, is discriminatory and therefore incompatible with Community law, and further that the requirement of purely negative documentary proof renders the protection guaranteed by the Community system entirely illusory.

The mere fact that the burden of proof has been reversed could be regarded as incompatible with that protection.

It is clearly discriminatory that the prohibition on the repayment of certain duties which have been unduly levied, in practice, prevents only the repayment of duties which are held to have been unduly levied on the ground that they are contrary to Community law. Moreover, the object of the prohibition is to prevent the normal consequences of the declaratory judgments whereby the Court interpreted the pre-existing Community rules and thus revealed the incompatibility with Community law, and consequent illegality, of the duties provided for by the national provision.

The second question

(a) It is first necessary to ascertain whether the main action may and must be decided, not in accordance with the provisions of national law, but on the basis of the new Community rules contained in Regulation No 1430/79.

According to the Italian rules on the applicability of new laws, a new law may apply to a legal relationship which is already in existence, provided that the effects of the relationship have not yet been exhausted and that the provision in question is intended to govern not the event which gave rise to the legal relationship but the effects thereof.

In this case, the fact already governed by the earlier legislation is the unlawful collection of health inspection charges in breach of the principles of Community law. The position is different as regards the recovery of the undue payment. The claim had been submitted and would be adjudicated on after the entry into force of Regulation No 1430/79 on 1 July 1980. Therefore, in order to decide the question of the recovery of charges wrongly levied and to order the repayment thereof, the uniform Community rules should be applied.

In accordance with the principle of the supremacy of Community provisions over national provisions, the implementation of the provisions of Regulation No 1430/79 implies that the provisions of the national system, or at least those which are incompatible with the Community provisions, are no longer applicable.

(b) The second question submitted by the Tribunale di Trento also leads to consideration of the question whether under Regulation No 1430/79 it is permissible to make the repayment of charges unduly levied conditional on the fact that the charge has not been passed on by the person concerned, the plaintiff in the action for the recovery of the charges.

In that respect, it should be noted that no provision of Regulation No 1430/79 refers to the possibility of passing on the charge or, still less, the possibility of taking into consideration the passing on of the charge for the purposes of an action for the recovery of undue payments. In any case, a provision to that effect could not legitimize discrimination in relation to other charges, nor render purely illusory the protection which is guaranteed to all parties by the Community rule infringed by the unlawful collection.

According to Article 1 (1) thereof, the regulation "lays down the conditions under which the competent authorities shall repay or remit import and export duties". Conditions for repayment may not therefore be imposed unless they are expressly provided for in the regulation.

Article 2 (1) stipulates that duties shall be repaid or remitted when "the amount of such duties entered in the accounts ... relates to goods in respect of which a customs debt has ... not arisen ...". Clearly a provision imposing a payment which is incompatible with a Community rule may not give rise to such a debt; the undue payment therefore creates a right to repayment.

Article 3 provides that duties may be repaid or remitted when they are levied in particular circumstances, and when there is no suggestion that the interested party has been negligent or has acted in bad faith. If the imposition of a charge contrary to Community law could give rise to a customs debt, the repayment of sums unduly levied in that way should have been provided for in that provision of the regulation.

Article 15 expressly provides that import or export duties shall be repaid "only to the person who paid or is liable to pay those duties, or to the persons who have

succeeded him in his rights and obligations". That restriction does not permit the passing-on to be taken into account for the purposes of the repayment of duties unduly levied. If the right to repayment were refused to a person who, having paid a duty which was unduly levied, was able to pass on the charge to another trader, that right could not be refused to the latter, who, having borne the charge, should be able to obtain repayment. Article 15 of the regulation corresponds entirely to the Italian system which was in force until 13 July 1982, according to which the person who pays sums unduly levied is always entitled to recover them, even if it is established that he has passed the charge on to another person, subject to the latter's right to seek reimbursement from the first person, within the limits of the repayment obtained by that person and after the repayment has been effected.

The assumption that a Community provision overrides any national provision, even when the latter is more recent, implies that Regulation No 1430/79 entirely replaced the provisions of all the systems of Member States relating to actions for the recovery of import or export duties unduly levied, in particular if the unlawfulness of the duty resulted from its incompatibility with a Community principle.

In any event, the coexistence of national provisions with Community provisions may be permitted only on condition that there is not the slightest incompatibility between them; in this case the provisions concerned are clearly incompatible.

Indeed the prohibition of charges having equivalent effect would be useless if it were not acknowledged that the victims of a breach of the Community principles are entitled to claim recovery from their national authorities.

The fundamental principle of the customs union, on which the entire structure of the Community rests, would be jeopardized if Member States were permitted not to refund sums unduly levied by them as charges having an effect equivalent to customs duties in intra-Community trade. The Court's ability to control effectively breaches which Member States may commit would also be affected since the vigilance of private individuals, concerned to safeguard their rights, creates an effective means of control, which supplements that which is entrusted to the diligence of the Commission and the Member States under Articles 169 and 170.

The *Government of the Italian Republic* questions the admissibility of the reference for a preliminary ruling.

Under Article 177 of the Treaty, the Court has jurisdiction to give a preliminary ruling only where the national court is to adopt a measure which is in the nature of a "decision". When the decision to be taken in the main proceedings is not likely to affect the outcome of the case, a preliminary ruling on the question of Community law is clearly no longer relevant. A reference for a preliminary ruling may not be made

when, as in this case, it appears from the reference itself that it cannot influence the judgment in the main proceedings. In this case the Presidente Istruttore is not required to deliver a judgment, since to do so falls within the jurisdiction of the assembled members of the Tribunale. His task is to adopt a measure which cannot be said to be in the nature of a decision and which is in no way definitive.

Under the terms of Article 177 a reference for a preliminary ruling must be made by the court which has jurisdiction to give judgment in the case in question — in this case the Tribunale. The Court must therefore take note of the fact that the rules for making a reference have clearly not been observed.

Substance

(a) The provision to which the first question of the Tribunale di Trento refers (Article 10 of Decree-Law No 430 is almost entirely reproduced by Article 19 of Decree-Law No 688) is no different from the text of Article 4 (IV) of the French Law of Finance for 1981 and derives from a principle which exists in other Member States, in particular Denmark, which make the repayment of sums unduly levied conditional on the existence of loss sustained by the person who paid those sums, in order to prevent his unjustified enrichment as a result of an action for repayment not subject to any restrictions.

(b) Regulation No 1430/79, which came into force on 1 July 1980, includes no provision intended to govern situations existing in the past, in particular the recovery of customs duties entered in the accounts and levied before the date of its entry into force. As the main proceedings are concerned with charges having equivalent effect which were levied between 1974 and 1977, it should be noted that no Community provision is applicable. The right to the recovery of the charges is therefore governed solely by Italian national law.

(c) In the Italian legal system, the general provisions concerning recovery of undue payments are the subject of Article 2033 of the Civil Code. Article 19 of Decree-Law No 688 constitutes an exception to the general rule which is derived from the interpretation given to Article 2033 by the courts.

It does not however follow that the special rule is incompatible with the Community legal system. That system contains no principle which prevents national systems from taking into consideration the passing-on of customs charges as a ground for refusing to repay a person who has paid the charge unduly.

(d) As regards the recovery of charges having equivalent effect levied contrary to Article 13 of the Treaty, the decisions of the Court have established the following principles:

In the absence of Community provisions, it is for the national legal system of each Member State to lay down rules for the recovery of national charges which are levied unduly by reason of their incompatibility with Community law;

To that end, national legislation may lay down certain conditions, provided that they are not less favourable than those envisaged for similar cases and that they do not render it impossible, in practice, to exercise the rights guaranteed to individuals by the Community legal system;

Nothing in Community law prevents the conclusion that a restriction may be imposed on claims for repayment in so far as the charges unduly levied have been incorporated in the prices of the undertaking which was liable for the charge and so passed on to the purchasers.

The principle of non-discrimination laid down by the Court does not mean that a national provision which establishes a special rule for specific sectors and which constitutes an exception to the ordinary rule is incompatible with Community law. On the other hand, a national provision which, in the same sector, lays down different rules for the right to recovery, according to whether the payment effected is held not to have been due on the basis of national laws or on the basis of Community provisions, is clearly incompatible with Community law. The national rule which governs the recovery of customs charges should provide for identical conditions in the case where the payment is held not to have been due on the basis of national rules and in the case where it is held not to have been due on the basis of Community provisions.

Article 19 of Decree-Law No 688 establishes identical provisions for the recovery of customs duties, manufacturing taxes, taxes on consumption and State taxes. It is of uniform effect and it makes no distinction as regards the conditions required for the repayment of national charges unduly levied according to whether they infringe national rules or Community rules.

As the case is concerned with the conditions to which recovery is subject, it should be noted that, by requiring documentary proof that the fiscal charge has not been passed on to other persons, the disputed provision in no way affects the exercise of the right, conferred on individuals by Community law, not to be required to pay charges having an effect equivalent to customs duties.

That rule corresponds to other provisions of the national legal system, in particular, that which lays down a 10-year period of limitation for the right to the recovery of undue payments and those which establish the obligation to conserve during the same period the records and accounts of the undertaking. There is therefore no insurmountable difficulty in producing the documents required by Article 19 of Decree-Law No 688.

(e) In any case the system instituted by Regulation No 1430/79 concerns cases of undue payment arising from errors of calculation, and therefore from possibilities which are not covered in Italy by Article 19 of Decree-Law No 688.

The *Commission's* observations may be summarized as follows:

The first question

(a) With regard to Italian customs legislation, it should be observed that the expression "import duties" refers to all the duties which the customs authority is under an obligation to levy, pursuant to the legislation in force at the time when the goods are imported, and therefore

not only customs duties provided for by the common customs tariff but also agricultural levies and other import duties provided for by Community provisions, charges having equivalent effect, excise duty, monopoly duty, taxes on consumption, State taxes and any other pecuniary charge levied at the frontier on importation.

The previous decisions of the Court show that different conditions and rules may coexist for direct or indirect taxes and even, as regards indirect taxes, for taxes on consumption in the full sense of the expression, and other forms of indirect tax. Article 10 of Decree-Law No 430 established identical conditions for the repayment of all charges on goods which are payable at the stage of consumption.

The rules relating to actions which may be brought under the disputed provisions for the recovery of charges having an effect equivalent to customs duties are not therefore less favourable than those relating to actions for the recovery of other national taxes.

(b) It cannot be said that the requirement of documentary proof that the goods in respect of which the charge was levied have not been transferred is so difficult to satisfy that the repayment of national charges having equivalent effect is thereby rendered impossible in practice, whereas the repayment of internal charges of the same type, being subject to different conditions, is possible. It does not seem discriminatory to require a certain type of formal proof (documentary proof) in the case of the repayment of certain types of charges, while that same proof is not required in the case of the repayment of other types of charges. The obligation to furnish documentary proof that the goods in respect of which the charge was paid have not been transferred, does not seem, in practice, extremely difficult to fulfil. It is sufficient to establish that the goods are still at the disposal of the importer in a warehouse or store. Moreover, the presumption, as regards taxes on consumption on certain goods, that the charge is passed on to other traders when the goods are transferred merley reflects a normal commercial practice.

(c) The retroactive nature of the provision in question in the main proceedings would seem more questionable.

Certainly the fact of attributing retroactive effect to a law is in itself legal. Nevertheless it is always in the nature of an exception since the law, in principle, provides only for the future. In practice, the legislature must be faced with a situation in which the only possible solution is to enact a law having retroactive effect. In this case, it is difficult to understand the factors which might have led the Italian Government to adopt that type of law.

It would seem difficult to reconcile the principle of legal certainty with that of the retroactive effect of a law which compels traders who concluded transactions at a time when certain legal rules were not in existence to comply with certain requirements relating to proof in order to recover undue charges paid at a time when no such requirement of proof existed. As regards an action for the recovery of undue payments, the

Civil Code never required the existence of negative documentary proof as a condition for being able to bring such an action.

The cumulative effect of the requirement relating to proof, which is not discriminatory in itself, and the consequences which the retroactive effect of the law entails, in particular as regards relationships which after a lapse of several years are extinguished or in any case have been terminated, clearly places a certain category of traders in an extremely difficult situation, inasmuch as it is difficult for them to meet the new requirements imposed by the legislature. From that point of view, the national rule goes beyond the requirements recognized by the Court for the recovery of sums unduly levied as charges having equivalent effect.

The second question

Regulation No 1430/79 applies to duties entered in accounts by the competent authority after 1 July 1980. The duties in question in the main action were charged at an earlier date.

In any event, national duties which are held to constitute charges having equivalent effect would not fall within the scope of Regulation No 1430/79, even after its entry into force. That regulation concerned import and export duties as defined in Article 1, that is to say solely Community duties, charges and levies. It does not apply to the repayment of national charges, nor to cases in which national charges have been declared incompatible with Community law.

The replies to be given to the questions submitted

The questions submitted by the Tribunale di Trento should be answered as follows:

1. (a) A national law which, by way of exception to the general provisions concerning the recovery of undue payments, provides that certain charges, including in particular health inspection charges, unduly levied contrary to certain provisions of Community law inasmuch as they are charges having equivalent effect, may be repaid only if it is proved that the charges have not been passed on to other persons, but which does not subject the repayment of any other tax, charge or duty wrongly levied, to the same condition, does not seem, as such, to be contrary to the principles of the Community legal systems as they have been interpreted by the Court of Justice.

   (b) The requirement of documentary proof, the sole condition to which the aforesaid national law subjects the repayment of charges unduly levied, may render the exercise of rights which national courts are under a duty to protect virtually impossible or extremely difficult when in addition to the burden of that proof a law is introduced which has retroactive effect.

2. Council Regulation (EEC) No 1430/79 of 2 July 1979 does not apply to the repayment of charges having equivalent effect applied to

intra-Community trade and instituted by a Member State in breach of Community law.

III — Oral procedure

At the sitting on 21 June 1981 oral argument was presented, and replies were given to questions put by the Court, by SpA San Giorgio, represented by Mr Catalano, the Government of the Italian Republic, represented by Mr Laporta, and the Commission, represented by Giancarlo Olmi, Deputy Director General of its Legal Department.

In the main they expanded upon their written observations. However, with regard to the first question submitted for a preliminary ruling, the *Commission* supplemented and amended its written observations on two points.

According to previous decisions of the Court, the principle of non-discrimination between imported products and domestic products must be respected with regard to the repayment of charges levied unduly; identical treatment must therefore be applied with respect to all, or at least the majority of, indirect taxes. In that connection the fact that Article 10 of Decree-Law No 430 concerns a group of taxes comprising predominantly import duties and charges gives rise to serious objections.

Moreover, it would appear that the provisions of the disputed legislation relating to proof may confer upon the administration the right to require from an importer who seeks repayment of a charge which was not payable, and which he claims not to have passed on, proof that the sale price was not higher than that which would have been asked in the absence of any charge or that there was not in reality a twofold operation: an increase in respect of the charge and a reduction, freely agreed to by the trader, intended to promote sales. Negative proof of that kind would be "fiendishly difficult" to provide and the result of requiring it would be to negate the trader's right to obtain repayment of the unduly levied charge.

The Advocate General delivered his opinion at the sitting on 27 September 1983.

Decision

1 By an order dated 23 July 1982, which was received at the Court on 5 August 1982, the Tribunale Civile e Penale [Civil and Criminal District Court], Trento, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty certain questions concerning, first, the determination of the principles of the EEC Treaty relating to the repayment of charges levied contrary to Community law and, secondly, the interpretation of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (Official Journal 1979, L 175, p. 1).

2 It appears that between 1974 and 1977 SpA San Giorgio, the plaintiff in the main proceedings, was required to pay health inspection charges which were levied contrary to Community law on the importation of dairy products from Member States of the EEC.

3 SpA San Giorgio brought an action before the Tribunale di Trento reclaiming the amounts in question. After summary proceedings the President of that court directed that the State Finance Administration should repay SpA San Giorgio LIT 65 160 585 and authorized provisional enforcement of that order.

4 The State Finance Administration appealed against the order and applied for suspension of the enforcement thereof. In support of its application it relied on Article 10 of Decree-Law No 430 of 10 July 1982 laying down provisions relating to manufacturing taxes, the movement of petroleum products, direct taxes, value-added tax and related charges (Gazzetta Ufficiale No 190 of 13 July 1982), which provides as follows:

"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 not entitled to the repayment of the sums paid when the charge in question has been passed on in any way whatsoever to other persons, except in cases of substantive error.

The charge is presumed to have been passed on whenever the goods in respect of which the payment was effected have been transferred, even after processing, transformation, erection, assembly or adaptation, in the absence of documentary proof to the contrary."

5 SpA San Giorgio questioned the compatibility of those provisions with the principles of Community law and, in view of the "serious nature" of the observations made and their importance for the decision on whether to suspend enforcement of the order, the President of the Tribunale di Trento requested the Court to answer the following questions:

"1. Would the Court, in order to clarify and, if appropriate supplement its previous decisions, in particular its judgment of 27 March 1980 in Case

61/79 (*Amministrazione delle Finanze dello Stato* v *Denkavit* [1980] ECR 1205) and its judgments of 10 July 1980 in Case 811/79 (*Amministrazione delle Finanze dello Stato* v *Ariete* [1980] ECR 2545) and in Case 826/79 (*Amministrazione delle Finanze dello Stato* v *MIRECO* [1980] ECR 2559), explain:

(a) Whether a national law which, by way of exception to the general provisions concerning the recovery of undue payments, provides that certain charges (including, in particular, health inspection charges) unduly levied contrary to certain provisions of Community law, inasmuch as they are charges having an effect equivalent to customs duties, may be repaid only if it is proved that the charges have not been passed on to other persons, but does not subject the repayment of any other tax, charge or duty wrongly levied to the same condition, is to be regarded as discriminatory, contrary to the principles of Community law; and whether it is significant that the charges covered by the above-mentioned provision have been wrongly levied solely inasmuch as their collection conflicts with a rule of Community law;

(b) Whether the requirement of negative documentary proof, the sole condition to which the aforesaid national law subjects the repayment of charges unduly levied, renders 'the exercise of rights which national courts are under a duty to protect virtually impossible'.

2. Would the Court state whether, as from 1 July 1980, the date of the entry into force of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, which, according to the terms of Article 1 (2), applies to customs duties and *charges having equivalent effect*, a Community system was introduced for the first time governing the repayment of charges unduly levied, without however providing for any exception where the charges are passed on to other persons; and whether that system takes precedence over any previous or subsequent national law."

6 It should be noted that Decree-Law No 430, which was applicable when the President of the Tribunale di Trento decided to refer the case to the Court of Justice, was not converted into a law but that provisions substantially identical to those of Article 10 thereof were subsequently reproduced in Article 19 of Decree-Law No 688 of 30 September 1982 introducing urgent revenue measures, which was converted into a law by Law No 873 of 27 November 1982 (Gazzetta Ufficiale No 270 of 30 September 1982 and No 328 of 29 November 1982). That provision is worded as follows:

"Any 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 repayment of the sums paid if he provides documentary proof that the charge in question was not passed on in any way whatsoever to other persons, except in cases of substantive error.

The documentary proof referred to in the preceding paragraph must also be provided when the goods in respect of which the payment was effected have been transferred after processing, transformation, erection, assembly or adaptation."

Admissibility

7 The Italian Government contests the admissibility of the questions submitted to the Court by the President of the Tribunale di Trento during the preliminary phase of the procedure. It submits that a request for a preliminary ruling is not admissible in summary proceedings for the recovery of a debt, since the judgment to be given, within the meaning of the second paragraph of Article 177, falls within the jurisdiction not of the President, but of the full court.

8 On this point the Court need only refer to the previous cases in which it has consistently held that every court or tribunal of a Member State is entitled to request a preliminary ruling under Article 177, regardless moreover of the stage reached in the proceedings pending before it and regardless of the nature of the decision which it is called upon to give. (See in particular: Case 43/71, *Politi* v *Ministry for Finance,* [1971] ECR 1039; Case 162/73, *Birra Dreher* v *Amministrazione delle Finanze dello Stato,* [1974] ECR 201; and Case 70/77, *Simmenthal* v *Amministrazione delle Finanze dello Stato,* [1978] ECR 1453).

9 It follows that both the summary order made by the President of the Tribunale di Trento and any decision to suspend enforcement of that order following the appeal lodged by the State Finance Administration fall within the scope of the second paragraph of Article 177 of the Treaty.

10 The preliminary objection raised by the Italian Government is therefore without foundation.

The first question

11 In essence the first question asks whether a Member State may make repayment of national charges levied contrary to the requirements of Community law conditional upon proof that those charges have not been passed on to other persons:

where repayment is subject to rules of evidence which render the exercise of rights which the national courts are under a duty to protect virtually impossible; and

where the same restrictive conditions do not apply to the repayment of any other national tax, charge or duty wrongly levied.

12 In that connection it must be pointed out in the first place that entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable thereto, the fact nevertheless remains, as the Court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law. (See the following judgments of the Court: Case 33/76, *REWE* v *Landwirtschaftskammer für das Saarland*, [1976] ECR 1989; Case 45/76, *Comet* v *Produktschap voor Siergewassen*, [1976] ECR 2043; Case 68/79, *Just* v *Ministry for Fiscal Affairs*, [1980] ECR 501; Case 61/79, *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana*, [1980] ECR 1205; Case 811/79, *Amministrazione delle Finanze dello Stato* v *Ariete*, [1980] ECR 2545, and Case 826/79, *Amministrazione delle Finanze dello Stato* v *MIRECO*, [1980] ECR 2559, the last three of which were cited by the national court).

13 However, as the Court has also recognized in previous decisions, and in particular in the aforesaid judgment in *Just* v *Ministry for Fiscal Affairs*, Community law does not prevent a national legal system from disallowing the repayment of charges which have been unduly levied where to do so would entail unjust enrichment of the recipients. There is nothing in

Community law therefore to prevent courts from taking account, under their national law, of the fact that the unduly levied charges have been incorporated in the price of the goods and thus passed on to the purchasers. Thus national legislative provisions which prevent the reimbursement of taxes, charges, and duties levied in breach of Community law cannot be regarded as contrary to Community law where it is established that the person required to pay such charges has actually passed them on to other persons.

14 On the other hand, 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. That is so particularly in the case of presumptions or rules of evidence intended to place upon 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. Once it is established that the levying of the charge is incompatible with Community law, the court must be free to decide whether or not the burden of the charge has been passed on, wholly or in part, to other persons.

15 In a market economy based on freedom of competition, the question whether, and if so to what extent, a fiscal charge imposed on an importer has actually been passed on in subsequent transactions involves a degree of uncertainty for which the person obliged to pay a charge contrary to Community law cannot be systematically held responsible.

16 The national court also asks the Court of Justice whether rules restricting the repayment of charges levied contrary to Community law are compatible with the principles of the EEC Treaty when they are not applied identically to every national tax, charge or duty. In that regard it refers to the judgments in which, after stating that the extent to which it is possible to contest charges unlawfully claimed or to recover charges unduly paid differs in the various Member States, and even within a single Member State, according to the type of tax or charge in question (see in particular the judgment in

Amministrazione delle Finanze dello Stato v *Denkavit Italiana),* the Court emphasized that individuals who seek to enforce rights by virtue of provisions of Community law may not be treated less favourably than persons who pursue similar claims on the basis of domestic law.

17 It must be pointed out in that regard that the requirement of non-discrimination laid down by the Court cannot be construed as justifying legislative measures intended to render any repayment of charges levied contrary to Community law virtually impossible, even if the same treatment is extended to taxpayers who have similar claims arising from an infringement of national tax law. The fact that rules of evidence which have been found to be incompatible with the rules of Community law are extended, by law, to a substantial number of national taxes, charges and duties or even to all of them is not therefore a reason for withholding the repayment of charges levied contrary to Community law.

18 The reply to the first question must therefore be that a Member State cannot make the repayment of national charges levied contrary to the requirements of Community law conditional upon the production of proof that those charges have not been passed on to other persons if the repayment is subject to rules of evidence which render the exercise of that right virtually impossible, even where the repayment of other taxes, charges or duties levied in breach of national law is subject to the same restrictive conditions.

The second question

19 The second question asks whether a solution to the problem set out in the first question can be derived from Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (Official Journal 1979, L 175, p. 1).

20 The attention of the national court should be drawn to the fact that that regulation, which deals with the repayment or remission of unduly levied

import or export duties, applies, by virtue of Article 1 (2) thereof, only to taxes, charges, levies and duties created by various Community provisions and collected by the Member States on behalf of the Community. Therefore that regulation does not apply to any national taxes, charges and duties which may be levied contrary to Community law.

21 Whilst it is true that that regulation is intended to ensure the repayment of Community charges unduly levied and for that purpose lays down a specific procedure, the fact nevertheless remains that it does not apply to the repayment of national charges.

Costs

22 The costs incurred by the Government of the Italian Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since, in so far as the parties to the main proceedings are concerned, these proceedings are in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions referred to it by the President of the Tribunale di Trento by order of 23 July 1982, hereby rules:

A Member State cannot make the repayment of national charges levied contrary to the requirements of Community law conditional upon the production of proof that those charges have not been passed on to other persons if the repayment is subject to rules of evidence which render the

exercise of that right virtually impossible, even where the repayment of other taxes, charges or duties levied in breach of national law is subject to the same restrictive conditions.

Mertens de Wilmars Koopmans Bahlmann Galmot

Pescatore Mackenzie Stuart O'Keeffe Due Everling

Delivered in open court in Luxembourg on 9 November 1983.

The Registrar
by order

H. A. Rühl
Principal Administrator

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 27 SEPTEMBER 1983 [1]

Mr President,
Members of the Court,

1. This reference for a preliminary ruling relates to a particular aspect of the conditions imposed for the recovery of import duties levied by the national authorities contrary to Community law. According to a series of decisions of the Court, the absence of specific Community rules entitles Member States to lay down the procedures for such recovery. However, that entitlement is subject to limitations which, starting with the judgment in Case 68/79 (*Just* v *Ministry for Fiscal Affairs* [1980] ECR 501), the Court has derived from the principle of non-discrimination and from the obligation to ensure the effective exercise of the right — a right, I emphasize, of Community origin — to obtain repayment. In this case the Court is asked to determine whether those limitations are exceeded by national rules under which repayment is available only to a person who provides documentary proof that he has not passed on the burden of the unduly levied charge to

1 — Translated from the Italian.