OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 29 June 1995 *

1. The Giudice Conciliatore, Milan (Italy), who referred this case to the Court, initially sought a preliminary ruling on five lengthy questions, of which he withdrew three a few days before the hearing at the joint request of both parties to the proceedings, following submissions by the office of the Italian State Attorney. The two remaining questions are as follows:

'1. Pursuant to the EEC regulations implementing in the Community the EEC/EFTA agreements, their additional protocols and subsequent amendments, are the provisions of Council Directive 83/643/EEC also applicable to customs transactions relating to EEC/EFTA trade and products covered by those agreements and subsequent amendments?

In particular, with reference to customs transactions relating to products covered by the EEC/EFTA agreements, is legislation of a Member State such as Article 15 of Presidential Decree No 254 of 8 May 1985 and Article 11 of Presidential Decree No 43 of 23 January 1973, Article 11(2)(b) of which limited (contrary to the second indent of Article 5(1) of Council Directive 83/643/EEC of 1 December 1983) the normal business hours of customs offices to six hours daily from Monday to Friday and authorized the charging of the cost of the services for customs transactions effected outside normal business hours, compatible with the abovementioned provisions of Community law?

2. In order to complement and clarify the findings expressly relating to intra-Community trade in the judgment in Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575, are the principles set out in that judgment also applicable to trade with non-member countries and with members of EFTA by virtue of the rules of the EEC Treaty on the prohibition of charges having equivalent effect to customs duties, the Customs Union and the establishment of the Common Customs Tariff and the ensuing secondary legislation? In particular, do the aforementioned provisions of Community law prohibit, *with regard also to customs*

* Original language: Spanish.

transactions relating to trade with non-member countries, the enactment and/or the retention by a Member State of national legislation — such as that laid down by the Ministerial Decree of 29 July 1991 (GURI No 193 of 31 July 1971) and 30 January 1971 (GURI of 5 February 1979) — pursuant to which private traders were charged for the cost of services "outside normal business hours", which is not simply an amount based on the cost per hour of the personnel actually engaged in the customs transactions requested, which are provided at the same time for the forwarding agent, but a single fee for each customs transaction requested, corresponding to the category and duration of the most costly service rendered, and which is in no way related to the charge levied separately for each of the other customs transactions requested by the forwarding agent and provided at the same time?'

2. Briefly, the questions initially submitted concerned:

— first, the impact of the rules and principles of Community law on the national legislation — Law No 428 of 20 December 1990 (hereinafter 'Law No 428') [1] — which governs the repayment of certain taxes unduly levied by the Italian customs administration;

— secondly, the applicability of those rules and principles of Community law to goods from non-member countries, whereby the charges or other levies imposed in respect of customs clearance of similar products must conform with the same rules as those applicable to goods from other Member States.

3. The first problem was specifically referred to by the first, second and third questions — now withdrawn — in which the referring court, in principle, sought the application or 'completion and clarification' by the Court of Justice of its case-law concerning the requirement that unduly paid charges should be refunded where a State has failed to fulfil the obligations imposed by Community law by continuing to impose charges or other State customs levies incompatible with Community law.

4. The fourth and fifth — and only remaining — questions seek to clarify whether the rules and general prohibitions applicable to intra-Community imports (specifically, the prohibition of charges having equivalent effect to customs duties) may be extended to the customs treatment of goods from non-member countries and, in particular, those from countries belonging to the European Free Trade Area (hereinafter 'EFTA').

1 — Law on Compliance with the Obligations Deriving from Italy's Membership of the European Communities (GURI, 1991 supplement, No 10).

The facts

5. The Italian limited company Aprile Srl, which operated as a customs agent in Milan, was declared insolvent on 20 October 1992. The receiver, after examining the company's accounts, decided to claim from the Tesoreria Provinciale dello Stato reimbursement of the amounts paid by the company in previous years by way of charges for customs operations carried out outside normal civil service working hours or outside the customs area.

6. The Administration refused to comply and the administrator therefore, having obtained leave from the court, brought at least two actions: one for the sum of LIT 618 436 900 in the Tribunale di Milano court and another for a lesser amount before the Giudice Conciliatore in the same city. According to the application for leave to institute proceedings, the reason for pursuing the claim by means of two actions before different judicial authorities was to obtain, in the second case, 'an immediate reference to the Court of Justice for a ruling on the matters constituting the *thema decidendum*'.

7. In the application to the Giudice Conciliatore — from whom the present reference emanates — Aprile claims from the Italian Administration the sum of LIT 933 200 corresponding to the charges paid for services provided on 22, 23, 24 and 26 November 1990 by the Segrate-Aeroporto di Linate customs office (Milan), which were levied under the Italian domestic rules which at that time allowed certain charges to be collected in respect of customs import operations effected outside customs officials' normal working hours.

8. In view of the opposition to the claim on the part of the Amministrazione delle Finanze dello Stato, the Giudice Conciliatore, Milan, by order of 26 April 1994, submitted the preliminary questions before the Court.

9. On completion of the oral observations phase and after the hearing had been fixed for 11 May 1995, on 5 May 1995 the Italian State Attorney informed the Giudice Conciliatore, on behalf of the defendant Administration, that 'in view of the non-fiscal nature of the amounts claimed by the plaintiff' the Administration had agreed not to apply Article 29(2) and (7) of Law No 428 and consequently withdrew its defence to that claim. Accordingly, he asked the judge to

amend the order for reference by limiting it to the last two questions, the plaintiff being agreeable to that request.

10. By order of the same date, 5 May 1995, the Giudice Conciliatore, Milan, informed the Court of Justice that it was unnecessary to give a preliminary ruling on the first three questions contained in his original order.

Preliminary remarks concerning admissibility

11. The Italian Government raises the preliminary objection that, in its view, the Giudice Conciliatore failed to consider the 'necessity' for the questions submitted in connection with the main proceedings and that, before submitting the questions, he should have resolved a number of points relevant to his decision.

12. That objection concerned the original order in its entirety, before it was reduced to the two last questions. Although the relationship between the five questions initially submitted makes it difficult to undertake a differentiated analysis of the procedural objection of inadmissibility, which concerned the reference as a whole, the withdrawal of most of the questions by the national court means that efforts must be made to separate the issues involved.

13. As regards the provision originally relied on for the refusal to refund the amounts unduly paid, there is no doubt that the objection must be dismissed. The order for reference pointed out that the views of the parties to the proceedings were based, positively or negatively, on a national law specifically governing the conditions for repayment or refund of amounts unduly paid to the Italian customs administration 'pursuant to national provisions incompatible with Community legislation'.

14. In those circumstances, in view of the doubts as to the impact of Community law on the rules governing reimbursement laid down by Italian Law No 428 — doubts which have even been the subject of pronouncements by the Italian Corte Suprema di Cassazione [2] — the assessment of the importance or relevance of the matter required of judicial authorities before they seek preliminary rulings appears to have been correct.

2 — See the judgment of the Suprema Corte di Cassazione, First Civil Division, of 10 April 1992, annexed to the parties' observations.

15. However, the national court having reduced the scope of its request for a preliminary ruling to questions relating only to goods from non-member countries, the objection of inadmissibility gains ground since it is beyond doubt that the order for reference does not go into sufficient detail about certain facts that are important to the final decision, in particular those concerning the precise origin of the goods in question.

16. The Court of Justice has consistently held that although the need to arrive at an interpretation of Community law that is useful for the national court requires that court to define the factual and legislative context of the questions submitted or, at least, to explain the factual hypotheses on which they are based, it is sufficient if the order from the national court and the written observations from the parties to the main proceedings provide the Court with enough information to enable it to interpret the rules of Community law relating to the situation at issue in the main proceedings, even if the national court has not exhaustively described the factual and legal situation. [3] The strictness of that requirement may vary according to the details of each case and the content of the questions submitted, notwithstanding the fact that certain recent decisions of the Court of Justice [4] are less favourable to the admissibility of preliminary questions where the orders for reference do not provide sufficient information or explain the reasons for the choice of the Community provisions referred to or the relationship between the latter and the national legislation applicable to the case.

17. As the Italian Government contends — and the Commission too feels obliged to recognize — the order for reference fails to mention certain aspects of the dispute which are relevant to the ruling to be given, in that it does not explain sufficiently whether or not the goods giving rise to the customs duties of which reimbursement is sought in fact came from non-member countries, or actually identify those countries. That omission may be attributable to the fact that the Italian judge made the order after receiving the originating application from the plaintiff (March 1994) and the defence from the office of the Italian State Attorney (April 1994) without himself ordering any inquiries to substantiate the facts and that the aspects relating to the origin of the goods were not clearly dealt with in the annexures to the parties' submissions.

18. Moreover — although this point is less important as far as admissibility is concerned — in the questions submitted some confusion may arise from the undifferentiated references made to the charges levied for customs services, without further details

3 — See Case C-83/91 *Meilicke* [1992] ECR I-4871 and Case C-316/93 *Vaneetveld* [1994] ECR I-763.

4 — See Cases C-320/90, 321/90 and 322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393 and the order as to inadmissibility in Case C-167/94 *Grau Gomis* [1995] ECR I-1023.

being given, when it is clear that such services may be of different kinds and be governed by specific rules: services provided outside normal working hours, or elsewhere than at customs offices or for more than one trader at the same time.

19. However, such imprecision should not be seen as a ground of inadmissibility. In the first place, it was the office of the Italian State Attorney itself which contended, in its defence of the Customs Administration (Ministry of Finance) to the original claim, that not all the imports concerned were of goods of Community origin, which is tantamount to conceding that both Community goods and goods from non-member countries were involved. Secondly, it is of little importance if there are overlapping references to the charges or levies imposed under one or other of the headings mentioned above when it has been made clear that the main proceedings are specifically concerned with charges for customs services provided outside normal business hours.

20. The fact also should not be overlooked that the defendant Administration has in its possession all the evidence needed to determine the non-Community origin of the goods the import of which is subject to the charges at issue, since the customs operations concerned are duly recorded. Consequently, the Administration has not only accepted *a sensu contrario* the plaintiff's claim that only 'some' of the goods were of non-Community origin but could also have provided documentary proof to the contrary, which it failed to do. It should be borne in mind that the originating application asked the Giudice Conciliatore to allow evidence to be taken specifically so that the Segrate-Aeroporto di Linate customs office could provide factual information concerning the imports in question.

21. In short, even if it is acknowledged that a greater degree of precision would have been desirable concerning the non-Community origin of the goods that gave rise to the charges of which repayment is sought, the reference should not be declared inadmissible for that reason since in fact both parties recognize that at least some of the goods imported by the plaintiff company, on which the contested levies were imposed, came from non-member countries.

The national legislation and the Community legislation

22. As originally formulated, the preliminary questions referred, first, to the Italian provision on repayment of amounts unduly paid, going on to focus on the case-law according to which certain charges paid by the plaintiff company are contrary to Community law.

23. To clarify the terms of the dispute, it is appropriate to refer briefly to the Italian law on which the Administration initially relied in order to resist the action for recovery and which it later agreed to disapply, referring paradoxically to the 'non-fiscal nature' of the sums of which reimbursement was sought. The relevant measure is Law No 428, Article 29 of which provides as follows under the heading 'Repayment of taxes considered incompatible with Community law':

— Article 29(1) extends the five-year limitation period laid down by Article 91 of the Consolidated customs legislation to all actions for recovery of amounts paid in connection with customs operations; nevertheless, it reduces that limitation period to three years — and the limitation period prescribed by Article 84 of that consolidated legislation — as from the 90th day following the entry into force of the Law;

— Article 29(2) provides that 'import customs duties, manufacturing taxes, consumption taxes, the sugar price supplement and State duties levied under national provisions incompatible with Community provisions shall be repaid, save where the burden thereof has been passed on to others';

— Article 29(7) provides that Article 29(2) is to apply even where the reimbursement relates to amounts paid before the entry into force of the Law (27 January 1991).

24. The plaintiff claims that the application of that provision to the refund of the contested levies is in breach of Community law, in that it subjects exercise of the right to reimbursement of public revenues incompatible with that law to shorter time-limits than those imposed by the general law, and, moreover, does so with retroactive effect; it also argues that Community law was infringed as a result of the fact that Law No 428 excludes any right of action for reimbursement in cases where the tax burden had been passed on to others or transferred.

25. Since the Italian Government agreed, at a late stage, not to apply Law No 428 to the present case (without that implying, apparently, full acceptance of the plaintiff's claims, which would have rendered continuation of the main proceedings unnecessary), there is now no need to consider that Law in relation to the obligations deriving from Community law regarding the refund of amounts unduly paid.

26. As regards collection of the sums paid for Italian customs services provided 'out of hours' and the calculation of the 'cost of the service', they were declared partially incompatible with Community law by the Court of Justice in its judgments in Case 340/87 *Commission* v *Italy* [5] and Case C-209/89 *Commission* v *Italy*. [6]

27. In the first of those judgments, the Court analysed Article 11 of Decree No 43 of the President of the Italian Republic of 23 January 1973 consolidating the legislative provisions on customs matters, as amended by Article 1(2) of Decree No 254 of 8 May 1985. It provided for the collection of an amount corresponding to the cost of the service for customs transactions carried out during business hours but outside the normal working hours of civil servants, which in the Italian Republic were six hours a day from Monday to Saturday. The judgment also examined Article 15 of Decree No 254, which provided more generally that the inspections and formalities referred to in the decree which are carried out during the business hours of offices but outside normal civil service hours are to be charged for according to the cost of the service.

5 — [1989] ECR 1483.

6 — [1991] ECR I-1575.

28. In that judgment, the Court of Justice held:

'... by charging traders in respect of intra-Community trade the cost of inspections and administrative formalities carried out during part of the normal business hours of customs offices at frontier posts as determined by the second indent of Article 5(1)(a) of Council Directive 83/643 of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States, as amended by Council Directive 87/53, the Italian Republic has failed to fulfil its obligations under Articles 9 and 12 of the EEC Treaty'.

29. In the second of the judgments cited (Case C-209/89), the Court of Justice held that legislation requiring from each undertaking individually, where services are rendered simultaneously to several undertakings in connection with the completion of customs formalities in intra-Community trade, payment of an amount disproportionate to the cost of the services provided was incompatible with Community law. Both the charges due for service outside normal working hours and those for services provided

outside the customs area, governed by the Ministerial Orders of 29 July 1971 and 30 January 1979 respectively, fell into that category.

The first preliminary question

30. The national court wonders whether the provisions of the second indent of Article 5(1) of Directive 83/643/EEC [7] are also applicable to customs formalities relating to extra-Community trade in the products covered by the Agreements concluded between the EEC and the EFTA countries.

31. Although, as the Commission rightly points out in its observations, the matter is now mainly of historical interest in view of the creation of the European Economic Area, it remains relevant to the proceedings pending before the national court owing to the timing of the events at issue.

32. Article 5 of that regulation governs the normal opening hours of customs offices at frontier posts. It is one of several provisions by means of which Directive 83/643 sought to facilitate physical inspections and administrative formalities in respect of the carriage of goods between Member States.

33. Pursuant to Article 1(1) of that directive:

'Without prejudice to individual provisions in force in the framework of general or specific Community rules, this directive shall apply to physical inspections and administrative formalities, hereinafter referred to as "inspections and formalities", concerning the transport of goods which have to cross:

— an internal frontier within the Community,

or

— an external frontier, where carriage between Member States involves crossing a third country.'

7 — Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States.

34. As already emphasized by Advocate General Van Gerven in his Opinion in Case 340/87 *Commission* v *Italy*, [8] 'according to its preamble and provisions Directive 83/643/EEC applies only to the carriage of goods between the Member States ... It plainly has *no* application to the carriage of goods between Member States and non-member countries or in other words where the goods concerned are not yet in free circulation.'

35. That statement must be repeated. Directive 83/643 applied to intra-Community trade but was not intended to affect the extra-Community commercial transactions which each Member State undertakes with non-member countries. To extend its effects to the latter trade would be to go beyond the limits inherent in its text.

36. In particular, the first preliminary question refers specifically to business hours: however, it cannot be inferred from Directive 83/643 that the Member States are obliged to keep their customs offices open for the same period for extra-Community trade as for intra-Community trade, or that the working day of customs staff has to be of the same length in both cases.

37. That does not preclude the possibility that one or more of the regulations implementing in the Community the Agreements concluded between the EEC and the EFTA countries and their additional protocols and amendments may contain references to Directive 83/643, thereby extending the latter's requirements to each specific case. If that were the case, the applicability of Directive 83/643 to particular types of extra-Community trade would derive not from its own content but from the references to it in other binding Community measures governing such trade.

The second preliminary question

38. In his last question, the Giudice Conciliatore asks whether the principles laid down in relation to intra-Community trade by the judgment in Case C-209/89 *Commission* v *Italy* concerning the prohibition of charges having equivalent effect to customs duties are also applicable to trade with non-member countries.

39. He wishes to know, in particular, whether also in relation to customs transactions concerning trade with non-member countries Community law precludes the introduction and/or maintenance by a Member State of national legislation under which private traders are required to pay for 'out of

8 — Opinion of Advocate General Van Gerven delivered on 11 April 1989 in Case 340/87 *Commission* v *Italy* [1989] ECR 1483, at 1495.

hours service' (that is to say outside normal business hours) not on the basis of the hourly cost of the personnel actually engaged in the customs transactions requested by the forwarding agent and provided at the same time but by means of a single fee for each customs transaction requested, corresponding to the category and duration of the most costly service rendered, which is in no way related to the charge levied separately for each of the other customs transactions requested by the forwarding agent and provided at the same time.

40. That mechanism for the collection of customs duties was declared incompatible with Community law by the abovementioned judgment of this Court in Case C-209/89 *Commission* v *Italy* as regards intra-Community trade. As stated earlier, [9] the Court took the view that it was a charge having equivalent effect to a customs duty within the meaning of Articles 9, 12, 13 and 16 of the Treaty, in so far as it required payment of an amount disproportionate to the cost of the services provided to the traders concerned.

41. The extension of that same legal consequence to trade with non-member countries could raise certain difficulties, stemming not from the particular features of that specific levy (whose status as a State levy is hardly contestable) but from the consequences of its generalized application to all types of countries, products and levies. That is why, in its observations, the Commission emphasizes how delicate the issue is.

42. Two very different cases must be considered:

(a) trade with non-member countries governed by bilateral or multilateral agreements to which the European Economic Community is a party, where such agreements also prohibit charges having equivalent effect. Such trade may be regarded as including transactions covered by sectoral rules (such as those on organization of the common markets in various agricultural products) which contain the same prohibition;

(b) trade with non-member countries which have not signed agreements containing that prohibition, covering goods not included in a common organization of the markets.

43. The first case covers trade with EFTA, which is specifically referred to in the order for reference: the agreements signed in

9 — See paragraph 29 above.

1972 with the various States [10] — which, as the Commission has pointed out, were later covered by the Agreement on the European Economic Area [11] — prohibited the levying of charges having equivalent effect, as did other bilateral agreements with non-member countries or multilateral agreements to which the Community was a party.

44. In those cases, neither the scope of the term 'charges having an effect equivalent to customs duties' nor the subjective right of the traders to decline to pay such charges [12] can be given an interpretation substantially different from that developed over the years by the Court of Justice in its judgments concerning intra-Community trade. The same must be said, with greater reason, regarding the similar prohibition contained in the regulations governing the common organization of the agricultural markets. [13]

45. In the second case described above (no provisions in conventions or sectoral regulations for certain countries and types of product) greater difficulties are encountered.

46. The initial case-law of the Court of Justice, set out in the judgment in *Diamantarbeiders* [14] in response to a preliminary question whose 'essential purpose [was] to have it made known whether, and to what extent, the Member States may introduce or maintain, after 1 July 1968, charges having an effect equivalent to customs duties, levied on goods imported directly from third countries' indicated that 'the Member States may not, subsequent to the establishment of the Common Customs Tariff, introduce, in a unilateral manner, new charges on goods imported directly from third countries or raise the level of those in existence at that time'.

47. In reaching that conclusion, the Court of Justice considered that the question of the application of such levies (having equivalent effect) in trade with non-member countries had to be resolved by reference both to the requirements stemming from the establishment of the Common Customs Tariff and to

10 — With the Republic of Austria, OJ, English Special Edition 31 December 1972 (Journal Officiel L 300), p. 4; with the Kingdom of Sweden, OJ, English Special Edition 31 December 1972 (Journal Officiel L 300), p. 98; with the Swiss Confederation and the Principality of Liechtenstein, OJ, English Special Edition 31 December 1972 (Journal Officiel L 300), pp. 191 and 283; with the Republic of Iceland, OJ, English Special Edition 31 December 1972 (Journal Officiel L 301), p. 3, with the Kingdom of Norway (OJ 1973 L 171, p. 2), and with the Republic of Finland (OJ 1973 L 328, p. 2).

11 — OJ 1994 L 1, p. 3.

12 — See the judgment in Case 87/75 *Bresciani* [1976] ECR 129 concerning the direct effect of the prohibition of charges having equivalent effect contained in Article 2(1) of the Yaoundé Convention of 20 July 1969.

13 — See the judgments in Case 43/71 *Politi* [1971] ECR 1039 and Case 21/75 *Schroeder* [1975] ECR 913.

14 — Joined Cases 37/73 and 38/73 *Sociaal Fonds voor de Diamantarbeiders* v *N. V. Indiamex and Association de fait De Belder* [1973] ECR 1609.

those resulting from a common commercial policy within the meaning of Articles 110 to 116 of the Treaty.

48. From the first point of view, although the Common Customs Tariff, as initially established by Regulation (EEC) No 950/68 of the Council of 28 June 1968, [15] did not expressly provide for the elimination or equalization of charges other than customs duties as such, it is nevertheless clear — the Court inferred — from its objective that under it the Member States are prohibited from amending, by means of charges supplementing such duties, the level of protection as defined by the Common Customs Tariff.

49. From the point of view of the common commercial policy, the same judgment expressed the view that charges having an effect equivalent to customs duties may be incompatible with that policy because, according to Article 113(1) of the Treaty, the common commercial policy is to be based on uniform principles (particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade) and the definition of those principles involves, as does the Common Customs Tariff itself, the elimination of national disparities, whether in the field of taxation or commerce, affecting trade with non-member countries.

15 — OJ, English Special Edition 1968 (I), p. 275.

50. A similar conclusion was reached in the judgment in Case 340/87 cited above, [16] which stated, with respect to customs formalities in connection with trade with non-member countries, that 'Member States have no power as a general rule to add national charges to the duties due under Community legislation since that would deprive the Community legislation of its necessary uniformity'. The same view was stated in the judgments in *SIOT* [17] and *SPI and SAMI*. [18]

51. In my view, those decisions should continue to be followed. The common commercial policy is intimately linked with the establishment of a cohesive customs union based on a common tariff applicable to imports of products from non-member countries. That unitary regime, to be consistent and effective, calls for the elimination both of quantitative restrictions [19] unilaterally imposed by a Member State and of unilateral national charges imposed on the imports of such products, which may be

16 — See paragraph 27 above.

17 — Case 266/81 *SIOT* v *Ministero delle Finanze* [1983] ECR 731.

18 — Joined Cases 267/81, 268/81 and 269/81 *Amministrazione delle Finanze dello Stato* v *SPI and SAMI* [1983] ECR 801.

19 — This was expressly provided by Council Regulation (EEC) No 288/82 of 5 February 1982 establishing the arrangements applicable to imports of products originating in Yugoslavia to take account of the accession of the Hellenic Republic to the Community (OJ 1982 L 30, p. 1) which was in force at the material time, without prejudice to the possibility of certain protective State measures and restrictions adopted under conditions similar to those applicable to intra-Community trade.

regarded as charges having equivalent effect. [20]

52. Any other approach would be tantamount to undermining the Common Customs Tariff since the Member States could easily change the rate applied under that tariff by the indirect procedure of requiring the payment of additional levies which would produce the same effect. The collection of additional duties or levies similar to customs duties — operating as taxation in the same way — unilaterally imposed by each State on products from non-member countries would in practice detract from the uniformity of the Community customs system.

53. Whilst it is true that such considerations cannot be extended indiscriminately to cover any internal charge, they are entirely valid when applied specifically to the customs treatment of goods from non-member countries on which charges are levied that have the same effect as customs duties on imported products.

54. The foregoing clarification is necessary in order to dispel any doubt which might arise as to the interpretation of the judgment of the Court of Justice in *OTO* [21] which, with regard to an internal tax, states:

'The Court has also consistently held that Article 95 applies only to products from the Member States and, where appropriate, to goods originating in non-member countries which are in free circulation in the Member States. It follows that that provision is not applicable to products imported directly from non-member countries (see the judgment in Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90 *Simba and Others*, paragraph 14). [22]

...

So far as concerns the possibility of applying Article 113 of the Treaty, it is important to note that the Treaty does not contain any provisions similar to Article 95 regarding domestic taxation in respect of trade with non-member countries, subject, however, to any treaty provisions which may be in force between the Community and the country of origin of a given product (see the judgment in Case 148/77 *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787, paragraph 24)

20 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code expressly defines import duties as being both customs duties as such and charges having an effect equivalent to customs duties payable on the importation of goods.

21 — Case C-130/92 v [1994] ECR I-3281, paragraphs 18 and 20.

22 — [1992] ECR I-3713.

and that although Article 113 confers upon the Community powers which enable it to take any appropriate measure concerning the common commercial policy, it nevertheless does not contain any legal criterion which is sufficiently precise to enable an assessment of the contested national rules to be made (see the judgment in Case 266/81 *SIOT* v *Ministero delle Finanze* [1983] ECR 731, paragraph 29).'

55. It must be borne in mind that the national tax analysed in *OTO* was a domestic tax on consumption forming part of the general Italian system of internal taxation, which was applied objectively regardless of the origin of the product and did not therefore affect imports directly and exclusively. Taxes of that kind cannot be described as charges having an effect equivalent to import customs duties and, to that extent, the Court's findings in that regard must be not extended to them: in the first case the relevant provision is Article 95 of the Treaty (contained in Title V concerning competition, taxation and approximation of laws) whilst in the second the prohibition of charges having an effect equivalent to import duties derives from the joint application of Article 113 (common commercial policy) and Article 9 (establishment of the Common Customs Tariff).

56. In those circumstances, the answer to the last question submitted by the national court must be based on the more general premiss that it is necessary to uphold the principle of uniformity of the common commercial and tariff policy, with the result that none of the Member States may unilaterally impose charges having an effect equivalent to customs duties in their trade with non-member countries.

57. By contrast with the circumstances considered in *Diamantarbeiders*, cited earlier, [23] in this case there can be no problems of timing concerning the maintenance in force, exceptionally, of national charges having an effect equivalent to custom duties which predated the establishment of the Common Customs Tariff. It is clear that in this case the measures at issue were introduced after 1 July 1968, the date of entry into force of the Common Customs Tariff: the Italian ministerial orders referred to by the national court in the second question as being applicable to the case are dated 20 July 1971 and 30 January 1979.

58. Finally, some further clarification is called for regarding the scope of the

23 — Paragraph 46.

prohibition of measures of that kind in extra-Community trade. As the Court of Justice stated in *Simmenthal*, [24] that prohibition does not display the same unconditional and absolute character as that relating to intra-Community trade, so that the Community authorities may make or allow exceptions and derogations with a view to ensuring uniformity of the conditions under which products are imported from non-member countries, that being the aim of the common commercial policy.

59. In this case it does not appear that the Community authorities have adopted specific provisions — neither the Italian Government nor the Commission made any reference to any — to ensure uniformity of the common commercial policy which might enable Italy to establish or maintain, for extra-Community trade, the measures having equivalent effect to import duties referred to by the national court in its second question.

60. Thus, in so far as the judgment of the Court of Justice in Case C-209/89 *Commission* v *Italy* considered as charges having an effect equivalent to customs duties certain Italian levies (however they are described and regardless of the fact that the Italian Government has now changed its view and decided that they are not of a fiscal nature) payable for customs services provided simultaneously to several undertakings for intra-Community transactions, then that conclusion must be regarded as applying to extra-Community trade to the same extent.

61. In other words, in so far as the charges at issue in the judgment cited above imposed a disproportionate burden on traders by making them bear costs which did not correspond to the services actually provided, in connection with the passage of certain goods through customs, the fact that they are in the nature of charges having equivalent effect to import customs duties was undeniable, as was the fact that they were incompatible with Community law. And that conclusion could be seen as applicable both to intra-Community trade and to imports from outside the Community, in the absence of provisions in conventions or specific provisions relating to specified types of products or individual non-member countries which are shown to apply similar conditions.

24 — Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453.

Conclusion

Consequently, I suggest that the Court of Justice give the following answers to the questions submitted for a preliminary ruling by the Giudice Conciliatore, Milan:

(1) Council Directive 83/643/EEC of 1 December 1983 on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States applies only to intra-Community trade and not to extra-Community trade between individual States and non-member countries.

(2) Without prejudice to provisions in conventions and specific provisions concerning specified types of products or individual non-member countries, the findings in the judgment of the Court of Justice in Case C-209/89 *Commission* v *Italy* concerning the charges having an effect equivalent to customs duties with which that case was concerned also apply to trade with non-member countries.