REPORT FOR THE HEARING
in Case C-163/90 *

I — Facts and procedure

1. *The 'octroi de mer' system*

According to the Commission's observations, *octroi de mer* (a levy charged on certain goods entering the French overseas departments, referred to in Council Decisions 89/687 and 89/688 as 'dock dues') is a relic of a kind of duty frequently levied in European States in previous centuries. This type of charge applied to all goods, irrespective of their origin, that were introduced into a specific area of the national territory. The aim of the charge was to generate revenue for the region concerned as well as to protect local production. With the advent of modern economies, almost all of the charges of this kind were abolished because they hindered the free movement of goods and created distortions of competition.

The *octroi de mer* is levied in the French overseas departments on the basis of a Law of 1946. It applies to all goods of any origin (including those from metropolitan France and, in principle, even those from other overseas departments) entering the overseas department in question. However, products from the region escape the *octroi de mer* and any equivalent internal charge. The revenue from the *octroi de mer* goes essentially to finance local authority budgets according to the rules governing the autonomous region.

Since 1980, the *octroi de mer* has been the subject of a number of complaints from traders. In 1984, the Commission brought infringement proceedings against France pursuant to Article 169. Later it decided to suspend those proceedings, preferring instead to seek a political solution. On 22 December 1989, the Council adopted, on the basis of Articles 227(2) and 235 of the EEC Treaty, two decisions, the first of which establishes a programme of options specific to the remote and insular nature of the French overseas departments (Poseidom — Council Decision 89/687/EEC, OJ 1989 L 399, p. 39) and the second of which authorizes the French Republic to maintain, until 31 December 1992, the *octroi de mer* arrangements at present in force, but on the other hand, obliges the French authorities to take the necessary measures for the *octroi de mer* to apply without distinction to products introduced into and products produced in the overseas departments, subject to the possibility that exemption from the charge may be authorized in respect of local production for a transitional period of ten years (Council Decision 89/688/EEC concerning the dock dues in the French overseas departments, OJ 1989 L 399, p. 46).

2. *Background to the dispute*

The four respondents in the present case all bought motor vehicles from an approved distributor in metropolitan France. Three

* Language of the case: French.

motor vehicles were manufactured in the Federal Republic of Germany and one originated in Sweden. The motor vehicles, bearing transit registration plates, were transported to the region of Réunion under an internal Community transit system in the case of the German motor vehicles and under an external Community transit system in the case of the Swedish vehicle. The vehicles were introduced into French territory under suspended duty arrangements which lasted until they reached Réunion, where the customs clearance formalities were carried out. At the time of customs clearance the applicant demanded payment from each of the respondents of a sum by way of *octroi de mer* applicable on the entry of goods.

The respondents considered that the application of the *octroi de mer* to goods imported into Réunion and produced in other Member States was contrary to Community law and therefore brought an action before the competent courts seeking reimbursement of the amounts paid.

The Tribunal d'Instance (Local Court), Saint-Denis, before whom the cases were brought, decided to stay the proceedings and to refer to the Court of Justice a number of preliminary questions on the interpretation of Articles 9 and 95 of the EEC Treaty. On being informed by the Tribunal d'Instance, Saint-Denis, of the appeal brought against those four judgments, the Court of Justice suspended and then removed from the Register, at the request of that court, the references for preliminary rulings (order of the Court of 13 June 1990 in Joined Cases C-222/89 to C-225/89 *Alidor and Others* v *Receveur des Douanes*). However, the Cour d'Appel (Court of Appeal), Saint-Denis, considering that the dispute required an interpretation of the EEC Treaty, also decided, pursuant to Article 17 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'1. Are Articles 3, 9 and 13, failing which the second paragraph of Article 95 of the EEC Treaty, to be interpreted as prohibiting the levying by a Member State or by a local authority within a Member State of an *ad valorem* charge on goods, distinct from VAT, which is imposed by reason of the introduction of the goods into a specific area only of the territory of that State and which affects in the same manner foreign goods and national goods other than those originating in the area in question?

2. More specifically:

(a) Are Articles 9 and 13 of the EEC Treaty to be interpreted as meaning that a charge may be defined as a charge having an effect equivalent to a customs duty when it is levied on the value of foreign or national goods on the occasion of their release for consumption, without direct or indirect reference to the crossing of a State frontier, or do they, on the contrary, mean that the crossing of a State frontier must be, *de facto* or *de jure*, one of the operative events giving rise to the levying of the charge?

(b) Pursuant to the second paragraph of Article 95 of the EEC Treaty:

(i) Can the regional origin of a product or class of products constitute a lawful criterion for different fiscal treatment established by a Member State, in so far as it necessarily excludes foreign producers from more favourable provisions, or must such different treatment be based also, or only, on the nature of the product concerned?

(ii) May the fiscal advantages enjoyed by products from the French overseas departments, particularly Réunion, as a result of their exemption from *octroi de mer*, be regarded as pursuing aims of economic policy which are compatible with the requirements of the Treaty and of the secondary legislation?

3. Is the free trade agreement in force between the Community and Sweden to be interpreted as prohibiting the levying by a Member State or by a local authority within a Member State of an *ad valorem* charge on goods, distinct from VAT, which is imposed on the occasion of the release for consumption of goods imported from Sweden by reason of their introduction into a specific area of the territory of that State and which affects in the same manner Community goods other than those originating in the area in question?'

3. *The considered views of the Cour d'Appel, Saint-Denis*

The Cour d'Appel, Saint-Denis, observes first of all that it appears from the evidence and the argument put forward at the hearing that the importation of the vehicles in question into French territory occurs simultaneously with their introduction into the region of Réunion where the whole of the customs clearance was carried out and, consequently, their release for consumption or into free circulation.

Secondly, it observes that the *octroi de mer* meets the Community definition of a charge having an effect equivalent to a customs duty since it possesses all the characteristics of a customs duty with the sole exception of the criterion of crossing a frontier. It has the particularity of being chargeable at a regional customs frontier rather than at an inter-State frontier.

Thirdly, the national court mentions the possible relevance of Article 95 of the EEC Treaty with respect to the disputed charge. It refers first of all to the definition of an internal taxation as laid down by the case-law of the Court, namely 'a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products' and raises the question whether that definition applies to a charge which is 'manifestly discriminatory and protective, and was expressly established ... in order to protect local production'. Proceeding from the

assumption that the *octroi de mer* comes under the definition of internal taxation, the Court d'Appel is not sure whether the applicant may avail itself of the possibility, accepted in the case-law, that 'national fiscal legislation may grant advantages, in the form of exemption from or reduction of duties, to certain types of product or to certain classes of producers', since in the present case 'the condition of equal treatment for national and foreign products ... is only partly met. Moreover, the charge affects products differently according to their origin, and not irrespective of that origin'.

4. *Procedure before the Court*

The judgment of the Cour d'Appel, Saint-Denis, was received at the Court Registry on 30 May 1990.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted: on 28 September 1990, by the Commission of the European Communities, represented by Jörn Sack, Legal Adviser at the Commission, acting as Agent; on 1 October 1990, by the Regional Authority of Réunion, represented by Pierre Soler-Couteaux, Professor at the Robert Schuman Faculty, of the Strasbourg Bar; on 8 October 1990, by the Government of the French Republic, represented by Philippe Pouzoulet, acting as Agent, assisted by Géraud de Bergues, Deputy Agent; and on 3 October 1991, by the respondents, represented by Philippe Rivière, Avocat.

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

Following the hearing of 3 October 1991 and the delivery of the Advocate General's Opinion on 21 November 1991, the President, pursuant to Article 53(2) of the Rules of Procedure, declared the oral procedure closed.

By order of 22 January 1992, after hearing the Advocate General, the Court decided to reopen the oral procedure.

II — Written observations submitted to the Court

The first two questions submitted by the national court

The *respondents* submit that the *octroi de mer* should be treated as a customs duty or charge having equivalent effect.

In this regard, they point out first of all that the Court has held in Case 148/77 *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787 that the status of the overseas departments is defined by reference to the French Constitution, according to which they are an integral part of the French Republic. According to the decision of the French Constitutional Council, of 2 December 1982, the status of the overseas departments is to be the same as that of the metropolitan departments. The respondents go on to state that, according to the Court's judgment in Case 58/86 *Coopérative Agricole*

d'Approvisionnement des Avirons v *Receveur des Douanes* [1987] ECR 1525, it is for the Community legislature to decide whether the economic, geographic or social circumstances of Réunion make derogations necessary.

Secondly, the respondents examine the *octroi de mer* in relation to the case-law of the French Cour de Cassation (Court of Cassation). They refer in particular to the judgment of 7 May 1861 in which the Cour de Cassation declared that the *octroi de mer*, created in 1850, 'has all the characteristics of customs duties'. By its judgment of 19 February 1868 the Cour de Cassation held that the *octroi de mer* essentially had the characteristics of customs duties. According to the respondents, the rules governing the *octroi de mer* have not changed the nature of that charge before and after the conversion of the colonies into departments, even though it has been described as a duty on consumption by a law of 1984.

Thirdly, the respondents consider the *octroi de mer* in relation to the provisions of the EEC Treaty. They state that the charge is contrary to the letter and the spirit of the EEC Treaty and subsequent rules. It is contrary, in particular, to the preamble to the Treaty, to Article 3, concerning the elimination of customs duties and all other measures having equivalent effect, to Article 9, basing the Community upon a customs union which covers all trade in goods and which involves consequential prohibitions, and to Article 10, extending the principle of the free movement of goods to products in free circulation, it being explained that in the present case the goods from a non-member country pass through metropolitan France in transit without attracting duties, which are first charged upon entry into the department of Réunion. The *octroi de mer* is also contrary to Article 12 of the Treaty, prohibiting the introduction of new customs duties, and to Article 13 of the Treaty, since the transitional period had long since expired.

The respondents state that the *octroi de mer* may not be considered to constitute taxation governed by Article 95 of the Treaty. After pointing out that the Court of Justice has held that Articles 9 to 16 and Article 95 of the Treaty cannot apply to the same tax at the same time, they add that the French Cour de Cassation has already held that the *octroi de mer* displays all the characteristics of a customs duty. Furthermore, it does not constitute internal taxation, for by definition it is not charged on domestic production but solely on imported goods of any origin crossing the frontier of Réunion.

Finally, the respondents challenge the argument that the Community rules relating to the free movement of goods concern the Member States and have no application to the internal trade of a Member State. They point out in this regard that the vehicles in question come from a non-member country and have only passed in transit through metropolitan France without any charges having been paid and they could be imported directly from any country upon payment of the same charges on entry into the department of Réunion.

They add that in any event, under national legislation, the overseas departments are always regarded as export territories for the purposes of trade between them and with metropolitan France.

They therefore propose that the Court, in its reply to the questions from the national court, state that the *octroi de mer* is to be considered a charge having equivalent effect to a customs duty prohibited by Community law and that Article 95 cannot justify the *octroi de mer*, which does not affect similar national products within metropolitan France, bearing in mind that the *octroi de mer* does not affect any product manufactured in Réunion but solely those imported from any sources, save where an exemption is granted and that the income from the tax is intended to bolster the budget of the local authorities.

The *Regional Authority of Réunion*, as *intervener*, observes first of all that the preliminary question does not concern the lawfulness of the general system for levying the *octroi de mer* but only covers the levying of a charge on a vehicle from metropolitan France and imported into Réunion since, according to the authority, the vehicles had been brought into free circulation in metropolitan France and the charge levied in the present case may therefore be treated only as an internal tax applicable between two parts of French customs territory.

The Regional Authority of Réunion points out that the *octroi de mer* is levied on foreign and national goods upon their release for consumption, without direct or indirect regard to the crossing of a State frontier. Owing to those two aspects of the *octroi de mer*, it may not be seen as a customs duty or a charge having equivalent effect.

With regard to the facts in the present case, the Regional Authority of Réunion states that since the French distributor established in metropolitan France had become the owner of the vehicle, the legal situation would have been identical if the consumer had bought a vehicle of French make or origin from a French distributor. It maintains that no crossing by the vehicle of a State frontier was involved in the transaction, importation having already taken place. It also submits that the fact that the vehicles were imported free of duty does not mean that they had actually crossed the frontier at the time of their entry into Réunion. According to the Regional Authority of Réunion, the national court is confusing the French customs régime, which requires that the same customs duties be paid on imported vehicles irrespective of their final destination within French territory, and the tax régime, which varies according to the part of French territory in which they are released for consumption.

As to the possible relevance of Article 95 of the Treaty, the Regional Authority of Réunion observes first of all that the national court has only referred to the second paragraph of that article, while the question submitted to the Court refers to interpretation of the whole article. The question submitted is whether the regional origin of a product may constitute a lawful criterion for differential tax treatment and whether the exemption of regional products from the *octroi de mer* may be regarded as pursuing economic policy objectives which are compatible with the requirements of the Treaty. In this respect, the Regional Authority of Réunion submits that the *octroi de mer* is a system of internal taxation linked to the individualization of the fiscal territories of the overseas regions which also have different VAT rates.

According to the case-law of the Court (see in particular the judgment in Case 106/84 *Commission* v *Denmark* [1986] ECR 833), Community law does not prohibit a Member State from laying down differential tax systems on condition that the differentiation pursues a lawful objective and, having regard to that objective, is based on a legitimate criterion. In the case of internal taxation, Article 95 allows national fiscal legislation to grant advantages, in the form of an exemption from, or a reduction of, duties, to certain types of product or to certain classes of producers.

Under the system for levying *octroi de mer*, products originating in Réunion are exempt from the levy, while all other products are subject to it. In the opinion of the Regional Authority of Réunion, the particularity of those regions, due in particular to their insularity, remoteness, limited domestic market, climate and socio-economic development, are amongst the lawful economic and social grounds envisaged by the Court of Justice. Consequently, a criterion for tax differentiation based on the island origin of products or classes of producers rather than on the nature of the products in question is permissible under Community law.

Furthermore, the abovementioned Council decisions of 21 December 1989, which allow the system for levying the *octroi de mer* to be maintained under certain conditions until 31 December 1992, show that the Commission regards the maintenance of a system of taxing goods entering the overseas departments together with maintenance of a power to exempt local products as compatible with the rules of the Treaty.

The *French Government* explains first of all the background to the *octroi de mer*, as levied in particular in the overseas departments. It draws the Court's attention to the importance of the *octroi de mer* to the economic development of the overseas departments, which, according to the French Government, simply compensates for the handicaps which local production suffers. It points out that metropolitan France gains no advantage from the system of *octroi de mer* since goods from metropolitan France are affected in the same way as goods from other Member States and, indeed, producers in metropolitan France are, in absolute terms, the hardest hit.

As to the applicability of Articles 9 and 13 of the EEC Treaty, the French Government believes that they do not apply to relations between Member States and overseas departments, which do not constitute States but are authorities of a Member State. According to the case-law of the Court, pecuniary charges applying to goods in circulation in the Community by reason of the fact that they cross a frontier constitute charges having equivalent effect to customs duties. Since goods imported into metropolitan France are not subject to the *octroi de mer* when crossing the frontier between Member States, and the *octroi de mer* applies in the same way to domestically-produced goods coming from metropolitan France, the *octroi de mer* is not a charge having equivalent effect within the meaning of Articles 9 and 13 of the EEC Treaty.

The French Government considers that if the first question is answered in the negative, the question whether the *octroi de mer* is covered by Article 95 of the Treaty becomes relevant. Article 95 provides for the elimination

of all forms of discrimination in the treatment of domestic products of the Member States and products originating in other Member States (see in particular the judgment in Case 94/74 *IGAV* v *ENCC* [1975] ECR 699). The *octroi de mer* affects products originating in metropolitan France or other overseas departments and products originating in other Member States. Furthermore, according to the case-law of the Court, products which may serve the same economic ends may be taxed at differential rates where it appears objectively that the costs of production differ considerably (see the judgment in Case 21/79 *Commission* v *Italy* [1980] ECR 1). In that respect, local conditions of production, geographical and climatic conditions are considerably different from those existing in the rest of the Community and justify differential taxation. Furthermore, the French Government argues that the *octroi de mer* levies constitute internal dues which apply without discrimination and in general, subject to the exception concerning local products.

In the event that their interpretation of the Treaty will not be accepted, the *French Government* and the *Regional Authority of Réunion* propose in the alternative that the Court, having regard to overriding considerations of legal certainty, should limit the effects of its judgment with regard to the past, as it did in its judgment in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455. The factors which lead to such a conclusion are the economic importance of the *octroi de mer* (recognized, moreover, by the abovementioned Council decisions of 21 December 1989), the disastrous consequences which would arise from an obligation to refund the amounts incorrectly levied and the legal complexity of the relations between the overseas departments and the rest of the Community, aggravated by the Community institutions' lengthy failure to act.

The *Commission*, too, first describes the background to the *octroi de mer* in the overseas departments. It states that, in accordance with Article 227 or the treaty as interpreted in the judgment in *Hansen*, cited above, Articles 9 and 13 as well as Article 95 of the Treaty apply at present to the overseas departments.

The Commission considers that the *octroi de mer* in its present form constitutes either a customs duty on imports or a charge having an effect equivalent to a customs duty on imports. Customs duties and charges having equivalent effect are both characterized by the fact that they affect goods by reason of the fact that they cross a frontier. Although the *octroi de mer* displays all the characteristics of a genuine customs duty, it may be the case that this name is used only for customs duties levied at national or Community level. Duties levied on the entry of goods into a smaller geographic area consequently fall under the concept of charges having equivalent effect. The Commission considers that that is the case where the *octroi de mer* is concerned since that charge is levied on goods by reason of the fact that they cross a regional frontier while local production is not subject to the *octroi de mer* or to a charge having equivalent effect.

The Commission goes on to consider the question whether the fact that the *octroi de mer* also affects most domestically-produced French goods justifies its application to

goods from other Member States, but concludes that this consideration of this question changes nothing. In the first place, according to the case-law of the Court, a charge does not have to be discriminatory in effect for it to be described as a charge having equivalent effect (see in particular the judgment in Cases 2/69 and 3/69 *Diamantarbeiders* v *Brachfeld* [1969] ECR 211) and, in the second place and, in any event, it is undeniable that there is a discriminatory and protective effect in relation to local products. In that respect, the question whether there is a local production is irrelevant because, even if there is not, the exemption could facilitate the setting up of production which does not yet exist.

The Commission considers furthermore that the application of the *octroi de mer* even to goods imported from other French regions may be called in question in Community law because the levying of the charge undermines the unity of the Community customs territory. Customs duties or charges having equivalent effect at regional level could restrict the free movement of goods more than charges levied at national level because there is a large number of regional frontiers.

As to the possible applicability of Article 95 of the Treaty, the Commission states that, should the *octroi de mer* not be held to be a customs duty or a charge having equivalent effect, it would still undoubtedly constitute discriminatory internal taxation and would therefore be incompatible with Article 95, since regional origin is the determining criterion for exemption from the tax. Such discrimination constitutes partial discrimination based on the national origin of the product.

In this context, the Commission refers to Case C-21/88 *Du Pont de Nemours Italiana* v *Unità Sanitaria Locale No 2 di Carrara* [1990] ECR I-889 in which the fact that a system of regional preference discriminated not only against imported goods but also against goods produced in other regions of the same country was not a determining factor such as to exclude application of the Treaty, in that case Article 30.

In conclusion, the Commission proposes that the Court should reply to the first two questions as follows:

'Article 9 et seq. of the Treaty must be interpreted as meaning that it prohibits as a charge having an effect equivalent to a customs duty between Member States any charge levied by reason of the introduction of goods from other Member States into a specific area of the national territory of a Member State, irrespective of the fact that goods originating in that Member State other than those produced in the area of the territory in question are also affected by the charge and without having regard to the purpose for which the charge is levied.'

The third question: application of the free-trade agreement in force between the European Economic Community and Sweden

In view of the observations which the *Regional Authority of Réunion* submitted on

the first two questions, it submitted no specific observations on the third question concerning the application of the free-trade agreement between the European Economic Community and Sweden to the importation of the Swedish vehicle involved in this case.

The *French Republic* considers that in the event that the Court treated the *octroi de mer* as a customs duty (or a charge having equivalent effect) or discriminatory internal taxation, that interpretation could not be extended to cover the corresponding provisions of the EEC-Sweden Agreement. In this regard, it refers in particular to the judgment in Case 270/80 *Polydor and Another* v *Harlequin Record Shops and Another* [1982] ECR 329 in which the Court refused to extend its interpretation of Articles 30 and 36 of the Treaty to the similar provisions of the 1972 Agreement between the EEC and the Portuguese Republic, namely Articles 14 and 23, on the grounds that, under that agreement, restrictions on trade in goods could be considered to be justified in a situation in which they could not be considered justified within the Community itself.

The *Commission* observes that, in accordance with Council Regulation No 2838/72/EEC concluding an Agreement between the European Economic Community and the Kingdom of Sweden (OJ 1972 L 300, p. 96), customs duties as well as charges having equivalent effect have been abolished in trade between the Community and Sweden in the case of certain products, including motor vehicles. According to the Commission, if the concepts of customs duties and charges having equivalent effect in the free-trade agreement are the same as those of the Treaty, it is obvious that the *octroi de mer* is incompatible with the provisions of that agreement. Even if their prohibition is not as strict or absolute as in intra-Community trade, the concept of charges having equivalent effect must at least cover charges which resemble customs duties in the strict sense to such an extent that they may be treated as such. In the Commission's view, that also applies to the *octroi de mer*.

The Commission further observes that, by analogy with Article 95 of the EEC Treaty, Article 18 of the agreement with Sweden also prohibits tax discrimination in trade between the contracting parties.

Since the Community institutions have not so far decided to apply to the French overseas departments a special régime for foreign trade, the provisions of the free-trade agreement between the Community and Sweden apply in their entirety to that territory.

The Commission consequently proposes to reply to the national court's third question as follows:

'Article 6 of the free-trade agreement between the European Economic Community and the Kingdom of Sweden is to be interpreted as meaning that it prohibits on the grounds that they are charges having an effect equivalent to a customs duty all regional or local tariffs whose duties affect Swedish goods imported into that area of the Community, irrespective of the fact that the same charge also affects Community goods entering the same area.'

III — Oral observations submitted at the hearing of 31 March 1992

At the hearing of 31 March 1992 oral observations were submitted by the Council, the Regional Authority of Réunion, the French Republic and the Commission, in particular on whether Decision 89/688 is invalid inasmuch as it authorized the French Republic to maintain in force until December 1992 the present *octroi de mer* system.

1. *The question as to whether the Court should rule on the validity of Decision 89/688*

The *Regional Authority of Réunion* made no observations on that question and the *Council* deferred to the Court's judgment. On the other hand, the *French Republic* and the *Commission* submitted that the Court had no grounds, in the context of the present reference for a preliminary ruling, to make a ruling on the validity of Decision 89/688. In support of that argument they point out, first, that the national court did not refer a question to the Court on the interpretation or the validity of the aforementioned decision and, secondly, that an assessment of its validity is not necessary in order to settle the dispute in the main proceedings inasmuch as it was adopted after the facts in the present case and has no retroactive effect.

According to the French Republic, the Court has never given a decision, in the context of a reference for a preliminary ruling, on the validity of a Community provision which was not applicable to the facts of the case and to which the national court had not referred. The Commission recalls that, in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest* [1992] ECR I-1847, the Court interpreted very restrictively its power to reply to relevant questions on interpretation which had not however been put by the national court. It therefore concludes that *a fortiori* the Court would not be justified in replying to a question which had not been put and which moreover is of no relevance in settling the dispute.

2. *The validity of Decision 89/688*

The *Council* considers that it is not the lawfulness of the charge on the goods marketed in the French overseas departments but the exemption of local production which is at issue. The charge affects all except domestic goods in the same way, whether they are French, from another Member State or from non-member States. Viewed from that angle, the exemption of domestic products, which is intended to assist regional economic activity, could be regarded, in the light of the judgment in *Compagnie Commerciale de l'Ouest*, as constituting a measure contrary to the second paragraph of Article 227(2) of the Treaty. Even if the aforementioned exemption complied with Article 95, it would be a fiscal aid of regional application which could be legitimized by the Community legislature. The Council therefore con-

cludes that, whatever approach is adopted, although the national law in force before the intervention of the Community legislature was very probably contrary to the EEC Treaty, the Council decision at issue is, on the contrary, valid.

The *Regional Authority of Réunion* repeats the arguments set forth in its written observations, in particular that the *octroi de mer* constitutes an internal taxation governed by Article 95 of the Treaty and that Decision 89/688, based on Article 277(2) was therefore valid.

The *French Republic* considers that the Council was justified in adopting Decision 89/688, even if the *octroi de mer* should be considered a customs duty. In this regard, it points out that Decision 89/688 was based not only on Article 227(2) of the Treaty but also on Article 235 thereof.

According to the case-law of the Court (Case 9/61 *Netherlands* v *High Authority* [1962] ECR 213), the only object of the first paragraph of Article 95 of the ECSC Treaty, the equivalent of Article 235 of the EEC Treaty, 'is to institute special rules for departing from the Treaty with the object of empowering the High Authority to meet an unforeseen situation'.

The French Republic therefore concludes that the Council should be able to resort to Article 235 of the EEC Treaty in order to make more flexible specific provisions of the Treaty where their excessive rigidity appears to be about to jeopardize the Community's objectives, in the present case, the integration of the French overseas department into the Community, provided that the measure in question appears to be transitional and limited in its scope.

As a preliminary point, the *Commission* explains why it proposed Article 4 of the disputed decision. During the proceeding pursuant to Article 169 it encountered an irreconcilable conflict between two objectives of the Treaty which had, in its view, the same value, in particular, first of all, observance of Community law, notably the first paragraph of Article 227(2) of the EEC Treaty, and, secondly, the promotion of the economic and social development of the French overseas territories, referred to in the third paragraph of that provision. It was in fact clear that the immediate abolition of the *octroi de mer* would have had profound and harmful consequences for the French overseas territories, and that, therefore, a reasonable time-limit should be set.

The Commission considers that it appears from the case-law of the Court, and in particular from that concerning monetary compensatory amounts and charges having an effect equivalent to a customs duty, that the legitimacy of a measure taken pursuant to the objectives of the Treaty must normally have as its consequence that the measure should be considered lawful and valid even if, in another context, it should be considered unlawful.

D. A. O. Edward

Judge-Rapporteur