OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 5 May 1993 *

Mr President,
Members of the Court,

1. The German Bundesfinanzhof (Federal Finance Court) has submitted a question for a preliminary ruling on the interpretation of Council Regulation (EEC) No 3563/84 of 18 December 1984 applying generalized tariff preferences for 1985 to textile products originating in developing countries (hereinafter 'the regulation'). [1] The question concerns, more specifically, the classification under that regulation of men's linen windcheaters imported from China and South Korea.

2. In 1985 Lloyd-Textil Handelsgesellschaft mbH&Co. KG (hereinafter 'Lloyd-Textil') imported into Germany a quantity of men's linen windcheaters from China and South Korea. The Hauptzollamt (Principal Customs Office) Bremen-Freihafen was of the opinion that import duties had to be levied on the import of those products. Lloyd-Textil, on the other hand, considered that the windcheaters qualified for the suspension of customs duties granted by the Community in respect of textile products from developing countries on the basis of the regulation at issue in these proceedings.

3. The first subparagraph, second indent, of Article 1(1) of the regulation provides that during 1985 Common Customs Tariff duties are to be totally suspended in respect of the products listed in Annexes I and II to the regulation. Article 1(2) specifies the countries and territories to which those tariff preferences are to apply. It is undisputed that they include China and South Korea.

4. Annex I contains a list of textile products covered by the Multifibre Arrangement (MFA). [2] That is apparent both from the title of the annex, which begins with the words 'List of MFA textile products ...', and from the recitals [3] in the preamble to the regulation. In implementing the Multifibre Arrangement, the regulation lays down by country of origin a threshold below which customs duties are suspended on imports into the Community of products referred to in that annex. Annex II contains a list of products which are not covered by the Multifibre Arrangement. For those products, duties are suspended up to a quantity determined by the regulation for the countries of origin as a whole. Both lists consist of an enumeration of products designated by a Nimexe code and an accompanying description. [4] According to footnote (a) to both

* Original language: Dutch.

1 — OJ 1984 L 338, p 98.

2 — Arrangement regarding International Trade in Textiles, OJ 1974 L 118, p. 2.; adopted by Council Decision 74/214/EEC of 21 March 1974 concluding the Arrangement regarding International Trade in Textiles, OJ 1974 L 118, p. 1, and extended by the Protocol extending the Arrangement regarding International Trade in Textiles, OJ 1982 L 83, p. 9.

3 — In particular, the 15th recital, set out in point 12 below

4 — The NIMEXE codes are laid down in Commission Regulation (EEC) No 3529/84 of 14 December 1984 amending the nomenclature of goods for the external trades statistics of the Community and statistics of trade between Member States (NIMEXE), OJ 1984 L 337, p. 1.

annexes, 'the designation of the products is to be considered as having no more than an indicative value, the preferential scheme being determined by the application of the numbers in the Nimexe'.

5. According to Article 12(1) of the Multifibre Arrangement, the Arrangement is limited to textile products 'of cotton, wool, man-made fibres, or blends thereof'. [5] Thus, the products at issue in this case, namely men's linen windcheaters, are not covered by that Arrangement. It follows that they cannot be regarded as falling within Annex I, but would appear instead to fall within Annex II. As stated above, that annex lists the textile products not covered by the Multifibre Arrangement.

However, that is contradicted by the fact that Category 21 of Annex I to the regulation refers to Nimexe code 61.01-32 without any qualification. [6] According to Commission Regulation No 3529/84, [7] cited above, that code covers 'parkas, anoraks, windcheaters, waister jackets and the like ... of other textile materials' than man-made textile fibres or cotton. Annex II, on the other hand, makes no reference either to Nimexe code 61.01-32, or to the corresponding product designations. Admittedly, a few other codes, [8] but not code 61.01-32, are set out in Category 161 under the general heading of 'outer garments'.

6. The question submitted to the Court for a preliminary ruling arises from the ambiguity referred to above: since men's linen windcheaters are not covered by the Multifibre Arrangement, they cannot be referred to in Annex I to the regulation, even though code 61.01-32, which covers linen windcheaters as well, is set out in that annex without any qualification. The Bundesfinanzhof raises the question whether, in those circumstances, Category 161 of Annex II to the regulation is to be interpreted as covering men's linen windcheaters (imported from China and South Korea), even though code 61.01-32, as stated above, is not referred to therein.

7. There is a difference of opinion on that point. Lloyd-Textil, in the proceedings before the Bundesfinanzhof, and the German Government, in observations submitted to the Court of Justice, maintain that men's linen windcheaters are covered by Category 161 of Annex II and do therefore qualify for suspension of customs duties. The Commission, which has also submitted observations to the Court, takes the opposite view. According to the Commission, men's linen windcheaters are covered neither by Category 161 of Annex II nor — a view shared by the other parties before the Court — by Annex I since that annex refers only to products which are covered by the Multifibre Arrangement. The Commission therefore

5 — Multifibre Arrangement, cited in footnote 2, p. 8. It is undisputed that linen, a product made from flax, is not a man-made fibre.

6 — In other words 'ex 32', which is usually inserted if only part of the products are covered by the relevant NIMEXE code, is missing.

7 — See footnote 4; the designation referred to in the text is set out on p. 323.

8 — 61.01-38, 48, 58, 68, 78, 89, 98 and certain 61.02 codes.

considers that none of the tariff preferences provided for in the regulation can be relevant to the windcheaters in question.

For the reasons set out below, I concur with the first-mentioned view.

8. First of all I wish to dispose of two arguments which I do not consider relevant. To begin with, I consider that footnote (a) (set out in point 4 above) does not offer a solution. The rule laid down therein refers to situations where, in one of the two annexes, the scope of the Nimexe code relating to a tariff heading and the designation corresponding thereto do not accord with one another. The dispute in this case, however, stems from a divergence of a different kind, namely that Nimexe code 61.01-32, which is referred to in Annex I, accords only in part with the scope of the annex.

9. Secondly, in my view, the question of interpretation under consideration cannot be resolved by reference to the principle of legal certainty, or, at any rate, in the form in which it is put forward by the Commission that argument is not persuasive. The Commission considers that legal certainty would be undermined if Category 161 in Annex II, notwithstanding the absence of any reference therein to men's linen windcheaters, were regarded as covering such garments.

I am not swayed by that argument. Legal certainty is called into question in this case as a direct result of the ambiguity of the regulation itself (see point 6 above). The question, then, is how that ambiguity can be dispelled. In that regard I see no self-evident reason why the answer advocated by the Commission, involving the refusal of a tariff preference, would better serve legal certainty than the opposite answer involving the grant of exemption.

10. In support of its legal certainty argument, the Commission refers to the need, for the sake of the uniform interpretation of Community customs legislation by the national authorities, to rely on the wording used in the regulation and the annexes thereto. Category 161 of Annex II makes no reference whatsoever to Nimexe code 61.01-32.

In that regard, I would cite a recent judgment of 1 April 1993, [9] on the interpretation of a table set out in a regulation specifying the rates of anti-dumping duty on Japanese housed bearing units. There too, the Commission submitted, in the interests of legal certainty, that an ambiguity in the regulation to be interpreted had to be dispelled by means of an interpretation that adhered closely to the wording. In paragraph 14 of the judgment, the Court rejected that argument in the following manner:

'That interpretation cannot be set aside on grounds of the need for a uniform application, within the Community, of the customs rules which would result from a literal

9 — Case C 136/91 *Findling Walzlager* [1993] ECR I 1793

interpretation of the provision in question. Such a uniform application must be ensured by a clear, exact and complete formulation of the Community rules in question.'

In my view, that consideration applies in this case as well: if legislation is not clearly worded, it is misplaced to rely on a literal interpretation of the provision concerned.

11. Taking the same approach, the Commission wrongly seeks to rely on the judgment in *Ethicon*. [10] In that case, the Court rejected the interpretation suggested by Ethicon to the effect that a customs exemption based on a *clearly worded* provision should be extended to products which were not referred to therein but which were similar as regards their properties and their use to the products mentioned in that provision. The Court refused to give the provision concerned a broad interpretation that was contrary to its wording, relying *inter alia* on the principle of legal certainty. [11] The case now before the Court is different, however, inasmuch as here the point of departure is a rule that is unclear. The resultant problem cannot therefore be resolved on the basis of the wording of the product designations set out in that rule because that is the very point on which the regulation is unclear.

12. I now turn to the arguments which have led me to the conclusion that Lloyd-Textil and the German Government are correct in their interpretation. I take as my starting point the scheme of the regulation. It is apparent, from its title, that the regulation contains a 'generalized' tariff preference for (practically) *all* textile products from the developing countries referred to therein. The purpose of the two annexes is, in that regard, merely to distinguish the products which are covered by the Multifibre Arrangement from all other textile products which are not.

The general nature of the tariff preference provided for in the regulation is not gainsaid by the recitals in the preamble thereto, quite the reverse. The seventh recital reads as follows:

'... for [*the*] products not covered by the MFA it would appear possible to grant the preferences to the countries or territories which are normally beneficiaries in the other industrial sectors' (emphasis added).

According to the 15th recital:

'... consequently, for 1985 the Community should open:

...

— in respect of *each* of the categories of products not covered by the MFA, originating in the countries and territories listed in Annex IV, Community tariff ceilings at a zero rate of duty ...' (emphasis added).

10 — Case 58/85 *Ethicon* [1986] ECR 1141.

11 — Paragraphs 12 and 13 of the judgment.

Those recitals would seem to refer to *all* textile products which are not covered by the Multifibre Arrangement. In any event, there is no indication in the numerous recitals of any exclusion of certain textile products, or of any policy considerations which might justify such an exclusion.

13. Admittedly, at the hearing the Agent for the Commission suggested a possible explanation for excluding men's linen windcheaters. He emphasized that tariff preferences are the result of negotiations between the Community and developing countries accorded preferential treatment, in which the products chosen are those which are particularly important for those countries since they account for a substantial volume of exports or of their own production. Hence the omission of linen windcheaters made from flax — a typical West European raw material — in Annex II would suggest that this product is not so important for the countries concerned. [12]

However, no single document has been submitted to the Court which lends support to that declaration or even makes it plausible. Nor, in my view, can it counterbalance the arguments set out below, which are closer not only to the general purpose of the regulation, as set out in the title and the aforesaid recitals (see point 12 above), but also to its structure and historical background.

14. So far as concerns the structure, in particular, the Commission maintains in its observations — in order to demonstrate that the regulation clearly does not contain tariff preferences valid for (practically) all textile products — that many textile products other than men's linen windcheaters are excluded from both Annex I and Annex II. In response to the Court's request that it give some examples, the Commission was able to name only the products designated by Nimexe codes 50.01 and 50.02, specifically 'silk-worm cocoons suitable for reeling' and 'raw silk (not thrown)'. In my view, those examples are not of such a kind as to detract from the generalized nature of the tariff preferences for textile products decided upon in the regulation.

In Regulation No 3529/84, the Nimexe codes for 'textiles and textile articles' are set out in Section XI. [13] That section contains in all just over 1 000 codes, from code 50.01 to the 63.02 codes. Amongst those thousand or so codes, the Commission has found two, namely the first two, which are not referred to in the annexes to the regulation which has to be interpreted. As a result of a quick search, I discovered a further six codes, namely the third and fourth (the 50.03 codes for 'silk waste') and the last four (the 63.02 codes for 'used or new rags, scrap twine, cordage, rope and cables and worn out articles of twine, cordage, rope or cables'). It would seem — and the Commission did not deny this at the hearing — that

12 — Whether that is so, is a matter I do not propose to decide here: the fact remains, as is apparent from this case, that linen windcheaters are indeed made in developing countries (at any rate in China and South Korea), if perhaps exclusively from raw materials imported from industrialized countries.

13 — Cited in footnote 4; the relevant codes are to be found on pp 269 and 333.

virtually all of the 1 000 codes in between are in fact included in the annexes to the regulation. As is clear from the product designations, the aforesaid eight exceptions relate to products which can hardly be regarded as 'textile products', [14] or which are in any event atypical: they are raw materials or waste products. All the typical textile products to which most of the thousand other codes apply would appear, on the other hand, to be covered by the regulation.

15. The historical background to the regulation also militates against the Commission's reasoning. In May 1985, that is to say some months after the entry into force of the regulation, the problem of men's linen windcheaters was raised when Lloyd-Textil imported a quantity of those products from China and South Korea into Germany. At the time, the German Government suggested that the Commission should remedy the omission in the regulation, by replacing code 61.01-32 in Category 21 of Annex I with code 61.01-*ex*32, [15] and by incorporating that code in the same manner in Category 161 of Annex II. Windcheaters would then have been covered by Annex I (and also by the Multifibre Arrangement) if they were made of cotton, wool or synthetic fibres, whereas they would have been covered by Annex II if they were made of another material such as linen. [16] That suggestion was adopted in Council Regulation (EEC) No 3600/85 of 17 December 1985, for 1986. [17]

16. In reply to the Court's questions, the Commission stated that the very fact that the regulation had not yet been amended in 1985 itself pointed to the Community legislature's intention to exclude linen windcheaters from preferential tariffs for 1985. In support of that assertion, the Commission has submitted a working paper from 1985 setting forth the reactions of some other Member States with reference to the problem which arose in May of that year concerning Lloyd-Textil.

I am not swayed by that argument either. It is apparent from the working paper that the problem had not arisen in any other Member State except Germany. Only one Member State, namely the Netherlands, had any opinion as to what should happen if linen windcheaters *were* imported. The Netherlands authorities would have classified them in Category 21 of Annex I, a view which has

14 — The regulation to be interpreted concerns the application of tariff preferences 'to textile products' (according to the title).

15 — For the meaning of 'ex', see footnote 6 above.

16 — The German Government's report to the Commission was incorporated in the working document which the Commission has submitted in an annex to its answer to questions from the Court. The German Government summarized its request in the last sentence as follows: 'an amendment — if necessary in the form of a corrigendum — to Regulation No 3563/84 should be made as soon as possible'.

17 — Regulation (EEC) No 3600/85 applying generalized tariff preferences for 1986 to textile products originating in developing countries, OJ 1985 L 352, p. 107.

not been defended by anyone in these proceedings. [18] Hence not a single Member State shared the Commission's view that linen windcheaters were altogether excluded from tariff preferences. Furthermore, the Council, as is apparent from the foregoing, did not adopt the Commission's point of view for 1986 but that of the German Government. Accordingly, in so far as anything can be said as to the intentions of the Community legislature, they rather militate against the Commission's standpoint. When interpreting legislation which is ambiguous, it is possible, in my view, to attach particular weight for the purposes of interpretation to a later solution adopted by the author of such legislation in order to clarify it.

Conclusion

17. On the basis of the foregoing considerations, I propose that the Court answer the question submitted by the Bundesfinanzhof as follows:

Category 161 of Annex II to Council Regulation (EEC) No 3563/84 of 18 December 1984 applying generalized tariff preferences for 1985 to textile products originating in developing countries must be interpreted as also covering 'men's linen windcheaters' (imported from China and South Korea).

18 — See point 7 above. It is clear that Annex I applies only to products covered by the Multifibre Arrangement, which is not the case as regards men's linen windcheaters.