OPINION OF ADVOCATE GENERAL JACOBS

delivered on 22 November 2001 [1]

1. In this action the Commission seeks a declaration that, by not making available to the Commission ITL 29 223 322 226 together with interest from 1 January 1996, Italy has infringed its obligations under the Community provisions concerning the Communities' own resources.

2. The dispute concerns duties on imports into Italy from third countries of goods destined for the independent republic of San Marino. Before December 1992 Italy collected customs duties on such goods pursuant to a convention between the two States. It is common ground that, since San Marino is not a Member State of the European Union, those duties do not form part of the Community's own resources. From 1979 to 1984, however, it appears that Italy wrongly accounted for such duties to the Commission as own resources and subsequently sought to correct that over-payment by reducing payments properly due as own resources by an amount allegedly representing the duties wrongly paid. From 1990 to 1992 Italy reduced the amount paid to the Commission as own resources by an amount allegedly representing duties collected on imports of goods destined for San Marino. The Commission, while accepting that such duties are not Community own resources, disputes the amounts which Italy claims are attributable thereto. Attempts to reach agreement as to a total amount having failed, the Commission seeks payment of the amounts so deducted or withheld together with interest.

Legislative framework

3. Article 2(b) of Council Decision 70/243 [2] states that Common Customs Tariff duties are to constitute own resources to be entered in the budget of the Communities. Article 6(1) states that Community resources are to be collected by the Member States and made available to

1 — Original language: English.

2 — Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 on the Replacement of Financial Contributions from Member States by the Communities' own Resources, OJ English Special Edition 1970(I), p. 224.

the Commission. Decision 70/243, which entered into force on 1 January 1971, was replaced by Council Decision 85/257 [3] with effect from 1 January 1986, which was in turn replaced with effect from 1 January 1988 by Council Decision 88/376. [4]

4. Regulation No 2891/77 implementing Decision 70/243 [5] had effect from the financial year 1978. Article 1 requires the Communities' own resources to be established by Member States and made available to the Commission.

5. Article 2 states:

'For the purpose of applying this Regulation, an entitlement shall be deemed to be established as soon as the corresponding claim has been duly determined by the appropriate department or agency of the Member State.

Where it becomes necessary to rectify an establishment recorded in accordance with the first paragraph, the competent department or agency of the Member State shall make a new establishment.'

6. Article 3 requires Member States to take all appropriate measures to ensure that the supporting documents concerning the establishment and the making available of own resources are kept for at least three calendar years from the end of the year to which they relate.

7. Article 9(1) requires the amount of own resources established to be credited by each Member State to the account opened for that purpose in the name of the Commission with its Treasury or appointed body.

8. Article 18(1) requires Member States to carry out the verifications and inquiries concerning the establishment and the making available of own resources. Article 18(2) requires Member States to carry out additional inspection measures at the Commission's reasoned request and associate the Commission, at its request, with the inspection measures which they carry out.

3 — Council Decision 85/257/EEC, Euratom of 7 May 1985 on the Communities' system of own resources, OJ 1985 L 128, p. 15. Articles 2(b) and 7(1) are to the same effect as Articles 2(b) and 6(1) of Decision 70/243.

4 — Council Decision 88/376/EEC, Euratom of 24 June 1988 on the system of the Communities' own resources, OJ 1988 L 185, p. 24. Articles 2(b) and 8(1) are to the same effect as Articles 2(b) and 7(1) of Decision 85/257.

5 — Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, OJ 1977 L 336, p. 1.

9. Regulation No 2891/77 was repealed by Regulation No 1552/89 [6] with effect from 1 January 1989. Articles 1, 2, 3, 9(1) and 18(1) and (2) of Regulation No 2891/77 are essentially reproduced in Regulation No 1552/89. [7] That Regulation added a new second paragraph to Article 3, which provides:

'If verification of those supporting documents by the national administration alone or in conjunction with the Commission shows that a finding to which they relate may have to be corrected, they shall be kept beyond the time-limit provided for in the first paragraph for a sufficient period to permit the correction to be made and monitored.'

10. Article 11 of Regulation No 1552/89 provides:

'Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by two percentage points. The rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

Background

11. During the period from 1 January 1979 to 30 November 1992, [8] San Marino was part of Italian customs territory by virtue of the Agreement on friendship and good neighbourly relations between San Marino and Italy of 31 March 1939, which remained applicable after the accession of Italy to the European Economic Community by virtue of Article 234 of the EC Treaty (now Article 307 EC). On the basis of that Agreement, and in particular Article 52 thereof, San Marino entrusted Italy with collecting duties on imports of goods into Italy destined for consumption in San Marino. Those duties were accordingly paid to the Italian Treasury and in consideration San Marino received an annual flat-rate compensatory amount paid by the Italian State. [9]

12. It appears that from 1979 to 1984 the duties collected by Italy on imports of

6 — Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources, OJ 1989 L 155, p. 1.

7 — By Articles 1, 2, 3 (first paragraph), 9(1) and 18(1) and (2).

8 — Until the Interim Agreement on trade and customs union between the European Economic Community and the Republic of San Marino of 27 November 1992 (OJ 1992 L 359, p. 14) entered into force.

9 — According to Italy, ITL 84 billion for the period 1979-89.

goods from third countries destined for San Marino were included in the total customs duties on imports into Italy from third countries and wrongly accounted for to the Commission as Community own resources. In June 1985 Italy asked the Commission whether it could rectify that overpayment by way of a deduction of the total overpaid of ITL 9 410 311 986 from subsequent sums payable as Community own resources and in future operate regular deductions before payment so that the amount paid by way of Community own resources did not include amounts attributable to duty collected on imports from third countries of goods destined for San Marino. The Commission stated in reply that such a deduction could be made only where the results of checks carried out pursuant to Regulation No 2891/77 showed that it was justified.

13. Between 1985 and 1996 there was a protracted exchange of correspondence punctuated by periodic meetings between the Commission and the Italian authorities concerning the lawfulness of such a deduction and the steps to be taken in order to ensure that duties on imports of goods from third countries destined for San Marino were accounted for separately from those on other such imports of goods into Italy. The essential developments over that period may be summarised as follows.

14. By letter of 11 June 1987 the Commission accepted the principle of deduction, both for the future and as a means of correcting part of the over-payment already made. The letter concluded as follows:

'All those amounts — past and future — are accepted only subject to inspection measures in association with the Commission pursuant to Regulation No 2891/77.

More generally, the Commission expects the Italian authorities to do everything necessary to ensure that imports destined for San Marino are not subsequently re-imported into Italy. The Commission considers that the present agreement may be in question if there is an unexplained increase in imports from third countries destined for San Marino.

The Italian authorities may effect the proposed deductions as soon as the Commission has received their agreement to the above.'

15. According to the Commission, in October 1988 the Italian authorities deducted the amounts overpaid for 1982 to 1984 (ITL 5 269 620 911) although they

did not give their agreement to the terms of the Commission's letter of June 1987 until March 1990, when they accepted the proposal for joint inspection measures.

16. In May 1991 the Commission sent the Italian authorities a report on the inspection measures concerning Italian controls of own resources which it had carried out in association with the Italian authorities in April 1990 and January/February 1991 pursuant to Article 18(2) of Regulation No 1552/89. [10] That report involved inspection visits to the Directorate General in the Italian Ministry of Finance responsible for customs and indirect taxes and to the Rimini and Trieste customs offices.

17. The report concluded that the conditions set out in the letter of 11 June 1987 had not been satisfied: because there was no monitoring of the Italy — San Marino border and there were inadequate controls, it could not be excluded that there was significant trade between third countries and the Community via San Marino and accordingly, in order to prevent any loss of Community own resources, Italy should totally revise the amounts which it was seeking to deduct with regard to 1979 to 1989 and improve its system of controls before further deductions could be authorised.

18. The Commission states that, notwithstanding that letter, in October 1991 the Italian authorities deducted from the amount payable as Community own resources ITL 4 140 691 075 representing duties allegedly wrongly paid to the Commission for 1979 to 1981 and subsequently reduced the amount paid by way of own resources for 1990 to 1992 by ITL 19 813 010 240. Together with the deductions already made in 1988 for 1982 to 1984, the total amount deducted was ITL 29 223 322 226. [11]

19. In January 1992 the Italian authorities disputed the conclusions in the Commission's report on their controls, stating that in their view the rules governing trade between Italy and San Marino and the controls applied were appropriate and that it was for the Commission to prove the contrary.

20. The Commission replied in June 1992, repeating the concerns expressed in its earlier report and stating that it was for Italy to provide customs documentation to justify the amounts deducted.

10 — Cited in note 6.

11 — From 1985 to 1989 it appears that ITL 22 425 598 940 was paid to the Commission as own resources; that amount however has not yet been reclaimed by Italy by way of deduction.

21. The Commission wrote again in February 1994, noting that the amounts attributed by Italy to imports destined for San Marino on the one hand had almost tripled for the years 1986 to 1992 and were disproportinately high in view of the internal consumption of San Marino and on the other hand had not been calculated in accordance with verifiable economic indicators for the years 1979 to 1992. With a view to resolving the issue, the Commission in that letter proposed to the Italian authorities a method of calculation of the amounts to be deducted for the period in question, essentially by reference to the number of inhabitants of the two States concerned and a corrective co-efficient to reflect their respective levels of wealth. That method resulted in a deduction for the period concerned of ITL 10 183 694 361. The Commission accordingly requested the Italian authorities to transfer to it by 1 May 1994 the sum of ITL 19 039 627 865, representing the amount already deducted by Italy less the amount regarded by the Commission as the correct deduction.

22. Italy replied in April 1994, rejecting the notion of a statistical method of calculating the amount to be deducted. Apart from general reservations as to the value of a statistical approach, the Italian authorities objected to (i) the failure of the Commission to take account of the tourist trade in quantifying the number of inhabitants of the two States and (ii) the macro-economic indicators used by the Commission to determine their wealth. The Italian authorities concluded that the Commission must accept the figures which they certified as correct.

23. The Commission responded in June 1994, repeating that its 1990/1991 report had concluded that the Italian customs procedures could not be relied upon to protect the Community's financial interests. Since it would be very difficult, even impossible, to reconstitute the correct amounts on the basis of customs declarations, the Commission had proposed an alternative and equitable approach. The Commission conceded however that it might be prepared to accept a revised coefficient to take into account the tourist trade and invited the Italian authorities to put forward before 15 August 1994 a proposal to that effect based on verifiable data.

24. In its reply dated 8 August 1994, Italy declined to accept that invitation, repeating the objections to the Commission's method set out in its previous letter and emphasising once more that the only lawful method of calculating the correct deductions was on the basis of the relevant Italian customs documentation.

25. In October 1994 the Commission accordingly invited the Italian authorities to justify the amounts claimed by reference to such documentation, stressing that it must be shown both that the final desti-

nation of the goods in question had been San Marino and that those goods had actually entered San Marino and been definitively integrated into its economy. The Commission added that unless it received by 1 December 1994 a breakdown of the amounts sought, with reference to customs documents (document number, date of acceptance, tariff position, value and amount) and the name of the customs office where the import formalities were carried out, it would be unable to accept any deduction proposed or already effected.

26. On 2 December 1994 the Italian authorities replied, stating that it was not possible to provide the relevant paperwork within the short period laid down by the Commission. If the Commission insisted on receiving the papers, it would have to grant an indefinite period; in any event, the Commission should accept the figures provided by Italy, subject at most to a few spot checks on offices to be agreed with the Commission.

27. By letter of 28 July 1995 corrected by letter of 8 November 1995, the Commission indicated that it could not accept Italy's arguments. For the reasons given in the earlier correspondence it was accordingly not able to accept that the deductions proposed or already effected were lawful and repeated its request for payment of ITL 29 223 322 226, noting that if that amount were not paid within three months interest would start to run pursuant to Article 11 of Regulation No 1552/89.

28. By letters in October and December 1995 Italy responded that it could not comply with the Commission's request on the ground that it was unjustified as to both the principal amount and any interest.

29. The Commission accordingly started the pre-litigation procedure envisaged by Article 226 EC, with both parties essentially repeating the positions taken in the earlier correspondence. Dissatisfied with Italy's position, the Commission has brought the present action before this Court.

The issues before the Court

30. As indicated, it is common ground that customs duties collected by Italy pursuant to the 1939 Agreement on goods from third countries which are destined for San Marino are not own resources of the Community. I will refer to such duties as San Marino duties. It follows that San Marino duties are not payable to the Commission and that any San Marino

duties which have been paid to the Commission were wrongly paid. It is clear from the pleadings that the Commission accepts that analysis.

31. The Commission's principal concern is that it is not permissible — in particular because it is not compatible with the Commission's role as manager of the Community budget — for Italy either to recoup past incorrect payments by deducting an equivalent amount from duties which are acknowledged to be payable to the Commission as own resources or, when making own resources available to the Commission, to withhold amounts allegedly representing San Marino duties without in either case adducing reliable evidence that the amounts in question are genuinely San Marino duties.

32. More specifically, the Commission considers that Italy has not adduced reliable evidence that the goods on which San Marino duties were allegedly levied in fact reached San Marino and remained there. The report carried out by its agents in 1990 and 1991 raised serious concerns. The report noted that, given the lack of checks at the Italy — San Marino borders, the Italian procedures for verifying the documentation did not sufficiently guarantee that goods imported into Italy from third countries and destined for San Marino actually arrived there or that Community customs duties were correctly levied on goods re-exported to the Community from San Marino. In particular, the report identified the following factors which caused the Commission to question the legality of the deductions.

33. The report found that the customs offices used the same code for goods destined for San Marino and for all goods whose destination was unknown when the formalities for release for free circulation were completed and where the customs declaration indicated several destinations, which meant that the volume of goods claimed to have been imported into San Marino was higher than the volume actually imported. As an example, the inspection of the Trieste customs office revealed for the financial year 1989 a difference of ITL 452.2 million between the deduction sought by Italy [12] on the basis of the code used (ITL 487.6 million) and the actual duties paid according to a check of customs documentation concerning goods declared to be destined for San Marino (ITL 35.4 million).

34. The report also found that there were significant delays between the date when

12 — As indicated in note 11, duties collected in 1989 and allegedly paid to the Commission have not yet been deducted by Italy and are hence not directly at issue in the present proceedings.

vehicles transporting goods destined for San Marino left the Italian customs area and the date when such goods were taken in charge by the competent fiscal authorities in San Marino, and requested that a much shorter time-limit be fixed by reference to the length of a given vehicle's journey.

35. With regard to the customs status of goods leaving San Marino, the report highlighted defects in the procedure for identifying such goods and for applying the common customs tariff to them.

36. The report also noted that there appeared to be no system for accounting for import duties initially levied on goods destined for San Marino which subsequently either did not arrive there or, having arrived, were re-exported to the Community.

37. As an example of a transaction suggesting that some trade between third countries and the Community passes through San Marino, the report notes the case of a company with its seat in San Marino which in one single transaction imported from the United States 700 000 kg of dog and cat food. Given the number of inhabitants (approximately 22 500), the Commission suggests that that transaction is particularly anomalous from the perspective of genuine integration of the goods.

38. Finally, the report recorded a significant increase between the periods 1979 to 1985 on the one hand and 1986 to 1989 on the other in imports apparently destined for San Marino, corresponding to a significant increase in the amounts which Italy sought to deduct from the amounts due by way of own resources.

39. Italy essentially submits that Community law gives the Member States the right to determine own resources which, once determined, must be made available to the Commission. Given that it is not in dispute that San Marino duties are not Community own resources, it is for the Commission as applicant to prove that the amounts at issue did not in fact concern imports of goods destined for San Marino. Until it has been established that the receipts in question are own resources, there is no sense in talking of deductions.

40. Italy refers at several points in its pleadings to both the Interim Agreement on trade and customs union between the

Community and San Marino [13] and Decision 1/93 of the Community — San Marino Cooperation Committee. [14] Italy invokes the Interim Agreement and Decision 1/93 mainly in the context of seeking to refute criticisms made by the Commission of the customs procedure applicable during the period at issue in the present case, namely 1979 to 1992, before the Interim Agreement entered into force. Italy's argument is essentially that, to the extent that the procedures under the Interim Agreement are similar to those which predated that agreement, it is not open to the Commission to criticise those procedures.

Analysis

41. I do not accept that the current method of dealing with San Marino duties pursuant to the Interim Agreement and Decision 1/93 is relevant to the issue before the Court in the present case, namely whether the Commission can succeed in its action for payment by Italy of amounts allegedly representing San Marino duties which have been deducted or withheld from amounts payable to the Commission by way of own resources. As the Commission has pointed out, the Interim Agreement and Decision 1/93 significantly altered the way in which San Marino duties are collected and the related procedures for checking and accounting for such duties.

42. Nor do I consider that it is helpful to analyse the present case in terms of the burden of proof: the same issue could have come before the Court had Italy, rather than make the deductions which led to the present proceedings, unsuccessfully sought repayment from the Commission and subsequently brought an action against it. In any event, the system under which customs duties are made available to the Commission as Community own resources is based on customs administration at Member State level: common sense suggests that the Commission is not in a position to adduce by way of evidence customs documentation completed in national customs offices. [15] That is all the more so given that Italy stated in its letter of 2 December 1994 that producing all the relevant documentation would be an immense task for those offices, involving considerable expense.

43. The Community legislation on own resources requires Member States to establish the Communities' own resources by duly determining or calculating the cor-

13 — Cited in note 8.

14 — Decision of 27 July 1993 adopting the procedures for making available to the San Marino Exchequer the import duties collected by the Community on behalf of the Republic of San Marino, OJ 1993 L 208, p. 38.

15 — See by analogy Case C-278/98 *Netherlands* v *Commission* [2001] ECR I-1501, paragraphs 39 to 41 of the judgment and the cases there cited.

responding amount. [16] It is clear that Italy failed to do this correctly for the years 1979 to 1984, when the amounts paid to the Commission as own resources incorrectly included San Marino duties. Moreover, where it becomes necessary to rectify a recorded establishment, the competent department or agency of the Member State concerned is required to make a new establishment. [17]

44. That legislation also requires Member States to take appropriate measures to ensure that the supporting documents concerning the establishment and making available of own resources are kept for at least three calendar years from the end of the year to which they refer. [18] Furthermore with effect from 1 January 1989 such documents must be kept beyond that time-limit if verification by the national administration in conjunction with the Commission shows that a finding to which they relate may have to be corrected. [19] Since the report sent to Italy in May 1991 clearly showed such findings, [20] Italy was under that extended obligation with regard to the years 1990 to 1992. Implicit in a requirement to retain supporting documents is a requirement to be able to produce them on request in the circumstances envisaged by the legislation. That Italy has failed to do.

45. Italy is accordingly in breach of its obligations under the legislation governing Community own resources and the Commission would have succeeded in an action for a declaration to that effect. However, the Commission in the present case seeks a declaration that Italy has failed to fulfil its obligations under the Community legislation on own resources by failing to make available to it specified sums, which the Court is clearly not in a position to verify. The Commission has moreover accepted that those sums represent at least in part amounts which do not constitute own resources of the Community. [21] It would in those circumstances be disproportionate for the Court to grant the form of order sought.

46. The Commission's claim as formulated must therefore fail. However it is clear that that cannot be the end of the matter. Article 10 EC imposes on the Community institutions and on Member States mutual

16 — Articles 1 and 2 of Regulation No 2891/77, cited in note 5, and of Regulation No 1552/89, cited in note 6. The provisions are summarised or set out in paragraphs 4 and 5 above.

17 — Second paragraph of Article 2 of Regulation No 2891/77, set out in paragraph 5 above; Article 2(2) of Regulation No 1552/89.

18 — Article 3 of Regulation No 2891/77 and the first paragraph of Article 3 of Regulation No 1552/89, summarised in paragraph 6 above.

19 — Second paragraph of Article 3 of Regulation No 1552/89, set out in paragraph 9 above.

20 — See paragraphs 33 to 38 above.

21 — See paragraph 21 above.

duties of loyal cooperation. In my view the effect of that provision is that in the circumstances of the present case both parties must continue to seek a solution. If the approaches which were tried before the present proceedings were commenced (documentary justification of the amounts claimed by Italy, agreement on a statistical approach which would enable a compromise figure to be reached) continue to be unacceptable to one or other party, another solution must be found: it might for example be appropriate for the parties to agree to appoint an independent expert and accept the result. It will be open to the Commission to return to the Court, but I would repeat that the Court cannot be expected to determine the sum due.

Costs

47. While the Commission's application must fail for the reasons given above, it is clearly appropriate that each party should bear its own costs.

Conclusion

48. Accordingly the Court should in my opinion

(1) dismiss the application;

(2) order the parties to bear their own costs.