OPINION OF ADVOCATE GENERAL LÉGER
delivered on 5 October 2006 [1]

1. By this action, the Commission of the European Communities seeks a declaration that, by enacting an environmental tax on gas pipelines containing methane gas, crossing the Sicilian Region ('the environmental tax' or 'the disputed tax'), the Italian Republic has failed to fulfil its obligations under Articles 23 EC, 25 EC, 26 EC and 133 EC and Articles 4 and 9 of the Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria signed in Algiers on 26 April 1976 and approved on behalf of the Community by Regulation (EEC) No 2210/78 [2] ('the Cooperation Agreement').

I — Legal framework

A — *Community law*

1. Relevant provisions of the EC Treaty

2. Under Article 23 EC, the customs union between Member States involves a Common Customs Tariff intended to bring about equalisation of the customs charges borne by products imported from third countries at the Community's external frontiers in order to avoid any deflection of trade with those countries and any distortion of the free movement of those products between Member States.

3. Article 25 EC prohibits customs duties and charges having equivalent effect between

1 — Original language: French.

2 — Council Regulation (EEC) No 2210/78 of 26 September 1978 concerning the conclusion of the Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria (OJ 1978 L 263, p. 1).

Member States. This prohibition is also to apply to customs duties of a fiscal nature.

4. Article 133 EC provides that the commercial policy of the Community is to be based on uniform principles, particularly in regard to changes in tariff rates and the conclusion of tariff and trade agreements. It implies that national disparities of a fiscal and commercial nature affecting trade with non-member countries must be abolished.

2. The Cooperation Agreement

5. According to Article 1, the Cooperation Agreement seeks 'to promote overall cooperation between [the People's Democratic Republic of Algeria and the European Economic Community] with a view to contributing to the economic and social development of Algeria and helping to strengthen relations between the Parties. To this end provisions and measures will be adopted and implemented in the field of economic, technical and financial cooperation, and in the trade and social fields'.

6. For the purposes of Article 4(1) of that agreement, the purpose of cooperation between the European Economic Community and the People's Democratic Republic of Algeria is to promote, in particular:

'...

— the marketing and sales promotion of products exported by Algeria;

...

— as regards energy, the participation by Community operators in programmes for the exploration, production and processing of Algeria's energy resources and any activities which would develop these resources on the spot, and the proper performance of long-term contracts for the delivery of oil, gas or petroleum products between their operators;

...'

7. Article 9 of the Cooperation Agreement provides that 'products originating in Algeria which are not listed in Annex II to the Treaty establishing the European Economic Community shall be imported into the Community free of quantitative restrictions and measures having equivalent effect, and of customs duties and charges having equivalent effect'.

8. Methane gas is one of the products listed in Article 9 of the Cooperation Agreement.

B — *National legislation*

9. Article 6 of the Regional Law of the Sicilian Region No 2 of 26 March 2002 [3] provides:

'1. An environmental tax shall be introduced for the purpose of funding investments to reduce and to prevent the environmental risks arising from the presence of gas pipelines containing methane gas installed in the Sicilian Region's territory. The revenue shall be used to fund initiatives for preserving, protecting and improving the quality of the environment, particularly in the zones those pipelines cross.

...

3. ... The taxable event shall be ownership of the gas pipelines, containing the gas, which cross the territory of the Sicilian Region.

4. Owners of the type 1 gas pipelines referred to in paragraph 3 who carry on at least one of the activities of transportation, distribution, sales or purchasing shall be liable to pay the tax.

5. For the purposes of the tax, gas pipeline shall mean all the pipes, bends, joints, valves and other special components which as a whole serve to transport and distribute natural gas.

6. The basis of assessment for the tax shall be the volume, measured in cubic meters, of gas pipelines classed as type 1 pipelines within the meaning of the Ministerial Order of 24 November 1984, which regulates, for safety purposes, installation for the trans-

3 — GURS (Official Journal of the Sicilian Region) No 14 of 27 March 2002, Part 1, p. 1; 'the Sicilian Law'.

portation and distribution of natural gas by pipelines.[4]

...'

II — The pre-litigation procedure

10. By several letters sent to the Italian authorities during 2002 and 2003, the Commission asked those authorities for clarifications concerning the event giving rise to, and the detailed rules for the application of, the environmental tax established by Article 6 of the Sicilian Law. By reply of 9 September 2003 the Italian Republic stated that 'the Sicilian environmental tax had not been applied in practice in the Italian legal system' since the Tribunale amministrativo regionale della Lombardia (Italy) held that law not to be compatible with the rules of Community law.

11. The Commission considered that the observations of the Italian Republic were neither exhaustive in fact nor well founded in law and, by letter of 19 December 2003, gave formal notice to the Republic to submit its observations within a period of two months, prescribed in accordance with Article 226 EC. Subsequently the Italian Republic obtained an extension of that period until 19 April 2004.

12. Having received no response following that formal notice, notwithstanding the extension of the period, the Commission sent the Italian Republic a reasoned opinion on 9 July 2004, and requested Italy to take the measures necessary to comply with that reasoned opinion within two months of its receipt. The Italian Republic did not respond to that opinion.

13. Consequently the Commission decided to bring the present action.

III — The action

14. The Commission claims that the Court should declare that, by establishing and retaining the disputed tax laid down by Article 6 of the Sicilian Law, the Italian Republic has failed to fulfil its obligations under Articles 23 EC, 25 EC, 26 EC and 133 EC as well as Articles 4 and 9 of the Cooperation Agreement, and order the Italian Republic to pay the costs.

4 — GURI No 12 of 15 January 1985, Part 1, section 1.3, p. 7.

A — *Main arguments of the parties*

15. As a preliminary point, the Commission submits that the Italian Republic cannot rely on the decision of the Tribunale amministrativo regionale della Lombardia, which held that the environmental tax was not compatible with Community law, for the purposes of demonstrating that that tax is no longer applied in the territory of the Sicilian Region. The Commission argues that it has been held that the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. [5] The Commission adds in its reply that a decree of 31 December 2004 of the Minister for the Budget and Finance of the Sicilian Region mentions in Chapter 1611 the revenue from the tax on the ownership of gas pipelines within the territory of the Sicilian Region. The Commission submits that that proves that the tax concerned in the present case is still in force. In addition, it states that, according to the rule in *Lancry and Others*, [6] the prohibition in Article 25 EC also covers taxes imposed by local and regional bodies.

16. Furthermore, the Commission submits that only one infrastructure is affected by Article 6 of the Sicilian Law, namely a Trans-Mediterranean pipe-line owned by an Algerian company. According to the Commission, that pipeline has two purposes: the distribution and consumption of gas in Italy, and the transportation of gas on Italian soil and its exportation to other Member States. However, according to the Commission, it follows from settled case-law that the imposition of new taxes or measures having equivalent effect on goods imported directly from non-member countries is prohibited. [7] The scope of that prohibition is identical to that in the context of intra-Community trade. [8]

17. Furthermore, the Commission submits that the introduction of the environmental tax is in breach of the Common Customs Tariff since that tax alters the equalisation of customs charges imposed at the Community's external frontiers on goods imported from third countries, potentially causing deflection of trade with those countries and distortion of the free movement of goods or of conditions of competition between Member States. The Commission also states that, according to settled case-law, a Member State cannot apply transit duties or any other tax relating to goods crossing through its territory. [9]

5 — Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 26.

6 — Joined Cases C-363/93 and C-407/93 to C-411/93 *Lancry and Others* [1994] ECR I-3957, paragraph 26.

7 — See Joined Cases 37/73 and 38/73 *Diamantarbeiders* v *Indiamex* [1973] ECR 1609, paragraphs 10 to 18, and Case 266/81 *SIOT* [1983] ECR 731, paragraph 18.

8 — Case C-125/94 *Aprile* [1995] ECR I-2919, paragraphs 32 to 42.

9 — See *SIOT*, paragraphs 18, 19 and 23.

18. Furthermore, according to the Commission, the true purpose of the environmental tax is to tax the transported product and not the infrastructure itself. The event giving rise to of the environmental tax is ownership of the plant. However, the Commission points out that the basis of assessment is the volume of the gas pipelines containing the gas. The detailed provisions in the Sicilian Law restrict the collection of the tax to the situation where gas is present in the gas pipeline and make the tax inapplicable to the infrastructure itself.

19. The Italian Republic considers that the Commission has not taken into consideration the other features of the environmental tax, and in particular the objective pursued by that tax. According to the Italian Republic, that tax has as its sole objective to fund investments intended to reduce and prevent the environmental risks arising from the presence of gas pipelines containing methane gas installed in the Sicilian Region. The environmental tax thus has as its objective to apply the environmental principles referred to in the Treaty, in particular the precautionary principle.

20. The Italian Republic adds that the tax at issue must be paid only if the gas is actually present in the infrastructure and if the owner carries on an activity of transportation, distribution, sales and purchasing. That approach corresponds to a legitimate requirement that the tax be connected solely to cases where there is a potential risk of environmental damage. The Italian Republic, in its rejoinder, [10] states that the relationship between the amount of the tax and the volume of the gas transported constitutes merely a fair technical parameter serving to establish an appropriate and rational link with the actual extent of the danger to the environment. The effect of the tax on the price is purely incidental and depends on the will of the owner of the gas pipelines.

21. In its reply [11] the Commission submits that the concept of a 'charge having equivalent effect to a customs duty' is an objective legal concept of Community law. That concept therefore is quite beyond the intentions of the national legislature and the objectives it pursues. The effects of the disputed national tax on trade in goods between Member States are all that matters to the Court. The Commission adds that the judgment in *Simitzi* [12] confirms the fact that charges having equivalent effect are prohibited, whatever the objective pursued and the intended purpose of the revenue from them.

10 — Paragraphs 12 and 13.

11 — Paragraph 3.

12 — Joined Cases C-485/93 and C-486/93 *Simitzi* [1995] ECR I-2655, paragraph 14.

B — *Assessment*

22. As a preliminary point, it should be noted that the cooperation agreements bind the Member States and that they must ensure compliance with the obligations arising from those agreements. [13]

23. Furthermore, under a Cooperation Agreement with a third country in which there is a prohibition to impose a customs duty or a charge having equivalent effect on a product originating from that country, as in the present case, there is no reason to interpret that concept of charges having effect equivalent to customs duties differently from the interpretation upheld by the Court for intra-Community trade. [14]

24. Therefore, the expression 'charge having equivalent effect to a customs duty' for the purposes of Article 9 of the Cooperation Agreement must be understood as any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, even though such pecuniary charge is not levied for the benefit of the State. [15]

25. However, such a charge escapes that classification if it constitutes payment for a service in fact rendered to the economic operator or if it attaches to inspections carried out to fulfil obligations imposed by Community law. [16]

26. That having been made clear, the merits of the complaint must now be assessed. In order to determine whether the disputed tax has the constituent elements of a charge having equivalent effect to a customs duty, it is appropriate to ascertain, firstly, whether that tax is imposed on goods then whether those goods are taxed by reason of their crossing a frontier.

27. Firstly, I would recall that under Article 6(3) of the Sicilian Law the event giving rise to the environmental tax is 'ownership of the gas pipelines, *containing the gas*, which cross the territory of the Sicilian Region'. [17] At first sight it would be possible to think that that

13 — Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 11.

14 — *Diamantarbeiders* v *Indiamex*, paragraph 10; Case 35/76 *Simmenthal* [1976] ECR 1871, paragraphs 14 and 15; and also *SIOT*, paragraph 18; and *Aprile*, paragraphs 38 to 40.

15 — See, in particular, Case C-293/02 *Jersey Produce Marketing Organisation* [2005] ECR I-9543, paragraph 55 and case-law cited.

16 — Case C-389/00 *Commission* v *Germany* [2003] ECR I-2001, paragraph 23 and case-law cited.

17 — Emphasis added.

tax is imposed on the means of transportation, namely the gas pipeline. However, I note that the tax is payable in respect of gas pipelines which actually contain gas.

28. According to the Italian Republic, the environmental tax is paid only if there is an actual and specific potential risk of environmental damage. It accepts that that situation is inconceivable where the gas pipeline does not contain gas. [18]

29. Those factors show that it is not the means of transportation, strictly speaking, on which the disputed tax is levied, but rather the goods which are transported within it, namely the gas.

30. Secondly, I note that Article 6(4) of the Sicilian Law states that '[o]wners of the type 1 gas pipelines ... shall be liable to pay the tax'. According to the Ministerial Order of 24 November 1984, to which Article 6(6) of the Sicilian Law refers, type 1 pipelines are gas pipelines in which the pressure is higher than 24 bars.

31. The Italian Republic does not dispute the fact that there is only one infrastructure which has the characteristics of the type 1 gas pipelines and that it is a plant connected to the Trans-Mediterranean gas pipelines which transport natural gas from Algeria.

32. The environmental tax therefore only affects gas imported from Algeria.

33. Furthermore, I would point out that, within the context of charges having equivalent effect, the Court has treated regional frontiers in the same way as national frontiers. [19] Consequently it is of little importance that the frontier crossed by the goods is the frontier separating Algeria from the Sicilian Region.

34. In the light of those considerations, the constituent elements of the definition of a charge having an equivalent effect are found in the present case.

35. That assessment is not affected, in my opinion, by the objective pursued by the tax.

18 — See paragraph 26 of the defence.

19 — *Lancry and Others*, paragraphs 26 and 27.

36. In its defence [20] the Italian Republic submits that the objective of the environmental tax is to fund investments intended to reduce and prevent environmental risks. Therefore, that tax was introduced solely in order to protect the environment, having regard, in particular, to the precautionary principle.

37. However, the Court has held on a number of occasions that the prohibition of all customs duties is a general and absolute prohibition. Consequently, customs duties or charges having equivalent effect are prohibited irrespective of the purpose for which they were introduced and the intended purpose of the revenue from them. [21]

38. I am of the opinion that that rule also applies to a tax introduced, as in the present case, under the precautionary principle.

39. Furthermore, I observe that the Italian Republic did not put forward any evidence to explain in what respect the Algerian gas transported by a type 1 gas pipeline is of a particularly dangerous nature necessitating the imposition of a tax such as the disputed tax.

40. It should also be noted that the Italian Republic has not shown that the disputed tax corresponds to the exceptional cases identified in the case-law and considered in point 25 of the present Opinion, that is that it constituted payment for a service in fact rendered to the economic operator or that it was attached to inspections carried out to fulfil obligations imposed by Community Law.

41. Finally, the Commission, in its application, submits that the disputed tax was also established in breach of Articles 23 EC and 25 EC. According to the Commission, Article 6 of the Sicilian Law contravenes the principles of the Common Customs Tariff because 'it establishes a charge having equivalent effect to a duty on imports (into the Community) or exports (to other Member States)'. [22]

42. I do not take that view on that point.

43. In my opinion, the disputed tax cannot apply to the goods both when they cross the frontier between Algeria and the Sicilian Region, and when they cross the Region to be consumed on the territory of other Member States. It is my opinion, in the light of the considerations put forward in point 27 et seq. of the present Opinion, that the tax is

20 — See paragraphs 10 and 11.

21 — See, in particular, Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraph 7, and *Simitzi*, paragraph 14.

22 — See paragraph 11.

payable only at the time the goods cross the frontier between Algeria and the Sicilian Region. Once the disputed tax is paid, the gas moves freely in the gas pipeline, either to the Region or to other Member States.

44. In the light of those factors, I am of the opinion that the complaint alleging breach of Articles 4 and 9 of the Cooperation Agreement is well-founded and that the remainder of the action for failure to fulfil obligations must be dismissed.

45. The complaint having been declared well-founded, the Italian Republic must be ordered to pay the costs, in accordance with the form of order sought by the Commission and the first subparagraph of Article 69(2) of the Rules of Procedure.

IV — Conclusion

46. In the light of the foregoing, I propose that the Court should:

(1) declare that, by introducing an environmental tax on methane gas from Algeria intended either for free circulation on the territory of the Sicilian Region or for exportation to other Member States, the Italian Republic has failed to fulfil its obligations under Articles 4 and 9 of the Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria signed in Algiers on 26 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2210/78 of 26 September 1978;

(2) order the Italian Republic to pay the costs.