OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 26 June 1986

My Lords,

This is a reference under Article 177 of the EEC Treaty by the Tribunal d'instance de Béthune. The court does not set out the relevant facts in the reference; it merely states that the company S. R. Industries summoned the customs authorities to appear for a declaration that Commission Regulation 3749/83 (Official Journal 1983 L 372 p. 1) was invalid and that, accordingly, the company was entitled to refuse to pay the sum of FF 2 066 245 by way of duties and taxes which had been claimed by the customs authorities.

Although they are not set out there appears to be little dispute as to the essential facts. The company imports, from a company in Hong Kong, sails for use with sailboards, which are either manufactured or supplied by S. R. Industries. The sails are apparently made in Hong Kong of material which is obtained from Japan. It appears from what the Court has been told that, initially, the company imported the sails into France through Le Havre when, through a customs' agent, it paid duty. In the course of 1983 the company began to import the sails through Béthune; it was informed by a forwarding agent that it was entitled to import the sails without paying customs duties. Accordingly, for a period it did so, merely completing the usual customs forms and mentioning that the place of origin was Hong Kong. However, at the end of October 1984 the customs authorities contended that what had been happening so far was wrong and that the company should have paid customs duties.

The reason why it was said that customs duties were not payable was that they were entitled to tariff preference; they were free of duty by reason of Regulation 3749/83. However, it is clear that under Regulation 3749/83 only those sails which are manufactured in specified countries (including Hong Kong) from single unbleached yarn are entitled to the benefit of the general preference. On the face of the Regulation the company was not entitled to import the goods free of duty, since they were not manufactured from such yarn in Hong Kong.

The company attacks the validity of that Regulation 3749/83 on a number of different bases.

In the first place it says that that Regulation is in conflict with the basic customs regulation dealing with the common definition of the concept of the origin of goods. That Regulation (802/68 (Official Journal, English Special Edition 1968 (I) p. 165] defines the concept of the origin of goods for the purposes of the uniform application of the Common Customs Tariff, of quantitative restrictions and of all other measures adopted in relation to the importation of goods by the Community or by Member States. Article 5 provides that where two or more countries are concerned in the production of goods they should be regarded as originating in the country where the last substantial process or operation that is economically justified was performed which results in the manufacture of a new product or represents an important stage of manufacture.

Commission Regulation 749/78 (Official Journal 1978, L 101 p. 7) defined the kind of

working, or processing, which was to be accepted as being independent working or processing for the purpose of the tariff classification, save that the working, or processing, specified in List A was to be accepted as a complete working or processing. List A includes customs heading 62.04 under which come 'sails' and it defines the working, or processing, which confers the status of originating products as being 'manufactured from yarn'.

It subsequently transpired that the Commission was satisfied that the making of sails from fabric was, in itself, a 'complete process constituting a stage of manufacture which results in a product obtained receiving a classification under a tariff heading other than those covering the various products utilized' so by Regulation 1520/79 (Official Journal 1979, L 185 p. 16), sails were taken out of List A in Regulation 749/78. The manufacture of sails was thus treated as being a separate working process, apparently from any fabric.

Regulation 802/68, however, contained an important proviso. By Article 2, which was amended by Regulation 1318/71 (Official Journal, English Special Edition 1971 (II) p. 394), it is provided that the Regulation is to be without prejudice to the special rules concerning, in particular, trade to which preference is granted by the Community unilaterally in derogation from the most-favoured-nation clause.

By Regulation 3570/83 (Official Journal 1983, L 362 p. 92), the Council applied generalised tariff preferences for 1984 to textile products originating in developing countries. By virtue of Article 1 of that Regulation, customs duties for the year 1984 were totally suspended in respect of the various products which are referred to. Hong Kong is one of the countries to which this general tariff preference applies. By paragraph 3 of Article 1, preferential entry, as provided for in the Regulation, shall be subject to conformity with the concept of originating products as determined in accordance with the procedure laid down in Article 14 of Regulation 802/68.

Regulation 3749/83 defined that concept for the purposes of applying generalized tariff preferences.

It is clear from the latter Regulation that the only sails which are to be treated as having tariff preference are sails which are manufactured from single unbleached yarn.

What is said on behalf of the applicants in this case is that the object of the generalized tariff preferences is to adopt a more liberal approach whereas, in fact, a more restrictive approach was adopted than was adopted in Regulation 802/68.

I do not accept that there is a conflict between the two Regulations which leads to Regulation 3749/83 being invalid. Regulation 802/68 is made for the purposes of defining the origin of goods for the purposes to which I have referred. Article 2 of Regulation 802/68, as amended, clearly contemplated that other 'special rules' would be adopted concerning trade of the kind specified. The provisions of Regulation 802/68 were 'without prejudice to' those special rules. They are thus expressly excluded from the provisions of that Regulation. Thus those rules may adopt a wider or a narrower definition. There is no conflict. It seems to me that the discretion of the Commission was thus not limited by any other provision of Regulation 802/68.

Then it is said, secondly, that the recital to Commission Regulation 3749/83 provides that there was to be more flexibility for

certain developing countries. The recital reads as follows:

'Whereas the resolutions adopted at the GATT Ministerial Conference in November 1982 and by Unctad in June 1983 recommended a special treatment for the least developed of the developing countries by envisaging more flexible requirements for rules of origin; whereas it is therefore desirable to establish a procedure concerning derogations to the rules of origin in favour of these countries.'

The power to make those derogations is contained in Article 5 of Regulation 3749/83. It may only be made in favour of countries listed in Annex D to Regulations 3569/83 (Official Journal 1983, L 362 p. 1) and 3571/83 (Official Journal 1983, L 362 p. 172) and in Annex E to Regulation 3570/83. It is plain that Hong Kong does not feature in any of those lists and, therefore, it does not seem to me that it can be argued that the Commission was required to give particularly favourable treatment to Hong Kong which is clearly not treated as being one of the least developed of the developing countries.

It is suggested on behalf of the company that it has not been shown that any industry in the Community needs protection in respect of these sails and it is said, also, that the Commission was not sufficiently generous in the approach it adopted in Regulation 3749/83. Those seem to me to be entirely matters for the Commission and within its discretion.

The next argument put forward is that what was done here by the Commission is contrary to the principle of legal certainty and the protection of legitimate expectations. It is said that Article 5 of Regulation 802/68 which points to the last substantial process or operation which is economically justified, has always been broadly construed by the Court. The cutting and making up of sails from fabric was such an operation, as was recognized in Regulation 1520/79. Accordingly the applicants were entitled to assume that if the sails were made up in Hong Kong that would be sufficient for the purpose of preference even though they were not manufactured in Hong Kong from single unbleached yarn. They could assume that the position in respect of exemption from duty would be no less favourable than under Regulation 802/68.

I cannot accept that contention. It is plain that from the very outset, in 1971, the definition of sails for the purposes of the generalized tariff preference has remained the same. It has always been limited to sails which were made from 'single unbleached yarn'. In particular it is clear that in the years during which the company was being founded and opening its business the definition in the Regulations was the same. If one looks at Regulations 3510/80 (Official Journal 1980, L 368 p. 1), 3817/81 (Official Journal 1981, L 384 p. 1) and 3606/82 (Official Journal 1982, L 377 p. 1), in respect of the years 1981, 1982 and 1983 it was clear that the definition was in the same terms. There was no legal certainty or legitimate expectation that it would be different.

The next argument which is put forward is that the applicants were prejudiced by a breach of the rule of legal certainty and the protection of their legitimate expectations in that they were misled by the French customs authorities. Even assuming that the French customs authorities, and the forwarding agent, did encourage the applicants to believe that these goods could be imported free of customs duty and even if they were imported for a period without Form A

referred to in Regulation 3749/83 being completed, that cannot affect the validity of the Commission Regulation 3749/83. I would, accordingly, reject that argument also.

Finally, I would, for my own part, accept the Commission's argument that, even if there was a discrimination against Hong Kong in this case, that this is not a matter which can directly assist the applicants in the case for the reasons given by the Court in the decisions in Case 52/81 *Faust* (1982) ECR 3745 and Case 245/81 *Edeka* (1982) ECR 2745.

The history of the case is an unfortunate one from the point of view of the company. They clearly fixed their prices in 1984 on the basis that no duty would be payable. The Secretary of State has apparently agreed to stagger payment over two years and to waive penalties and interest. Whether more can be done by way of a discretionary waiver is not for this Court.

In my view the arguments which have been adduced in this case, although forcefully presented, do not show that Regulation 3749/83 is invalid. I would reply to the question posed to that effect.

The costs of the Commission are not recoverable, the costs of the parties in the main action fall to be dealt with by the national court.