they existed when the Treaty entered into force, provided, first, that the duties or charges levied meet the needs of their development and industrialization or produce revenue for their budgets and, secondly, that the introduction of or any change in such duties or charges does not give rise to any direct or indirect discrimination between imports from the various Member States, and subject to the obligation to implement reductions laid down in the second subparagraph of Article 133(3). The progressive reduction of the duties and charges existing when the Treaty entered into force to the level of those imposed on imports from the Member State with which each country or territory has special relations, as provided for under the second subparagraph of Article 133(3), was achieved when Decision 64/349 was implemented. As from that time, with regard to those customs duties or charges having equivalent effect, all discrimination between imports from the various Member States is prohibited.

REPORT FOR THE HEARING
in Case C-260/90 *

I — Facts and procedure

1. *Legal framework of the dispute*

Article 133 of the EEC Treaty is worded as follows:

'1. . . .

2. Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be progressively abolished in accordance with the provisions of Articles 12, 13, 14, 15 and 17.

3. The countries and territories may, however, levy customs duties which meet the needs of their development and industrialization or produce revenue for their budgets.

The duties referred to in the preceding subparagraph shall nevertheless be progressively reduced to the level of those imposed on imports of products from the Member State with which each country or territory has special relations. The percentages and the timetable of the

* Language of the case: French.

reductions provided for under this Treaty shall apply to the differences between the duty imposed on a product coming from the Member State which has special relations with the country or territory concerned and the duty imposed on the same product coming from within the Community on entry into the importing country or territory.

4. Paragraph 2 shall not apply to countries and territories which, by reason of the particular international obligations by which they are bound, already apply a non-discriminatory customs tariff when this Treaty enters into force.

5. The introduction of or any change in customs duties imposed on goods imported into the countries and territories shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States.'

Article 74 of Council Decision 86/283/EEC of 30 June 1986 on the association of the overseas countries and territories with the European Economic Community ('the decision') provides as follows:

'1. The relevant authorities of a country or territory may retain or introduce, in respect of imports of products originating in the Community or in other countries or territories, such customs duties or quantitative restrictions as they consider necessary in view of the present development needs of that country or territory.

2. (a) The trade arrangements applied to the Community by the countries and territories may not give rise to any discrimination between Member States nor be less favourable than most-favoured-nation treatment.

(b) The provisions of (a) shall not preclude a country or territory from granting certain other countries or territories or other developing countries more favourable treatment than that accorded to the Community.'

2. *Background to the dispute*

On 26 July 1988 Mr Bernard Leplat, the plaintiff in the main proceedings, imported into the Territory of French Polynesia a Mercedes motor vehicle originating in the Federal Republic of Germany. On importing the vehicle he was required to pay various amounts by way of import revenue duty, the new social welfare solidarity tax, harbour tax and statistical tax. Those amounts came to a total of FCP 1 143 525.

Mr Leplat requested the Tribunal de Paix (District Court), Papeete, to order the Territory of French Polynesia to repay that sum together with interest at the statutory rate. In support of his application, he contends that those duties and charges constitute measures having equivalent effect to customs duties and that they are covered

by Article 133 of the EEC Treaty. In Mr Leplat's view, it follows from that article that the territorial authorities were required at least to reduce those duties and charges to the level of those applicable to trade between France and French Polynesia when the Treaty entered into force. Goods originating in France were at that time admitted into Polynesia free of customs duties. He further contends that Article 74 of Council Decision 86/283 may not serve as a legal basis for levying the duties in question on the ground that it constitutes an unlawful amendment of the terms of Article 133.

The Papeete court considered that the solution to the dispute depended, first, on the interpretation of Article 133 of the EEC Treaty and, secondly, on the validity of the relevant provision in Council Decision 86/283. It therefore decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the provisions of Article 133(2) and (3) of the EEC Treaty apply to measures having an effect equivalent to customs duties?

(2) If so, may the overseas countries and territories associated with the Community levy such duties or charges on imports of products originating in the European Economic Community?

(3) If so, what are the obligations imposed on the overseas countries and territories by the objective of reducing customs duties which is mentioned in Article 133(3) of the Treaty?

(4) If not, are the decisions of the Council of the European Communities on the association of the overseas countries and territories which authorize those countries and territories to retain or introduce customs duties on products imported from the Community, in particular Article 74 of Decision 86/283 of 30 June 1986, valid in the light of Articles 133 and 136 of the Treaty?'

The judgment of the Tribunal de Paix, Papeete, was lodged at the Court Registry on 27 August 1990.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 19 November 1990 by the Council of the European Communities, represented by Jürgen Huber, an Adviser in its Legal Service, acting as Agent, on 23 November 1990 by the Commission of the European Communities, represented by its Legal Advisers, Marie-José Jonczy and Hans Peter Hartvig, acting as Agents, on 26 November 1990 by the Kingdom of the Netherlands, represented by B. R. Bot, Secretary-General at the Ministry of Foreign Affairs, on 27 November 1990 by the French Republic, represented by Philippe Pouzoulet, Assistant Director in the Department of Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, and Claude Chavance, Deputy Agent, on 4 December 1990 by the United Kingdom, represented by Derrick Wyatt, Barrister, and H. A. Kaya, acting as Agent, and on 27

December 1990 by the Autonomous Territory of French Polynesia, represented by the Prime Minister, Alexandre Leontieff, and Jean-Paul Levy, *Avocat* at the Cour d'Appel (Court of Appeal), Paris.

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.

II — Written observations submitted to the Court

The Court's jurisdiction under Article 177 of the EEC Treaty

As a preliminary issue, the parties which submitted observations, with the exception of French Polynesia, address the question whether the Court has jurisdiction in this case to give a ruling under Article 177 of the Treaty. The *French Republic* and the *Commission* take the view that the Court has jurisdiction, while the *United Kingdom* is of the opinion that the Court must declare that it has no jurisdiction on the ground that the referring court is not a court or tribunal of a Member State. The *Kingdom of the Netherlands* and the *Council* expressly refrain from addressing that point. However, those parties all accept that the question has already been raised in Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* v *French State* [1990] ECR I-4647, in which the judgment of the Court had not been delivered when the observations in the present case were lodged.

The question whether Article 133 covers charges having equivalent effect to customs duties

The first question referred

French Polynesia considers that Article 133 applies not only to the concept of customs duties *stricto sensu* but also to the concept of charges having equivalent effect. That article in fact provides that customs duties are to be abolished in accordance with Articles 12, 13, 14, 15 and 17 of the Treaty. As those articles refer to the progressive abolition of all customs duties and of all charges having equivalent effect, the reference to customs duties in Article 133 must be interpreted as also covering charges having equivalent effect. To interpret it otherwise would be to deprive that article of all practical effect because it would be possible to authorize the levying of a customs duty merely by changing its name.

While accepting that Article 133 refers only to customs duties, the *Netherlands Government* takes the view that that article would lose its practical effect if the principle of the abolition of customs duties and the power to levy such duties did not also extend to charges having equivalent effect. It refers in that respect to the arrangements for association set out in Part Four of the Treaty. It follows in particular from Article 132(1) that, as far as imports from the Community are concerned, the overseas countries and territories ('the countries and territories') are required to comply with the principle of non-discrimination. That non-discriminatory treatment must correspond to the trade relationship which

links the country or territory in question to the Member State of the Community with which it has special relations. The Netherlands Government believes that if the concept of customs duties were to be interpreted restrictively, it would be possible, by means of discriminatory charges having equivalent effect, to compromise the aim pursued by Article 133, namely that in each country or territory the conditions under which the products of the Member State with which it has special relations, those of the other Member States and those of the other countries and territories are marketed should be placed on an equal footing.

Secondly, according to the Netherlands Government, the scheme of the arrangements established by Article 133 also indicates that the first question should be answered in the affirmative. The wording used in Article 133(2), in particular the reference to Articles 12 to 17, supports the conclusion that that provision was intended to relate not only to the timetable for the abolition of customs duties but also to the material scope of the duties to be abolished. While the timetable for the abolition of customs duties is governed by Article 14, Articles 12 and 13 indicate that the 'standstill' obligation to be complied with and the obligation to abolish customs duties also extend to charges having equivalent effect.

The Netherlands Government refers finally to the implementation of the rules in Article 133 which was achieved through the implementing decisions adopted under Article 136. Those decisions were not confined to customs duties but also apply to charges having equivalent effect; in particular where the abolition of duties payable when goods cross frontiers and customs procedures are concerned.

In the light of those observations, the Netherlands Government concludes that the first question referred should be answered in the affirmative.

The *French Government* points out that although Article 133 mentions only customs duties, it none the less refers to Articles 12 to 17 of the EEC Treaty, which also provide for the abolition of charges having equivalent effect. With regard to duties imposed when goods are imported into the countries and territories, the principle of non-discrimination thus also applies to charges having equivalent effect. The French Government submits that if that were not the case Article 133 would be deprived of its practical effect.

The *United Kingdom* argues that Article 133 applies to customs duties only and not to charges having equivalent effect. In that connection, it cites the opinion of Mr Advocate General Roemer in Case 26/69 *Commission* v *France* [1970] ECR 565. According to the Advocate General, Article 133 of the Treaty concerns only the 'abolition of customs duties on imports and ... therefore even charges having an effect equivalent to customs duties are not included'.

The United Kingdom considers that that interpretation is also supported by the following considerations. First of all, the wording of Article 133(3) provides that customs duties are to be reduced in line with the percentages and timetable of the reductions provided for under the Treaty. Those words are relevant as far as customs duties in the strict sense are concerned but have no relevance at all to charges having

equivalent effect. Secondly, Article 70 of Council Decision 86/283, cited above, provides that products originating in the countries and territories are to be imported into the Community free of customs duties and charges having equivalent effect. There would be no point in mentioning charges having equivalent effect if they were included within the reference to customs duties. Article 74, on the other hand, authorizes the countries and territories to retain or introduce customs duties in certain conditions but is silent as to charges having equivalent effect. From this the United Kingdom concludes that Article 133 of the Treaty and Article 74 of the decision apply solely to customs duties in the strict sense.

The *Commission* begins by pointing out that the general provisions of the Treaty and of secondary legislation do not apply to the countries and territories; only the special arrangements based on Articles 131 to 136 of the Treaty apply to them. Those arrangements, which were introduced for a period of five years, were extended by a number of successive decisions, the most recent being that adopted by the Council on 30 June 1986, which is in issue in the present case. With regard to the implementation of the trade arrangements, Article 132 provides, first, that the Member States are to apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the EEC Treaty and, secondly, that each country or territory is to apply to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the European State with which it has special relations. The Treaty, moreover, does not provide that the common customs tariff is to apply to the countries and territories; if the common customs tariff does none the less apply in some countries and territories, that is so because of a purely internal decision by the Member State in question.

With regard to the first question in the reference, the Commission considers that Article 133 does not apply to charges having equivalent effect. In the first place, Article 133 expressly mentions only customs duties, whereas when the Treaty intends to deal with charges having equivalent effect it does so explicitly. In that respect, it is not conclusive that Article 133(2) refers to Article 12 et seq. because it is quite plausible that that reference applies only in relation to the scope of Article 133.

Secondly, Article 132 provides no argument in favour of a broad interpretation of Article 133. The latter article draws a clear distinction between imports into the Community of goods originating in the countries and territories and imports into the countries and territories of goods originating in the Member States. With regard to imports into the countries and territories, Article 132 sets out to establish a situation in which there is no discrimination between the Member States, thus showing that the purpose of the Treaty is not necessarily to establish reciprocity between the obligations of the countries and territories and those of the Member States. That situation is compatible with the purpose of association, which is to promote the economic and social development of the countries and territories. That explains why Article 133(3) enables the countries and territories to levy customs duties which meet the needs of their development and implies that the authors of the Treaty deliberately refrained from dealing in Article 133 with charges having equivalent effect.

The Commission concludes that Article 133 does not apply to charges having an effect equivalent to customs duties, although it accepts that that outcome could in theory mean that the countries and territories

might, by introducing charges having equivalent effect, frustrate the results that the abolition of customs duties was intended to achieve.

The question whether the countries and territories may levy charges on imports of products from the EEC

The second and third questions

The *Autonomous Territory of French Polynesia* claims that it follows from Article 133(3) and (5) that the charges in issue may be levied in the countries and territories provided they do not place products from Member States other than France at a disadvantage. It points out in that respect that the duties payable on entry into the territory of Polynesia are levied both on products originating in metropolitan France and on those originating in the other Member States of the EEC.

According to the *Netherlands Government*, the customs duties in question should have been abolished by no later than the end of the transitional period and could not, moreover, have been reintroduced. However, Article 133(3) constitutes a derogation from the principle contained in Article 133(2). The assessment of the need to have recourse to the power defined in Article 133(3) is primarily a matter for the authorities of the country or territory concerned and review by the Court might consist in defining a number of objective criteria or indications relating to the lawful exercise of that power. When making use of that power, moreover, the countries and territories must comply with the principle of non-discrimination between the Member State with which it has special relations and the other Member States.

As regards the third question, the Netherlands Government claims that the wording of the Treaty shows that since the end of the transitional period duties and charges must be imposed without any discrimination in favour of the Member State with which the country or territory has special relations. The reference criterion for the level of duties which may still be levied must therefore be the level applicable to imports originating in the Member State with which the country or territory has special relations. The Netherlands Government notes that it is apparent from the judgment of the referring court that in this instance imported goods originating in French customs territory were admitted into French Polynesia free of duty when the Treaty entered into force. If that is correct, it means, according to the Netherlands Government, that the duties levied in this case when a motor car was imported from the Federal Republic of Germany cannot be levied.

In the opinion of the *French Government*, the permanent derogation from the principle of reciprocity between the countries and territories and the Member States of the EEC set out in Article 133 is justified by the fact that the countries and territories are inadequately developed. It nevertheless believes that in application of those derogating arrangements the duties imposed on imports into the countries and territories must comply with the principle of non-discrimination between the Member States in accordance with the wording of that article. In that respect, the customs arrangements in force in French Polynesia fully comply with the relevant provisions of the Treaty because they do not discriminate between the Member States.

The *United Kingdom* submits that if the Court accepts the answer to the first question advocated by the United Kingdom there is no need to answer the second and third questions. In case the Court should not accept that argument, however, the United Kingdom concludes from Article 132 that a country or territory is required to apply to imports from the Member States and from the other countries and territories the same treatment as that which it applies to imports from the Member State with which it has special relations. According to the United Kingdom, it follows from Article 133(3) that each country and territory is required to ensure that, at the end of the transitional period, charges having equivalent effect to customs duties on imports from the Member States and the other countries and territories have been reduced to the level of those imposed on imports from the Member State with which the country or territory has special relations.

The United Kingdom adds that, in the absence of any clear and precise indication as to the legal position regarding charges having equivalent effect, no obligation resulting from Article 133 could confer rights on individuals that the courts of the countries and territories would be required to protect.

The *Commission* considers that it follows from Article 133 that the countries and territories may retain customs duties which existed when the Treaty entered into force and which were justified by the criteria set out in Article 133(3), provided that those duties are progressively reduced in respect of the other Member States of the Community to the level of duties applicable to the same products imported from the Member State with which the country or territory has special relations. Furthermore, the countries and territories may introduce new customs duties or amend existing duties provided that they meet the objectives set out and do not result in discrimination between imports from the various Member States of the Community.

The validity of Article 74 of Council Decision 86/283 of 30 June 1986

The fourth question

The *Autonomous Territory of French Polynesia* claims that the disputed article does not in any way constitute an amendment of Article 133 of the EEC Treaty. Article 133(5) of the Treaty provides that the introduction of or any change in customs duties imposed on goods imported into the countries and territories must not give rise to any discrimination between the Member States of the EEC. The word 'introduction' indirectly authorizes the creation of new customs duties and new charges having equivalent effect. It follows that the article in issue, by authorizing the retention or introduction of such duties, did not infringe the Treaty.

The *Netherlands Government* states that Article 74 can be intended only to lay down and develop the detailed rules for the association arrangements established in Part Four of the Treaty. Article 74 must, accordingly, be applied and interpreted in the light of the purpose and scope of Article 133, in particular paragraphs (2) and (3). On that last point, the Netherlands Government refers to the interpretation of those provisions which it formulated in reply to the second and third questions.

The *French Government* claims that the argument of the plaintiff in the main proceedings, to the effect that Article 74 constitutes an unlawful amendment of the terms of Article 133 of the Treaty, is contradicted by the wording of Article 133(5), which expressly refers to the creation of new duties or charges. It observes in that respect that Council Decision 86/283, which contains the disputed article, was adopted pursuant to the second paragraph of Article 136 of the Treaty. That decision was adopted following the four decisions previously adopted by the Council in application of that provision in order to renew the Implementing Convention concerning association with the countries and territories. According to the French Government, it must be concluded from the wording of those provisions that they correspond to an interpretation of Article 133 of the Treaty, representing a unanimous decision of the Council, according to which the countries and territories are to remain empowered to levy customs duties and charges having equivalent effect, subject to the conditions laid down in the Treaty.

As to whether the requirements of the second paragraph of Article 136 were complied with by the Council, the French Government observes that, according to Article 131, association of the countries and territories is to serve primarily to further the interests of the inhabitants of those countries and territories. It is thus for the Council to take Article 133 of the Treaty into account when it adopts association decisions pursuant to the second paragraph of Article 136. The French Government concludes that the Council fully complied with the EEC Treaty when it adopted the disputed article.

The *United Kingdom* claims that Article 74 is compatible with Article 133 of the Treaty. First of all, the argument that the countries and territories may introduce and retain customs duties is supported by the wording of Article 133, which refers, *inter alia*, to the introduction of customs duties. Furthermore, although Article 133 provides for a gradual process towards equality of treatment, it is not intended to freeze customs duties at the level at which they stood when the transitional period expired. The United Kingdom concludes that Article 74 of Decision 86/283 is compatible with Articles 133 and 136 of the Treaty.

The *Council* observes that the decision the validity of which is challenged is based on the second paragraph of Article 136 of the Treaty. That paragraph provides that the Council is to lay down provisions for a further period on the basis of the experience acquired and of the principles set out in the Treaty. Articles 132 and 133 are the provisions which implement the general principles on the basis of which the Council must act. The Council considers that those articles are permanent in nature and that it must also comply with them when it takes decisions pursuant to Article 136. When assessing the various factors to be taken into account, the Council enjoys a margin of discretion, provided that it complies with the primary purpose, namely to promote the interests and development of the countries and territories.

With regard to the specific question of the validity of Article 74, the Council observes that Article 133 enables the countries and territories to levy customs duties under certain conditions. It interprets the words 'may . . . levy' as meaning 'may retain or introduce'. That interpretation follows in particular from Article 133(5), which mentions the 'introduction of or any change in' customs duties. Since 'introduction'

refers to the imposition of new customs duties, it follows that the word 'levy' must also be interpreted as including the possibility of introducing new customs duties.

According to the Council, a reading of paragraph (3) in conjunction with paragraph (5) of Article 133 shows, on the other hand, that any direct or indirect discrimination between imports from the various Member States is prohibited. That applies both to customs duties in existence when the Treaty entered into force and to new customs duties subsequently introduced. In that respect, the Council considers that the words 'from the various Member States' cover all the Member States, including that with which the country or territory has special relations.

In short, the Council maintains that Article 133 enables it to adopt, pursuant to the second paragraph of Article 136, provisions which make it possible for the countries and territories to retain existing customs duties or to introduce new customs duties which they regard as necessary for their development, provided that these do not give rise to any discrimination between the Member States, including the Member State with which the country or territory in question has special relations.

The *Commission* compares the wording of Article 133 of the Treaty with the wording of Article 74 of the contested decision. It points out that, pursuant to the latter article, trade arrangements may not give rise to any discrimination between the Member States of the Community, and concludes that even though Article 74 of the decision differs somewhat from Article 133 inasmuch as it is worded differently and introduces certain matters concerning relations with non-member countries, the arrangements introduced by Article 74 of the decision substantially correspond with those which follow from Article 133 of the Treaty.

Should the arrangements provided for by the contested article differ from those of Article 133, the Commission maintains that such arrangements may be valid in the light of Article 136 of the Treaty, regard being had to the discretion given to the Council 'on the basis of the experience acquired and of the principles set out in this Treaty'. The Commission points out that while the specific provisions of Part Four of the Treaty are still valid as principles, the fact none the less remains that the detailed rules of association initially laid down represented minimum arrangements in favour of the countries and territories which in no way precluded subsequent improvements resulting from the development of the social and economic position of the countries and territories in order better to satisfy the purpose of that association as set out in the Treaty.

By way of summary, the Commission states that the fact that the arrangements in force for each country or territory are on the whole more advantageous than the arrangements initially provided for in terms of the objectives pursued shows conclusively that the provision in question does not infringe the Treaty. The Commission concludes that, in so far as the Council decision gives the countries and territories wider discretion in levying customs duties and charges having equivalent effect, that is consistent with the Council's power under Article 136 of the Treaty.

Gordon Slynn
Judge-Rapporteur