OPINION OF ADVOCATE GENERAL TESAURO

delivered on 18 May 1995 *

1. The issue in this case is the legality or otherwise of a charge levied on the production of goods in and the import of goods into Ceuta, the Spanish enclave on the Mediterranean coast of Africa. The Tribunal Superior de Justicia, Andalusia, has referred the following question to the Court of Justice for a preliminary ruling under Article 177 of the Treaty:

'Do Article 25(2) of the Act concerning the conditions of accession of the Kingdom of Spain to the European Communities and Protocol No 2 thereto, in conjunction with the provisions of the EEC and ECSC Treaties concerning the free movement of goods, allow the existence after 1991 of a charge such as the one governed by Spanish Law 8/1991 of 25 March 1991 approving the Arbitrio sobre la Producción e Importación en las Ciudades de Ceuta y Melilla (charge on production in and import into the cities of Ceuta and Melilla) which is arranged in such a way as to result in the "almost total absence of any additional tax burden on internal operations" while at the same time maintaining an actual charge on imports from the customs territory of the Community?'

2. That question was raised in proceedings between the Ayuntamiento (Municipal Council) of Ceuta and the Chamber of Commerce, Industry and Shipping of that city. The latter seeks annulment of the municipal order, based on the abovementioned Law No 8 of 25 March 1991, [1] which approved the procedures for levy of the local charge on goods brought into or produced within the municipal limits.

3. In order to apprehend the precise scope of the question referred to the Court, it is appropriate to set out the provisions of the Act concerning the conditions of accession of the Kingdom of Spain to the European Communities [2] (hereinafter 'the Act of Accession') which relate specifically, as regards the matters at issue here, to the territories of Ceuta and Melilla, together with the contested national legislation.

Article 25(1) and (2) of the Act of Accession provide:

'1. The Treaties and the acts of the institutions of the European Communities shall apply to the Canary Islands and to Ceuta

* Original language: Italian.

1 — BOE (Official State Gazette) No 73 of 26 March 1991, p. 765.

2 — OJ 1985 L 302, p. 23.

and Melilla, subject to the derogations referred to in paragraphs 2 and 3 and to the other provisions of this Act.

2. The conditions under which the provisions of the EEC and ECSC Treaties concerning the free movement of goods and the acts of the institutions of the Community concerning customs legislation and commercial policy shall apply to the Canary Islands and to Ceuta and Melilla are set out in Protocol No 2.'

The protocol in question states that 'The customs territory of the Community shall not include the Canary Islands and Ceuta and Melilla' (Article 1(2)) and goes on to lay down the rules applicable to the import of goods from a non-member country into those territories, those applicable to products originating in the Canary Islands and Ceuta and Melilla that are released for free circulation in the customs territory of the Community, the special regime applicable to fishery and agricultural products and to trade between those territories, and, finally, the regime applicable to Community goods brought into the Canary Islands or Ceuta and Melilla, which includes provision for the progressive abolition of customs duties and charges having equivalent effect during the transitional period.

More particularly, Article 6 provides:

'1. On import into the Canary Islands or into Ceuta and Melilla, products originating in the customs territory of the Community shall qualify for exemption from the customs duties and charges having equivalent effect under the conditions defined in paragraphs 2 and 3.

2. The customs duties existing in the Canary Islands and in Ceuta and Melilla and the charge known as the "arbitrio insular — tarifa general" existing in the Canary Islands shall be abolished progressively, with regard to products originating in the customs territory of the Community, according to the same timetable and under the same conditions as those provided for in Articles 30, 31 and 32 of the Act of Accession.

3. ...'.

Those conditions are the ones laid down in the Act of Accession for the remainder of Spanish territory, that is to say the progressive reduction of duties during the transitional period, culminating in their total abolition as from 1 January 1993. Finally, no special provision is made for products covered by the ECSC Treaty, these therefore being subject to the same rules.

4. It should also be borne in mind that, by virtue of the combined provisions of Article 26 of the Act of Accession and of Chapter V(2) of Annex I to that act, the Community rules on value added tax do not apply to those territories. On the other hand, there is no derogation regarding application of the fiscal provisions of the Treaty, which implies, pursuant to Article 2 of the Act of Accession, that those provisions, in particular Article 95, apply to the territories of Ceuta and Melilla.

5. For the precise purpose of complying with the obligations deriving from the abovementioned provisions of the Act of Accession, the Spanish legislature adopted Law No 8/1991, which made changes to the system of local taxes prevailing in Ceuta and Melilla, replacing the earlier municipal tax on the entry of goods (the 'aforo') with a new charge, known as the 'arbitrio'. The charge is now payable not only on the introduction of movable goods into the territories concerned, as it was earlier, but also on the domestic production of such goods, with the aim, specifically indicated in the preamble to the Law, of eliminating any discrimination based on the *origin* of the goods. Having regard, moreover, to the particular difficulties holding back economic development in the territories in question, difficulties which in the past justified the application of a tax regime different from that applicable to the rest of national territory, the Law laid down a number of measures, albeit of a temporary nature, for the protection of local industry.

Pursuant to Article 1, 'the *arbitrio* on production and importation is an indirect municipal charge levied on the production and manufacture in and imports into the cities of Ceuta and Melilla of all categories of tangible movable goods, in accordance with the provisions of the present Law'. Article 3 goes on to state that taxable operations comprise the production of goods by way of trade by economic agents in pursuit of their business activity and importation of the same goods into the territories to which the Law applies, and, by virtue of Article 5(1), the second category includes goods originating in other regions of Spain. The chargeable event for the tax is, by virtue of Article 11, the placing of the goods at the disposal of the buyer, in the first case, and, in the second, presentation of the import declaration. The basis of assessment is, for domestic production, the aggregate amount due to the transferor at the time of transfer of the goods, whereas for goods from outside it is their customs value (Articles 15 and 16). Determination of the rates applicable to the various products is delegated, subject to the minimum and maximum limits laid down by the Law (0.5% and 10%), to the municipal administration concerned (Article 18), which is required to fix them by means of the implementing measures for the adoption of which they are responsible.

In the case of Ceuta, those measures were adopted by order of 24 September 1991. [3]

3 — Ceuta Official Gazette of 25 September 1991, p. 143.

Articles 7 and 9 of Law No 8/1991 indicate, finally, the products and imports that are to be exempt from payment of the charge. The categories of goods which benefit from those exemptions are in fact largely the same in both cases. However, Article 7(2) applies special rules for the benefit of local industry, to the effect that 'total or partial exemptions may be granted temporarily for goods produced or processed by industries established in the territory of the cities of Ceuta and Melilla forming part of the sectors protected by Law No 50 of 27 December 1985 on regional incentives for economic development intended to rectify the imbalances existing between the various parts of the national territory'.

In that regard, it should be pointed out that Article 14 of the abovementioned municipal order of September 1991 provides that the exemptions in question may be obtained, under the conditions and for the period indicated in the measure granting them, in response to reasoned applications from interested parties.

6. Having regard to the relevant provisions of the Act of Accession, it is therefore in the light of Articles 9 and 12 or 95 of the Treaty that it must be considered whether the charge at issue is compatible with Community law.

I should point out in that connection that it is settled law [4] that the same tax cannot, under the scheme of the Treaty, fall simultaneously within the category of charges having an effect equivalent to customs duties, within the meaning of Articles 9 and 12, and that of internal taxation within the meaning of Article 95: Articles 9 and 12 prohibit the collection, as between Member States, of import and export customs duties or charges having equivalent effect, whereas Article 95 merely prohibits internal taxation if, and to the extent to which, it discriminates against products from other Member States.

7. More particularly, the essential feature of a charge having an effect equivalent to a customs duty, which distinguishes it from internal taxation, is the fact that the former is borne exclusively by imported products as such, whereas the latter is borne by both domestic and imported products. [5]

The Court of Justice has also made it clear in *Legros*, [6] in relation to dock dues levied in the French overseas *départements*, that 'a charge, proportional to the customs value of goods, levied by a Member State on goods imported from another Member State by reason of their entry into a region of the territory of the first Member State constitutes a

4 — Case 94/74 *IGAV* [1975] ECR 699, paragraph 13; Case 193/85 *Co-Frutta* [1987] ECR 2085, paragraphs 8 to 11.

5 — Case 193/85, cited above, paragraph 9.

6 — Case C-163/90 *Legros and Others* [1992] ECR I-4625.

charge having an effect equivalent to a customs duty on imports, notwithstanding the fact that the charge is also imposed on goods entering that region from another part of the same State'. [7] On that occasion, the Court held that the charge at issue could not be classified as internal taxation under Article 95 because, whilst it applied to all goods brought into Réunion by reason of their entry into that part of French territory, products originating in Réunion were *systematically* exempted, not on the basis of objective criteria which could have been applied also to imported products but precisely on account of their regional origin. [8]

The contested charge, which clearly differs from the dock dues at issue in *Legros*, thus in principle displays features such as to allow it to be classified, according to the case-law of the Treaty, as internal taxation within the meaning of Article 95.

8. Now, if the legislation at issue is examined in the light of the principles just referred to, it becomes clear that the 'arbitrio' applies without distinction both to foreign goods and those imported from other parts of national territory when they are brought into Ceuta and to goods originating in Ceuta; it applies to categories of goods in accordance with an objective criterion, namely inclusion in the categories of goods listed in the table annexed to the municipal order of 24 September 1991, regardless of the origin of the product concerned. Furthermore, the rates applicable to the various products and the exemptions provided for — with the exception of the special case covered by Article 7(2) of Law No 8/1991, which I shall discuss shortly — are determined solely by reference to the particular category to which the product belongs, regardless of origin.

9. That conclusion is not, moreover, undermined by the observation in the order for reference that, in view of the fact that industrial production and processing are very limited in Ceuta, the 'arbitrio' is ultimately charged mainly on the importation of goods, and that, in reality, the imposition of a corresponding charge on production is nothing more than a subterfuge resorted to by the legislature in order to keep in place the previous import tax now prohibited by Community law. In that connection, the Court of Justice has made it clear that a tax which is levied on both imported and domestic products but in reality, since there is no, or very little, domestic production of the same or similar goods, applies exclusively, or almost exclusively, to imported products does not constitute a charge having equivalent effect if it forms part of *a general system of internal taxation applying systematically to categories*

7 — Paragraph 18.
8 — Paragraph 12.

of products according to objective criteria, regardless of their origin. [9] As already stated, the 'arbitrio' is levied on certain goods when they are released for consumption and, at least in principle, their regional, domestic or foreign origin is immaterial.

10. The conclusion would be different, however, if it was shown to be the case, as contended by the defendant in the main proceedings, that the proceeds of the charge at issue are intended to finance activities by a public or quasi-public body which functions solely in order to promote regional production, particularly by granting loans to undertakings established in Ceuta. At an early stage, in *Capolongo*, [10] the Court held that:

'In the interpretation of the concept "charge having an effect equivalent to a customs duty on imports", the destination of the financial charges levied must be taken into account.

In effect, when such a financial charge or duty is intended exclusively to support activities which specifically profit taxed domestic products, it can follow that the general duty levied according to the same criteria on the imported product and the domestic product nevertheless constitutes for the former a net supplementary tax burden, whilst for the latter it constitutes in reality a set-off against benefits or aids previously received.

Consequently, a duty within the general system of internal taxation applying systematically to domestic and imported products according to the same criteria can nevertheless constitute a charge having an effect equivalent to customs duty on imports, when such contribution is intended exclusively to support activities which specifically benefit the taxed domestic product.'

11. The line taken in those decisions was confirmed with regard to Article 95 as well. [11] However, because the provisions on discriminatory internal taxation and charges having equivalent effect cannot be applied in conjunction with each other — as I pointed out earlier — the criterion for distinguishing between the two cases has been held by the Court to be the question whether the burden borne by national products when released for consumption is offset wholly or in part by the benefits deriving from the use to which the proceeds of the charge are put. Where the burden is offset in its entirety, the

9 — See Case 78/76 *Steinike and Weinlig* [1977] ECR 595, paragraph 30, and Case 193/85, cited above, paragraph 14.

10 — Case 77/72 *Capolongo* [1973] ECR 611, paragraphs 13 and 14. That judgment was followed in numerous later cases, in particular Case 78/76, cited in footnote 9, Case 105/76 *Interzuccheri* 1977] ECR 1029, Case 32/80 *Kortmann* [1981] ECR 251, Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, and Case C-266/91 *CELBI* [1993] ECR I-4337.

11 — Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 15.

charge in question is incompatible with Article 12 et seq. of the Treaty; if it is only partially offset, the charge is incompatible with Article 95 and is prohibited to the extent to which is it is discriminatory to the detriment of the imported product. [12]

12. The Municipality of Ceuta denies that the proceeds of the 'arbitrio' are put to any specific purpose: together with other revenues, it claims, they help provide the local administration with the financial resources needed for all the activities required of it. Since there are no provisions on that point in the contested legislation, a factual assessment is called for, which is a matter for the national court. The latter must establish whether, in this case, the proceeds of the charge are intended to finance activities which benefit only regional production. If that is found to be the case, it must conclude that the charge on imported products constitutes a charge having equivalent effect if the advantages enjoyed by regional products offset in its entirety the burden which they bear on being released for consumption. If, on the other hand, those advantages only partially offset the burden borne by the regional products then the rules at issue entail tax discrimination incompatible with Article 95.

13. That said, it nevertheless seems that the tax rules at issue are certainly discriminatory in another respect, to the detriment of imported goods. Article 7(2) of Law No 8/1991 provides that certain total or partial exemptions from the charge may be granted, temporarily, solely for goods produced by industries established within the territory of Ceuta (and Melilla); by virtue of Article 14 of the order of 24 September 1991, which lays down detailed arrangements for the application of that specific provision, those derogations are to be granted at the request of interested parties. The discriminatory nature of that provision is not diminished by the fact that not only imported goods but also those originating in other parts of Spanish territory are excluded from that benefit. As the Commission notes, discrimination based on the regional origin of a product amounts, at least in part, to discrimination based on nationality, in so far as products similar to or competing with local products which may enjoy an exemption receive less favourable treatment. As is apparent from numerous decisions of the Court of Justice on Article 30, it is not necessary, in order for a measure to be classifiable as discriminatory or protectionist, that it operates to the

12 — See the judgments in: Case C-72/92 *Scharbatke* [1993] ECR I-5509, paragraphs 10 to 16, Case C-266/91, cited above, paragraphs 13 to 19, Case C-17/91 *Lornoy* [1992] ECR I-6523, paragraphs 17 to 22, Case C-114/91 *Claeys* [1992] ECR I-6559, paragraphs 14 to 19, Joined Cases C-144/91 and C-145/91 *Demoor* [1992] ECR I-6613, paragraphs 18 to 21, Joined Cases C-149/91 and C-150/91 *Sanders Adour* [1992] ECR I-3899, paragraphs 20 to 22, and Joined Cases C-78/90 to C-83/90, cited above, paragraphs 26 to 28.

benefit of all national products or to the detriment of only imported products, to the exclusion of domestic production. [13]

If it is borne in mind, however, that Article 95 cannot be invoked against internal taxation which is borne by imported products where there are no similar or competing national products, [14] the incompatibility of the 'arbitrio' with that provision can be said to exist only to the extent to which it is applied to goods of which there is regional production that is taxed less heavily than similar or competing imported production.

14. Finally, it does not seem to me that the conclusions I have reached can in any way be weakened by invoking — as the Spanish Government does — the Treaty rules on economic and social cohesion, in particular Article 130a. Whilst those provisions, which require the Community to pursue action aimed in particular at reducing disparities between the levels of development of the various regions, must serve as a key to the understanding of Community law as a whole, they cannot justify exceptions to the application of other Treaty rules for which there is no express provision in the Treaty itself or in other instruments of the same rank. As far as the applicability of the rules on the free movement of goods in the territories of Ceuta and Melilla is concerned, the Act of Accession laid down no exception extending beyond the transitional period. That said, I am of the opinion that both the Treaty itself and secondary law offer various means of attaining the aim laid down in Article 130a, without its being necessary to undermine the foundations on which the Community is based.

15. Accordingly, I am of the opinion that the question submitted by the national court should be answered as follows:

1. Article 25 of the Act concerning the conditions of accession of the Kingdom of Spain to the European Communities and Protocol No 2 thereto, read in

13 — Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, paragraphs 37 and 38, Case C-179/90 *Merci* [1991] ECR I-5889, paragraph 21, Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad* [1991] ECR I-4151, paragraph 24, and Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraphs 12 and 13.

14 — Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, in particular paragraph 10.

conjunction with Article 9 et seq. of the EC Treaty, preclude the levying of a charge on goods imported from other Member States and on domestic goods at the time of their release for consumption in Ceuta if it is found that the proceeds of that charge are used to finance activities which specifically benefit products originating in that region, so as to offset *in full* the burden which they bear as a result of the charge. That charge must be held to constitute discriminatory internal taxation within the meaning of Article 95 of the Treaty if its proceeds are used to finance activities which compensate *only in part* for the burden borne by regional products as a result of collection of the charge.

2. Article 25 of the Act concerning the conditions of accession of the Kingdom of Spain to the European Communities and Protocol No 2 thereto, read in conjunction with Article 95 of the EC Treaty, preclude the levying of a charge on goods imported from other Member States and on domestic goods at the time of their release for consumption in the territory of Ceuta, to the extent to which it is levied on products that are similar to or compete with goods originating in Ceuta that are exempted wholly or in part from payment of the charge by reason of their regional origin.