Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Rules that, by applying the fixed customs duty of 150 lire on the goods in question from other Member States with a dutiable value not exceeding 428 lire per article, after the entry into force of the Treaty, and by taking that duty as the basis for the calculation of the successive reductions in customs duties, the Italian Government has failed in its obligations under Articles 12 and 14 (1) of the Treaty;**

2. **Orders the defendant to pay the costs.**

Donner Riese Rueff
Delvaux Hammes Rossi Catalano

Delivered in open court in Luxembourg on 27 February 1962.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 7 DECEMBER 1961[1]

Mr President,
Members of the Court,

This second dispute relating to the application of the Treaty of Rome is between the same parties and follows the same procedure as the first, that is to say, by application of Articles 169 and 171 concerning a ruling by the Court, on the application of the Commission, that a Member State has failed to fulfil one of its obligations under the Treaty. As in the first case it concerns the application of the 'stand-still' rule, but in this instance it relates to a customs duty and not to a quantitative restriction (Articles 12 and 14).

Article 12 provides:

'Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they

1 — Translated from the French.

already apply in their trade with each other.'

Article 14 (1) provides:

'For each product, the *basic duty* to which the successive reductions shall be applied shall be the duty *applied* on 1 January 1957.'

The action turns, as you know, on the question what was the 'duty applied on 1 January 1957' on imports to Italy of tubes, valves and lamps for radio receivers which come under tariff heading 1204 d in the Italian customs tariff.

The *Italian Government* maintains that it was an *ad valorem* duty of 30% subject to a fixed minimum of 150 lire per article, contained in the Sixth Protocol on additional concessions under GATT, signed at Geneva on 23 May 1956. This Agreement was only ratified by a Law of 2 January 1958 and published on 17 February 1958, but it had been provisionally brought into force by a Decree of 12 July 1956 of the President of the Republic, published on 14 July and therefore before 1 January 1957. It is true that a Circular dated 13 July 1956 had provided that the duty formerly relating to this tariff heading, which was 35% without any fixed minimum, would still be collected where it was more favourable to the importer but this Circular is merely a concessionary measure and cannot prejudice the application of the new tariff, which is the only legal tariff. It was therefore right, the defendant says, for this tariff to be taken as the 'basic duty' for the application of the successive reductions provided for by the Treaty.

The *Commission* takes the view that, in accordance with the Circular, it is the duties as a whole as they emerge from the application of the more advantageous of the two tariffs which must be considered. It is, in fact, this combination of duties which constitutes 'the duty applied on 1 January 1957'. It follows from this that the basic duty chosen by the Italian Government contravenes the Treaty in so far as it does not take into account the old duty of 35% without a fixed minimum where it is more advantageous, that is to say, on tubes, valves, etc. with a dutiable value not exceeding 428 lire per article.

First, the Commission maintains that the duty to be taken into consideration is the duty *actually applied* on 1 January 1957 and not the duty applicable by law. Alternatively, it claims that it will show that at the relevant date the tariff system resulting from the application of the more advantageous of the two duties was the only one which complied with the Italian legal position, a position which the Circular had therefore correctly interpreted.

The Italian Government disagrees on these two points. It refers to the first paragraph of Article 234 of the Treaty concerning the maintenance of rights and obligations arising from earlier agreements concluded with third countries which, in this case, are those made under the auspices of GATT in 1956 from which arose the right, and even the obligation, of Italy to apply in full the new duty subject to the fixed minimum.

I shall consider these different questions in turn.

I — The duty actually applied or the duty legally applicable

Article 12 of the Treaty is worded as follows:

'Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those *which they already apply* in their trade with each other.'

And Article 14 reads:

'For each product, the basic duty to which the successive reductions shall be applied shall be the duty *applied* on 1 January 1957.'

The texts, then, favour the argument of the Commission. However, this argument is not in itself decisive, for it could be maintained that by implication the text referred to a legally applied duty. Must one, therefore, enquire in every case, if need by by reference to the law and even to the constitution, whether the tariff actually applied is in accordance with domestic law? Must one, on the other hand, be content to consider the rates actually levied at the frontier, whether by negligence or by error? I believe that, as often happens, the truth, like wisdom, *stat in medio*.

What then is the problem? It concerns the 'standstill' relating to trade between Member States. What is of importance, therefore, is the *actual* customs situation governing trade in each product at the relevant date. Obviously one cannot take into account errors or even the more or less arbitrary and variable tolerances which can arise in the levying of duties. But I think, on the other hand, that it would be going too far to demand or to allow in each case an inquiry into whether the duty levied was legal, or even constitutional. In my opinion, what should be taken into consideration is the tariff arising from an application of the official scales, taking into account adjustments and interpretations brought to the notice of the public and applied by the administration, as well as any suspensions and exemptions to which the tariff may be subject; the duties which result are, in fact, those which govern trade. No doubt a person subject to such a duty is always entitled to raise an objection and complain of its illegality or unconstitutional nature but until such objection is raised and substantiated and the tariff modified as a result the effects on international commerce are those produced by the tariff applied: that indeed is what matters.

In short, I propose that you should admit of a concept of *apparent regularity*. When there exists an official interpretation by the competent administration and instructions in accordance with this interpretation are given to the collecting officers to fix the terms and conditions of the levying of a duty, then that is the 'duty applied' within the meaning of Articles 12 and 14 of the Treaty.

Such an interpretation, moreover, appears to me to be required not only by the purpose of the provisions in question but also by the need, in order to apply these provisions, for a simple, and to some extent automatic, rule which would avoid inextricable complications which would otherwise be inevitable.

Moreover, as the Commission has observed, this interpretation appears to be confirmed by the provisions of Article 19 of the Treaty concerning the setting up of the common customs tariff. Here again, it is the 'duties *applied* in the four customs territories comprised in the Community' which must be considered. (Article 19 (1) and (2), first subparagraph). Proof that the Treaty intended to refer to the duties actually applied is found in the third subparagraph of Article 19 (2), which expressly substitutes the duties shown in List A for those actually applied on 1 January 1957. These were duties in the French customs tariff, which on 1 January 1957 were subject to a temporary suspension due to come to an end — and which actually came to an end — within six months. It was decided in this particular case to make an exception to the rule and to consider the duties without taking into account the suspension still in force on 1 January 1957. This is indeed a case in which the exception proves the rule, particularly since on 1 January 1957 a large number of conventional duties existed which were suspended both in France and elsewhere and which were not made the subject of any exemptions.

The defendant, it is true, quotes the provisions of the second subparagraph of Article 19 (2), referring particularly

to the Italian tariff and according to which:

'with respect to items on which the Italian tariff contains a conventional duty, this duty shall be substituted for the duty applied'.

from which it follows that the simultaneous consolidation of two basic duties is inconceivable: the basic duty can only be a single duty.

In my opinion, the Commission effectively refutes this argument in its reply (pages 3 and 4). The purpose of the provisions of the second sub-paragraph of Article 19 (2) is to substitute, in certain cases and under certain conditions, a conventional duty for the duty applied, but these provisions do not govern the question which of the two duties under discussion was, in this case, the one which was to be taken into consideration on 1 January 1957. Both in fact, were conventional duties, that of 35% without fixed minimum having been bound under the Annecy Protocol of 1949, while the second had been bound under the Geneva Protocol of 1956. But which of the two was applicable, or were they both applicable concurrently? This is another problem which is not resolved by the provision in question. As to the claim that in no case can a duty 'applied' within the meaning of the Treaty be a combination of two different duties, I do not think that this is correct.

In fact, customs rules are prepared for this situation and generally provide that, when several duties are applicable, the one most favourable to the importer shall be applied. That this applies to Italian legislation appears from the documents annexed to the file.

A final objection could be made as to the manner in which the duties used in calculating the arithmetical average employed as a basis for setting up the common external tariff were determined. This point was the subject of a question raised at the hearing.

In fact, as we have seen, Article 19 provides that for the purposes of this calculation, the arithmetical average of the *duties applied* in the four customs territories of the Community shall be used as the basis. From the reply given it appears that in this case the experts, according to the information provided by the Italian Government, used the duties in the second tariff, that is the duty of 30% with a fixed minimum of 150 lire per article. It was upon this basis that, in order to take into account the existence of the fixed minimum at a more or less flat rate, the duty was assessed at 33% for the complete tariff range. The representative of the Commission has told us that, in his opinion, the result would have been no different if the simultaneous application of the two duties for that part of the tariff heading concerning tubes, valves and lamps for radio receivers had been taken as the basis, in view, no doubt, of the multiplicity of factors concerned in the calculation.

Whatever documentary or other similar interest there is in this question from the fact that Article 19, like Article 14, refers to duties *applied,* I do not think that it affects the outcome of the present action. In fact, even if an error had been committed in the calculation of the common external tariff, and even if, contrary to the argument of the Commission, this error had not been covered by the unanimous approval of this external tariff by the Council on the basis of Article 28, the error so produced would not in any event affect the question of the abolition of customs tariffs *between Member States* under Article 14 — which is the only question you have to judge.

Finally, I shall deal with the argument based on the similarity of the text of Article 19 with that of Article 14: in both cases one must take (or one should have taken) into consideration the duties *actually applied* on 1 January 1957, in accordance with official instructions from the competent authorities, in this

case in accordance with the Circular of 13 July 1956.

II — Was the duty applied legally applied?

It is therefore only as a subsidiary point, and consequently very briefly, that I shall examine this question, full explanations of which have been provided both in the written and oral procedures.

The following points seem to be established:

1. Parliament is the only competent authority in Italy to legislate on customs matters;
2. Nevertheless, delegations of powers to the executive have been allowed on several occasions, enabling it, in particular, to enact temporary measures of suspension or reduction;
3. On the other hand, the executive is not allowed to increase legal tariffs;
4. The Geneva Agreement of 1956 could not apply until after its ratification by Parliament, which did not take place until after 1 January 1957;
5. Wishing nevertheless to implement it as soon as possible, the Government used the powers delegated to it in order to insert new duties into the customs list without waiting for the ratification; this was the purpose of the Presidential Decree of 12 July 1956, Annex A which refers to the duty of 30% with the minimum of 150 lire per article for the whole of the tariff heading 1204 d.

The question is therefore as follows: Was the Italian Government able to do this legally, even where the new duty was less favourable to the importer than the old?

Yes, says the Italian Government, since the new duty remained in every case lower than the legal tariff (40% with a fixed minimum of 200 lire per article).

No, says the Commission, since the duty of 35% without a fixed minimum had been bound under a convention (the Annecy Agreement) which had been ratified by Parliament.

It is therefore a question of determining the limit of the delegation of powers allowed to the executive: in what conditions could such a power be used to implement in advance a customs agreement properly signed but not yet ratified which substituted one conventional tariff for another when the new tariff, whilst to some extent higher than the old, remained nevertheless lower than the legal tariff? That is a problem of domestic law, perhaps even a constitutional problem.

I do not wish to take part in such a controversy and even doubt whether the Court is competent to do so.

I would only state that the Circular of 13 July 1956 was no doubt prudent in deciding, in its interpretation of the Presidential Decree of the previous day, that the new duty should be applied only in so far as it was more favourable than the old. It is this system which constituted the 'duty applied' on 1 January 1957.

III — Article 234

Let us first look at the first two paragraphs of this Article:

'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.'

I shall not return to the long debate

to which the interpretation of these provisions has given rise. I believe that their meaning is quite clear.

It concerns the classic question of the observance by the contracting parties to a treaty of previous commitments which already bind one or other of those parties to non-contracting States — to 'third countries'. The principle is that each State which is a party to a treaty remains bound by the obligations previously assumed by it towards third countries, even if those obligations conflict with those which arise from the new treaty. The problem is therefore to resolve this contradiction, the only means being to exercise all the rights available to the State in order to free itself lawfully from those obligations which are incompatible with the newly contracted undertakings: notice of termination of the agreement according to the forms and time limits provided for in the agreement itself, negotiations commenced in order to obtain an amendment of the agreement, etc. The States which are parties to the new treaty may enter into a formal agreement between themselves to use all the means at their disposal to arrive at this result, if necessary by assisting each other. But it is obvious that, in so far as the obligations of a State under a treaty are incompatible only with the exercise of certain *rights* to which that State was entitled under earlier agreements, there is no difficulty: the State in question is simply *bound* by virtue of its new obligations to make no further use of those rights in so far as they are incompatible with those obligations.

It is in this way that similar problems within the framework of the ECSC have been resolved. Thus, to take as an example a case which resembles this one inasmuch as it concerns the unbinding of customs duties, Article 16 of the Convention on the Transitional Provisions distinguishes between rights which were not yet bound at the date of entry into force of the Treaty, and those already bound. As regards the former, Article 16 only prohibits all subsequent binding without the agreement of the High Authority; as regards the latter, it is provided that the High Authority may:

'if necessary make to Member States the appropriate recommendations for terminating the bindings *by the procedure provided in the agreements containing them.*'

Thus, when the first paragraph of Article 234 provides that:

'The *rights and obligations* arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, *shall not be affected* by the provisions of this Treaty',

it is merely stating an established principle of international law, which was probably not without value, especially from a psychological point of view. However, the only legal problem which arises is that which appears in the second paragraph, that is, where the rights or obligations are incompatible with the Treaty. I quote:

'To the extent that such (incompatibility exists) the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.'

If this incompatibility concerns a *right* to which a Member State was entitled under an earlier agreement, the 'appropriate steps' are merely renunciation of this right by the State in question. If it concerns the *right of a third country,* or an *obligation of a Member State* towards a third country, one will then have to resort to the procedures necessary to eradicate the incompatibility by lawful means.

Which then is the position here? First of all, is the Geneva Agreement incompatible with the Treaty, in so far as it substitutes the new duty of 30% with a fixed minimum for the duty of

35% without a fixed minimum for valves and other articles for radio receivers?

If my view (that is, the argument of the Commission) is adopted on the first point, then it follws that the application of the new duty after the entry into force of the Treaty and the establishment of this new duty as the basis for the successive reductions where it was higher than the old duty, namely for articles for use in radio receivers, the value of which was 428 lire or less, was contrary to Articles 12 and 14. But the obligation arising from the Treaty of only partially applying the new bound duty is equivalent simply to a renunciation by the Italian State of the exercise of a right which it possessed as a result of the existence of this tariff. Moreover, this renunciation does not concern third countries, to which the new tariff applied from the time it legally came into force and will continue to do so until the setting up of the common external tariff. The renunciation is nothing other than the application of certain provisions of the Treaty by the Italian Government *to other Member States* — namely the provisions concerning the abolition of customs duties.

It is true that it might be asked whether such a solution does not discriminate against third countries which, being parties to the same agreement (GATT), nevertheless have only the new tariff — which is not the more favourable of the two — applied to them, whilst their partners who are members of the EEC benefit not merely from tariff reductions (which one must allow) but from tariff reductions calculated on a more advantageous basic duty. This would lead to distortion of competition, for example between the United States and Germany on the Italian market.

I do not think this objection is justified. In fact this situation arises from the application of the Treaty. The third countries in question have benefited from simultaneous application of the two duties in accordance with the Circular of 13 July 1956, but since the introduction of the new tariff following ratification of the Geneva Agreement they are subject only to this tariff.

The manner in which Member States proceed *amongst themselves* to abolish customs duties cannot be criticized by third countries, provided that it is accomplished in accordance with the provisions of the Treaty and does not prejudice the rights which those countries possess under agreements in force. For these reasons I feel that the argument based on Article 234 cannot be maintained.

My final view therefore is that, after all this legal debate, it is the argument put forward by the Commission which is in accordance with the Treaty.

Before concluding however, I would like to emphasize that only legal considerations are involved in this case, of which the most important is the need to abide by a simple quasi-automatic rule. However, for reasons as much of logic as of economy, it is unfortunate that in this case the tariff laid down by the Geneva agreements, which is the most recent tariff, which was implemented a short time after the fateful date of 1 January 1957 and which governs trade between all the member countries of GATT, cannot be taken as a basis for the tariff reductions between Member States.

In any case I quite understand why the Italian Government did not yield immediately to the argument of the Commission but insisted that the matter be referred to the Court.

I am therefore of the opinion:

— that the Court should rule that, by applying the fixed minimum duty of 150 lire after the entry into force of the Treaty, and by taking this duty as

the basic duty for the calculation of the successive reductions in relation to other Member States of the customs duties imposed upon imported tubes,valves and lamps for radio receivers from other Member States with a dutiable value not exceeding 428 lire per article, the Italian Republic has failed in one of its obligations under the Treaty;

— that the Government of the Italian Republic should bear the costs.