OPINION OF ADVOCATE GENERAL JACOBS
delivered on 10 July 1997 *

1. In 1993 in *Neckermann Versand* [1] this Court was asked by the Hessisches Finanzgericht whether certain women's garments were to be classified for customs purposes as pyjamas. The question was in essence whether, in order to be considered to be pyjamas, it was necessary that the garments in question were, to judge from their appearance, to be worn exclusively in bed, or whether it was sufficient that they might, in addition to other uses, also be worn in bed. The Court's answer was to the effect that not only garments which, to judge from their appearance, were to be worn exclusively in bed but also garments used mainly for that purpose must be considered to be pyjamas.

2. The present case raises a related issue. The German Bundesfinanzhof (Federal Finance Court) has referred to the Court the question whether the term 'nightdresses' within the meaning of tariff subheading 60.04 B IV b 2 bb of the 1985 Common Customs Tariff [2] is to be interpreted as covering exclusively 'other' under garments which, in view of their characteristics, are clearly intended only to be worn as night wear, or whether that term is to be interpreted as also covering products which, on the basis of their appearance, are intended mainly, but not exclusively, to be worn in bed.

3. The subheading in issue reads as follows:

'60.04 **Under garments, knitted or crocheted, not elastic nor rubberized:**

...

B. Other:

...

IV. Other:

...

b) Of synthetic textile fibres:

...

2. Women's, girls' and infants':

...

bb) Nightdresses

...'.

The main proceedings

4. The question is raised in proceedings between Wiener S. I. GmbH (hereinafter 'Wiener') and the Hauptzollamt (Principal

* Original language: English.

1 — Case C-395/93 *Neckermann Versand* v *Hauptzollamt Frankfurt am Main-Ost* [1994] ECR I-4027.

2 — Council Regulation (EEC) No 950/68 of 28 June 1968 on the Common Customs Tariff, OJ English Special Edition 1968 (I), p. 275, as amended by Council Regulation (EEC) No 3400/84 of 27 November 1984, OJ 1984 L 320, p. 1.

Customs Office) Emmerich. Those proceedings concern imports of textile garments from Thailand which took place in 1985. Wiener declared those garments as 'women's nightdresses' under tariff subheading 60.04 B IV b 2 bb of the Common Customs Tariff, and the garments were released into free circulation on that basis and recorded against the tariff quota for nightdresses. However, subsequent examination of the imports led the Hauptzollamt to the view that the goods were 'dresses' coming under tariff subheading 60.05 A II b 4 cc 22; [3] it therefore imposed the corresponding post-clearance duty, which was higher.

5. Wiener appealed against that decision to the Finanzgericht (Finance Court), which established that the goods in issue were lightweight knitted garments (mixed cotton fabric; 65% polyester, 35% cotton; cotton) intended to cover the upper body, broad cut, 'submarine' neckline, short-sleeved or sleeveless, extending down to the knee or thigh, sometimes bearing particular printed images and sometimes belted. Independent specialists regarded the garments, in view of their characteristics or use, as being exclusively or primarily nightdresses. However, according to the factual assessment made by the Finanzgericht the cut and presentation suggested that the products were also worn as leisure wear. The Finanzgericht therefore excluded customs tariff classification as 'nightdresses' on the ground that only garments that are exclusively worn in bed can be so classified. In so doing it relied on an earlier judgment of the Bundesfinanzhof [4] in which it was held that 'nightdresses' within the meaning of heading 61.08 of the 1989 Common Customs Tariff [5] had to be clearly identifiable as being exclusively intended as night wear. Wiener's appeal to the Finanzgericht was therefore unsuccessful.

6. Wiener then lodged an appeal on a point of law with the Bundesfinanzhof, which indicates in the order for reference that it would be inclined to confirm the decision of the Finanzgericht were it not for this Court's judgment in *Neckermann Versand*. There, as mentioned above, the Court ruled that the heading in question 'must be interpreted as meaning that not only sets of two knitted garments which, according to their outward appearance, are to be worn exclusively in bed but also sets used mainly for that purpose must be considered to be pyjamas'. The

3 — That subheading reads as follows:

'60.05 **Outer garments and other articles, knitted or crocheted, not elastic nor rubberized:**

A. Outer garments and clothing accessories:

..

II. Other:

...

b) Other:

...

4. Other outer garments:

...

cc) Dresses:

...

22. Of synthetic textile fibres

...'

4 — Judgment of 21 August 1990 VII K 16-26/89, BFH/NV 1991, 422.

5 — Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ 1987 L 256, p. 1, as amended by Commission Regulation (EEC) No 3174/88, OJ 1988 L 298, p. 1.

Bundesfinanzhof asks whether the present case should be resolved along the same lines in view of the fact that 'pyjamas' are listed in the Common Customs Tariff next to 'nightdresses' (even though the present case concerns the tariff position in 1985 whereas *Neckermann Versand* concerned the tariff position in 1988 and 1989). It therefore made the present reference.

7. Before considering that question I propose to consi-der a general problem concerning the cooperation between national courts and this Court under Article 177 of the Treaty.

Division of tasks under Article 177 of the Treaty

8. The present case in my view clearly raises the broader issue of the appropriate division of tasks between this Court and national courts. My starting-point on that issue is as follows.

9. On the one hand it is clear that, on any reading of the Cour-t's case-law on references concer-ning questions of interpretation of Community law, the reference by the Bundesfinanzhof is admissible. It raises a question concer-ning the interpretation to be given to a subheading of the Common Customs Tariff, incorporated in a Council regulation, which is an act of one of the institutions. On numerous occasions this Court has interpreted the successive regulations on the Common Customs Tariff with a view to achieving a uniform interpretation of their provisions, indispensable not only because they are pieces of Community legislation directly applicable in all the Member States but also in order to safegu-ard the uniform application of the Common Customs Tariff and thus to avoid deflecti-ons of trade. Indeed, by virtue of the third paragraph of Article 177 it would seem that the Bundesfinanzhof was under an obliga-tion to refer the issue of nightdresses to this Court since its judgment will not be open to appeal. The order for reference is moreover excellently reasoned: it sets out the relevant facts and legal issues in an exemplary fashion.

10. Nevertheless it is necessary in my view to address the question whether it is appropriate — and especially whether it is still appropriate today, in view of developments which I shall mention below — for the Court to be asked to rule in every case where a question of interpretation of Community law may arise.

11. The present case is a perfect example of a case where it may be questioned whether it

is appropriate for this Court to be involved. A solution may lie in a reconsideration of the respective roles of this Court in interpreting the rules of Commu-ni-ty law and of the national courts in applying those rules to the facts of a particular case.

12. From the very first references which the Court received it has emphasized that its jurisdiction under Article 177 of the Treaty is limited to the interpretation of the rules of Community law, and that it has no jurisdiction with respect to the facts of cases. [6] The facts (and the relevant rules of national law) must be established by the referring court, and it is that court which decides the case by applying, to the extent necessary, the interpretation which this Court has given to the relevant rules of Community law.

13. However, the Court's approach to that distinction is pragmatic; it is not characterized by excessive formalism. Frequently, for example, a national court asks the Court whether a particular rule of national law is compatible with Community law, a question which the Court cannot answer as such, but which it will normally reformulate as a question of interpretation of Community law. [7] That practice is guided by the principle that the Court should assist the referring court as much as possible, by giving a reply which will enable that court to give judgment. Further, the Court's insistence, especially in recent years, on the national court's duty to inform it of the legal and factual context of the case referred [8] is doubtless inspired by the same principle. It is not the Court's task to deliver preliminary rulings containing only abstract interpretations of Community law rules, which may be of little use for the resolution of the actual dispute. [9] It is rather the Court's task to give an interpretation which is tailored to the needs of the referring court.

14. There can be no doubt that, in principle, that approach is wholly sound. It is consonant with the spirit of cooperation between this Court and the national courts, with the Court's task of adjudicating rather than giving non-binding legal opinions, and with the requirement of uniformity in the interpretation and application of Community law.

6 — Joined Cases 28/62, 69/62 and 30/62 *Da Costa* v *Nederlandse Belastingadministratie* [1963] ECR 31, at p. 38. See, in the area of customs classification, Case 12/71 *Henck* v *Hauptzollamt Emmerich* [1971] ECR 743, paragraphs 2 and 3 of the judgment.

7 — See, as recent examples, Case C-250/95 *Futura Participation* v *Administration des Contributions* [1997] ECR I-2471 and Case C-329/95 *VAG Sverige* [1997] ECR I-2675.

8 — See, *inter alia*, Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* v *Circostel* [1993] ECR I-393, paragraph 6 of the judgment; Case C-157/92 *Pretore di Genova* v *Banchero* [1993] ECR I-1085, paragraph 4; Case C-378/93 *La Pyramide* [1994] ECR I-3999, paragraph 14 and Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 12.

9 — See also Case 244/80 *Foglia* v *Novello* [1981] ECR 3045 and Case 83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871.

15. None the less, the Court's approach has the drawback of attracting a virtually infinite number of questions of interpretation. Any 'application' of a rule of law can be regarded as raising a question of 'interpretation' — even if the answer to the question of interpretation may seem obvious. [10] Every national court confronted with a dispute turning on the application of Community law can refer a question which, if more or less properly phrased, this Court is bound to answer after the entire proceedings have taken their course. That will be so even where the question is similar in most respects to an earlier question; the referring court (or the parties' lawyers) may always seek to distinguish the facts of the cases. It will also be so even where the question could easily, and with little scope for reasonable doubt, be answered on the basis of the existing case-law; again the facts may be different, or it may be that a particular condition imposed in earlier case-law gives rise to new legal argument and is regarded as needing further clarification. [11] The net result is that the Court could be called upon to intervene in all cases turning on a point of Community law in any court or tribunal in any of the Member States. It is plain that if the Court were to be so called upon it would collapse under its case-load.

16. The present case also shows that even a very specific ruling may not obviate the need for further references. As already mentioned, the present case is a sequel to *Neckermann Versand*, [12] where the Court decided on a particular interpretation of the sub-heading 'pyjamas' in the Combined Nomenclature which should be adopted by all customs authorities in all the Member States. However, the fact that there is now such an interpretation does not preclude new disputes. In turn, those disputes could always be characterized as raising a new question of interpretation. Parties might for example raise the question: 'Is it significant in assessing whether certain sets of garments are clearly intended to be worn mainly in bed as pyjamas that those garments carry pictures or drawings suggesting beach and holiday scenes?' The national court might be persuaded to refer that question to this Court as a further question of interpretation of the sub-heading 'pyjamas'. On the approach which it has hitherto adopted, the Court would attempt to give a specific reply to that question.

10 — 'Before a provision can be applied to a specific case, it is always necessary, from a logical and practical point of view, to determine its meaning and scope, failing which it is impossible to establish whether it is applicable to the case in question or to infer from its terms all the implications for that case. It may tentatively be stated that when a provision is applied its interpretation and application are interwoven and merge, but it is inconceivable for a provision to be applied without there being any need to interpret it, unless the meaning of the word "interpretation" is distorted in such a way as to suggest that some difficulty is necessarily involved': Opinion of Advocate General Capotorti in Case 283/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415, at p. 3436.

11 — See, for example, Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb* v *Paranova* [1996] ECR I-3457.

12 — Cited in note 1.

17. Confronted with this problem, I do not consider that it is appropriate, or indeed possible, for the Court to continue to respond fully to all references which, through the creativity of lawyers and judges, are couched in terms of interpretation, even though the reference might in a particular case be better characterized as concerning the application of the law rather than its interpretation. However, to declare more references inadmissible would not be the right answer. Where a referring court has duly translated a Community law point into a question of interpretation the Court is in principle bound to reply.

18. It seems to me that the only appropriate solution is a greater measure of self-restraint on the part of both national courts and this Court.

19. So far as national courts are concerned, a distinction must be drawn between courts which under the second paragraph of Article 177 have a discretion whether to refer and courts of last instance which, under the third paragraph, are obliged to refer. In the present case the reference is made by a court which must be regarded as a court of last instance and I will consider below the scope of the obligation to refer in such a case.

20. Where a court is not a court of last instance and has a discretion to refer, this Court has consistently held that the exercise of that discretion is a matter for the referring court alone, and this Court will not normally question whether the reference is appropriate. It is however clear that the appropriateness of a reference can be assessed in the light of the object of Article 177, which is to ensure that Community law is the same in all Member States. [13] A reference will be most appropriate where the question is one of general importance and where the ruling is likely to promote the uniform application of the law throughout the European Union. A reference will be least appropriate where there is an established body of case-law which could readily be transposed to the facts of the instant case; or where the question turns on a narrow point considered in the light of a very specific set of facts and the ruling is unlikely to have any application beyond the instant case. Between those two extremes there is of course a wide spectrum of possibilities; nevertheless national courts themselves could properly assess whether it is appropriate to make a reference, and the Court of Justice, even if it continued to maintain that the decision to refer was exclusively within the discretion of the national courts, could perhaps give some informal guidance and so encourage self-restraint by the national courts in appropriate cases.

21. So far as self-restraint on the part of this Court is concerned, even if it were possible

13 — See Case 166/73 *Rheinmühlen* [1974] ECR 33, paragraph 2 of the judgment.

for the Court to reply fully to all requests in the future, it may be doubted whether that will continue to be desirable. In some areas of Community law, where there is already an established body of case-law, increasing refinement of the case-law is likely to lead to less legal certainty rather than to more. In such areas the Court could, I think, declare that it has substantially performed its task of uniform interpretation, in that the essential principles or rules of interpretation have been set out sufficiently to enable national courts to decide matters themselves. The customs classification of goods is, as I will attempt to show below, a good example of such an area; there are however, as I shall also suggest, other areas where the Court might usefully adopt a similar approach. Such a declaration of self-restraint would not lead to a decision of inadmissibility. It would be couched in terms of a reply to the referring court's questions, but the reply would not be specific. It would merely recall the principles and rules of interpretation developed by the previous case-law, and would leave it to the national court to decide the particular issue with which it is confronted. The Court might also make it clear that it was delivering a general judgment, which was not intended to deal solely with the specific case in issue but could be regarded by other national courts as authority for deciding future cases and for considering whether a further reference should be made. The judgment would not preclude national courts from sending new references in the particular area where the Court has engaged in self-restraint. New references would not be inadmissible, but unless it were shown that a novel issue of principle was raised the Court would not consider the particular merits of such references; it would simply recall its existing case-law. And ways could probably be found to do that very speedily.

Self-restraint and customs classification

22. What would the suggested approach mean in the area of customs classification, [14] and what would be the effects of self-restraint on the application of the Common Customs Tariff?

23. An examination of the Court's case-law on customs classification shows that there are essentially three types of case with which the Court has been confronted.

24. One type of case is on the validity of specific classification regulations adopted

14 — On customs classification see generally J.-R. Nassiet, *La réglementation douanière européenne*, 1988, pp. 44 to 53; D. Lasok, *The Customs Law of the European Economic Community*, Second edition, 1990, Deventer, pp. 194 to 216; P. Vander Schueren, 'Customs classification: One of the cornerstones of the Single European market, but one which cannot be exhaustively regulated', 28 *CMLRev* (1991), p. 855; E. Vermulst, 'EC customs classification rules: Should ice cream melt?', 15 *Michigan Journal of International Law* (1994), p. 1241; P. Witte and H.-M. Wolffgang, *Lehrbuch des europäischen Zollrechts*, Second edition, 1995, Berlin, pp. 319 to 353; C. J. Berr and H. Trémeau, *Le droit douanier*, Fourth edition, 1997, Paris, pp. 106 to 113.

by the Commission. [15] By virtue of Article 9(1)(a), (b), (d) and (e) of Council Regulation No 2658/87, [16] the Commission has the power, according to the procedural rules laid down in Article 10, to adopt measures concerning the following:

'(a) application of the combined nomenclature and the Tariff concerning in particular:

— the classification of goods in the nomenclatures referred to in Article 8,

— explanatory notes;

(b) amendments to the combined nomenclature to take account of changes in requirements relating to statistics or to commercial policy;

...

(d) amendments to the combined nomenclature and adjustments to duties in accordance with decisions adopted by the Council or the Commission;

(e) amendments to the combined nomenclature intended to adapt it to take account of technological or commercial developments or aimed at the alignment or clarification of texts;

...'.

The validity of such measures can be subject to doubt because, whilst in such matters the Council has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, a broad discretion to define the subject-matter of tariff headings, the Commission's power to adopt those measures does not authorize it to alter the subject-matter of the tariff headings which have been defined on the basis of the harmonized system established by the International Convention on the Harmonized Commodity Description and Coding System [17] whose scope the Community has undertaken, under Article 3 thereof, not to modify. [18]

15 — See, for example, Case 158/78 *Biegi* v *Hauptzollamt Bochum* [1979] ECR 1103; Case C-233/88 *Van de Kolk* [1990] ECR I-265; Case 265/89 *Vismans Nederland* [1990] ECR I-3411; Case C-194/91 *Krohn* v *Hauptzollamt Hamburg-Jonas* [1992] ECR I-6661; Case C-401/93 *Goldstar Europe* [1994] ECR I-5587 and Case C-143/93 *Van Es Douane Agenten* v *Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431.

16 — Council Regulation (EEC) No 2658/87 of 23 July 1987, cited in note 5. See previously Article 3 of Council Regulation (EEC) No 97/69 of 16 January 1969 on measures to be taken for the uniform application of the nomenclature of the Common Customs Tariff, OJ English Special Edition 1969 (I), p. 12.

17 — Done at Brussels on 14 June 1983 and approved on behalf of the Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).

18 — Case C-267/94 *France* v *Commission* [1995] ECR I-4845, paragraphs 19 and 20 of the judgment.

25. It is clear that the proposed self-restraint could not apply to those types of case: they are not concerned with interpretation, but with validity, and it is well known that this Court alone has the power to declare Community acts invalid. [19]

26. The second type of case is concerned with questions of interpretation which are more or less general in character, in that they are broader than the classification of a particular product.

27. An example is *Develop Dr Eisbein*. [20] In that case questions were referred in connection with the classification of photocopiers. Those questions did not however relate to the particular heading or subheading on photocopiers. They related to Rule 2(a) of the Rules for interpretation of the nomenclature of the Common Customs Tariff, [21] on incomplete or unfinished articles. The Court held that:

'an article is to be considered to be imported unassembled or disassembled where the component parts, that is the parts which may be identified as components intended to make up the finished product, are all presented for customs clearance at the same time and no account is to be taken in that regard of the assembly technique or the complexity of the assembly method'.

28. Again the Court should continue to deal with such cases, [22] because they properly raise issues of interpretation, and not application.

29. The third type of case is by far the most frequent one. A large majority of cases concern the classification of a specific product, and in effect require the Court itself to classify the product. One recent judgment illustrates that particularly well. In *Colin and Dupré* [23] the Cour d'Appel, Bourges,

19 — Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

20 — Case C-35/93 [1994] ECR I-2655.

21 — See Part I, Section I, A of the Annex to Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff (OJ English Special Edition 1968(I), p. 275), as amended by Regulation (EEC) No 1/72 of the Council of 20 December 1971 (OJ 1972 L 1, p. 1). See at present Part One, Section I, A of Annex I to Regulation No 2658/87, cited in note 5, as amended.

22 — See also Case 28/75 *Baupla* v *Oberfinanzdirektion Köln* [1975] ECR 989; Case 165/78 *Imco-Michaelis* v *Oberfinanzdirektion Berlin* [1979] ECR 1837; Case 248/80 *Glunz* v *Hauptzollamt Hamburg-Waltershof* [1982] ECR 197 and Case 295/91 *IFF* v *Hauptzollamt Bad Reichenhall* [1982] ECR 3239.

23 — Joined Cases C-106/94 and C-139/94 [1995] ECR I-4759.

referred classification questions on four particular products, asking, for example, whether 'red Pulmoll pastilles fall within the scope of Commission Regulation (EEC) No 717/85 of 19 March 1985 on the classification of goods within subheading 17.04 D I or of Chapter 30 of the Common Customs Tariff, "Pharmaceutical products" — 30-4'. Similar questions were asked on 'green Pulmoll pastilles', 'Sangart mixture' and 'Quintonine'. In its judgment the Court took care to point out that it is the Court's task to interpret the Common Customs Tariff and the Combined Nomenclature, not to give its opinion on the classification of particular products, and that the questions therefore had to be understood as seeking to ascertain whether products such as those mentioned in the questions fell under certain specific headings. [24] However, the Court's replies to those questions barely conceal that the Court did give its opinion on the classification of particular products. The reply to the first question, for example, is as follows:

'Having regard to their composition, presentation and purpose, pastilles such as red Pulmoll pastilles fall under heading 17.04 of the Common Customs Tariff.'

30. In other cases the referring court takes more care to couch its question in terms of interpretation. In *3M Medica*, [25] for example, the first question was whether the term 'orthopaedic appliances' in heading 9021 of the Combined Nomenclature (1992) must be interpreted as including products of the kind described in the grounds of the order as shoes serving as walking aids to be worn with a fitted plaster cast. The Court replied by saying that:

'Sandals and shoes with outer soles of plastics and uppers of textile materials or plastics designed to be worn on the foot over a plaster cast do not constitute "orthopaedic appliances" under heading 9021 of the combined nomenclature (1992).'

Again that was a case on the classification of a particular product and, although couched in terms of interpretation, one fails to see the difference from a case such as *Colin and Dupré*. As one author puts it, 'Legal imperatives aside, tariff classification is in essence a matter of factual evaluation in view of the features and properties of the products to be classified'. [26]

24 — At paragraph 12 of the judgment.

25 — Case C-148/93 [1994] ECR I-1123.

26 — P. Vander Schueren, op. cit., at p. 856.

31. An examination of those cases shows that the Court, in deciding them, employs a limited number of principles and rules of interpretation. It is to those principles which I now turn; by recalling them in its judgment in the present case the Court could give general guidance which should permit national courts to deal with the great majority of particular classification cases.

32. The classification of goods in the Common Customs Tariff is guided by some basic principles of interpretation to which the Court consistently and constantly refers: in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties, as defined in the relevant headings of the Common Customs Tariff and the notes to sections or chapters. [27] In addition there are some instruments which are important means for ensuring the uniform application of the Tariff and as such may be regarded as useful aids to its interpretation. Among those instruments are: the notes which head the chapters of the Common Customs Tariff and Explanatory Notes to the Nomenclature of the Customs Cooperation Council, [28] classification slips issued by the Committee on Common Customs Tariff Nomenclature (at present called 'Nomenclature Committee', see Article 7 of Regulation No 2658/87), [29] and classification opinions of the Nomenclature Committee. [30] However, it is also clear that those instruments do not have legally binding force and thus cannot prevail over the actual provisions of the Common Customs Tariff. [31]

33. There are some further criteria which may, or may not, be relevant for classification purposes.

34. One such criterion is the intended use of a product. In *Neckermann Versand* the Court was faced with the difficulty that 'pyjamas' were not defined in the relevant heading of the Common Customs Tariff, nor were they defined in any notes. The Court held that, in the absence of such a definition, the objective characteristic of pyjamas, which is capable of distinguishing them from other ensembles, can be sought only in the use for which pyjamas are intended (i. e. to be worn in bed). [32] The Court added that, if that objective characteristic can be established at the time of customs clearance, the fact that it

27 — See, for example, Case C-121/95 *VOBIS Microcomputer* v *Oberfinanzdirektion München* [1996] ECR I-3047; *Colin and Dupré*, cited in note 23, paragraphs 21 and 22 of the judgment; Joined Cases C-59/94 and C-64/94 *Ministre des Finances* v *Pardo & Fils and Camicas* [1995] ECR I-3159, paragraph 10; Case C-459/93 *Thyssen Haniel Logistic* [1995] ECR I-1381, paragraph 8; Case C-393/93 *Stanner* v *Hauptzollamt Bochum* [1994] ECR I-4011, paragraphs 14 and 15; *Neckermann Versand*, cited in note 1, paragraph 54.

28 — See cases cited in note 27.

29 — Case 166/84 *Thomasdünger* v *Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001, paragraph 14 of the judgment and *Stanner*, cited in note 27, paragraph 15.

30 — Case 42/86 *Directeur Général des Douanes et Droits Indirects* v *Artimport* [1987] ECR 4817, paragraph 10 of the judgment. See also Joined Cases 69/76 and 70/76 *Dittmeyer* v *Hauptzollamt Hamburg-Waltershof* [1977] ECR 231, paragraph 4.

31 — See Case 149/73 *Witt* v *Hauptzollamt Hamburg-Ericus* [1973] ECR 1587, paragraph 3 of the judgment; *Dittmeyer*, cited in note 30; Case 798/79 *Hauptzollamt Köln-Rheinau* v *Chem-Tec* [1980] ECR 2639, paragraphs 11 and 12; *Artimport*, cited in note 30 and *Develop Dr Eisbein*, cited in note 20, paragraph 21.

32 — Cited in note 1, paragraphs 6 and 7 of the judgment.

may also be possible to envisage another use for the garments will not preclude them from being classified for legal purposes as pyjamas. [33] In *Thyssen Haniel Logistic* the Court similarly held that the intended use of a product may constitute an objective criterion for classification if it is inherent in the product, and if that inherent character can be assessed on the basis of the product's objective characteristics. [34] It is true that in *Wesergold* the Court held that the intended use of a product can only be taken into account for the purpose of its tariff classification if the wording of the heading, or the note referring to it, makes an express reference to that criterion. [35] That statement must however be read in the light of the specific facts of that case. It concerned a product composed of orange juice and sugar, intended for the production of drinks through the addition of water and/or sugar. The national court and the Commission argued that that product could not be classified as 'fruit juice containing added sugar' because the product had become unsuitable for direct consumption and had lost its original character of fruit juice. The Court rejected that argument on the basis that the product had not lost the objective characteristics and properties of 'fruit juice containing added sugar'. The judgment therefore illustrates the point that the intended use of a product is relevant only if classification cannot take place on the mere basis of the objective characteristics and properties of the product. [36]

35. Comparable considerations govern the use of manufacturing processes as a criterion. In *Jepsen Stahl* v *Hauptzollamt Emmerich* the Court pointed out that, whilst the Common Customs Tariff generally, and preferably, employs criteria for classification based on the objective characteristics and properties of products which may be ascertained when customs clearance is obtained, it refers in certain cases to manufacturing processes; in those cases the manufacturing process becomes decisive. [37] The judgment in *Hauptzollamt Hamburg-Jonas* v *Wünsche* makes it clear however that, where there is no reference to the manufacturing process in the relevant headings or notes, that process must be disregarded. [38]

36. The Court has also given general guidance in cases where products are a mixture of different constituents and have undergone certain types of processing. In those cases the product in issue must contain the essential constituents of the basic product in proportions which do not differ substantially from those of the basic product. [39]

37. Finally, the Court has also rejected some criteria as being irrelevant for classification purposes. In *Post* the Court rejected an

33 — See paragraph 8.

34 — Cited in note 27, paragraph 13 of the judgment. See also Case 36/71 *Henck* v *Hauptzollamt Emden* [1972] ECR 187, paragraph 4; Case 37/82 *Bevrachtingskantoor* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 3481, paragraph 8 and Case C-256/91 *Emsland-Stärke* v *Oberfinanzdirektion München* [1993] ECR I-1857, paragraph 16.

35 — Case C-219/89 [1991] ECR I-1895, paragraph 9 of the judgment. See also Case 38/76 *LUMA* v *Hauptzollamt Duisburg* [1976] ECR 2027, paragraph 7.

36 — See also Case 222/85 *Hauptzollamt Osnabrück* v *Kleiderwerke Hela Lampe* [1986] ECR 2449, paragraph 15 of the judgment.

37 — Case C-248/92 [1993] ECR I-4721, paragraph 10 of the judgment. See also Case 40/88 *Weber* v *Milchwerke Paderborn-Rimbeck* [1989] ECR 1395, paragraphs 14 and 15 and *Directeur Général des Douanes et Droits Indirects* v *Artimport*, cited in note 30, paragraphs 12 and 13.

38 — Case 145/81 [1982] ECR 2493, paragraphs 7 to 13 of the judgment. See also Joined Cases 208/81 and 209/81 *Palte & Haentjens* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 2511, paragraph 6.

39 — *Henck* v *Hauptzollamt Emden*, cited in note 34, paragraph 10 of the judgment; *Weber* v *Milchwerke Paderborn-Rimbeck*, cited in note 37, paragraph 19 and Case C-120/90 *Post* [1991] ECR I-2391, paragraph 16.

amendment of a heading, which at the time of the facts had already been proposed by the Nomenclature Committee of the Customs Cooperation Council, and which was later enacted, where that Committee had made it clear that before that amendment a different type of classification was appropriate. [40] The Court also made it clear in that judgment that neither the alleged trade usage nor any divergent application of the rules in certain Member States could influence the interpretation of the Common Customs Tariff which was based on the wording of the tariff headings. [41] In *Jepsen Stahl* v *Hauptzollamt Emmerich* the defendant relied on a Euronorm for the purpose of classification of certain steel products, but the Court pointed out that those Euronorms are standards adopted by the European Committee for Standardization and concern only the definition of steel products, independently of their classification for customs purposes. [42] In *Analog Devices* v *Hauptzollamt München-Mitte and Hauptzollamt München-West* the Court held that, although technical developments resulting in more widespread use of integrated circuits justified the drawing up of a new customs classification, it was for the competent Community institutions to do so, and failing amendment the interpretation of the Common Customs Tariff could not be adapted to changing processes. [43] That, however, does not preclude the taking into account of technical developments in the interpretation of specific headings. Thus, in *Chem-Tec* v *Hauptzollamt Koblenz* the Court held that in the subheading 'Products suitable for use as glues put up for sale by retail as glues in packages ...' the term 'packages' had to be interpreted, taking into account the relevant explanatory notes, in the light of the particularly swift pace of technical development in the case of packages. [44]

38. It seems to me that those principles of interpretation, together with the rules of interpretation which the Common Customs Tariff itself contains, [45] are sufficient for permitting national courts to decide most classification cases autonomously. Occasionally, of course, a more general question of interpretation may surface, and it would be appropriate for a national court to refer that question to this Court. But where that is not the case, national courts should not refer, and if they do the Court should in my view simply restate the above principles.

39. Applying that approach in the present case, I consider that the referring court will be able to decide the case by applying (a) the principle that classification must be based on the objective characteristics and properties of the products in issue, and (b) the principle that the intended use of a product may constitute an objective criterion for classification if it is inherent in the product and if that inherent character can be assessed on the basis of the product's objective characteristics.

40 — Cited in note 39, paragraphs 22 and 23 of the judgment.

41 — See paragraph 24 of the judgment.

42 — Cited in note 37, paragraphs 12 and 13 of the judgment.

43 — Case 122/80 [1981] ECR 2781, paragraph 12 of the judgment. See also Case 234/87 *Casio Computer* v *Oberfinanzdirektion München* [1989] ECR 63, paragraph 12.

44 — Case 278/80 [1982] ECR 439, paragraph 14 of the judgment.

45 — See note 21.

Self-restraint and uniformity

40. I recognize, of course, that the requirement of a uniform application of Community law rules is particularly forceful in the field of customs legislation because of the specific nature of the Common Customs Tariff. If in one Member State certain types of garment were consistently characterized as nightdresses whereas in another Member State the same types of garment were consistently characterized as other dresses deflections of trade would be bound to arise. Those deflections of trade are inconsistent with the very idea of a common customs tariff. However, I am not convinced that the approach I suggest would undermine uniform application; nor am I convinced that the Court's present approach of considering every specific question of customs classification necessarily contributes much to such uniform application. Those questions are indeed often very specific, and even for the particular products considered by the Court the interpretation which it gives will still involve some assessment on the part of national customs authorities and courts. The example of pyjamas may again illustrate that. I am not at all persuaded that the Court's definition of pyjamas in *Neckermann Versand*, although undoubtedly correct, resolves the general issue of delineating pyjamas from other garments (in particular in the context of changing fashions of dress).

41. In the light of the detailed character of the Common Customs Tariff, which refers to myriads of products and thus contains many thousands of headings and subheadings, it is clear that the Court's contribution to uniform application of the Common Customs Tariff by deciding on the classification of particular products will always be minimal. There are, moreover, other, and perhaps more effective, ways of ensuring uniformity in the field of customs classification. As mentioned above, [46] the Commission has the power to adopt classification regulations for particular products. It seems to me that such regulations are a better instrument for ensuring both appropriate classification and uniform application. Especially where products of a technical kind are in issue, a regulation identifying the essential characteristics and technical specifications of the product, exemplified where appropriate, as such regulations often are, by illustrations, and enacted in consultation with experts from the Member States, is a more appropriate guide than a series of court decisions.

42. It may even be that the proposed self-restraint has more to offer in the way of uniformity than the current approach of giving specific replies to specific questions of classification. By bringing together the various rules and principles of interpretation found in its case-law, the Court's judgment will plainly be of broader significance than if it were restricted to the particular issue of

46 — See paragraph 24.

nightdresses. And if future case-law were to concentrate on general issues of interpretation it is plain that the Court, by offering general guidance to customs authorities and national courts, would further contribute to a uniform application of the Common Customs Tariff. Conversely, as I have suggested, rulings on very specific questions are liable to generate further, still more specific questions, which at some stage must be left to national courts, or to the legislature, to resolve.

43. There are two further points which I will mention only briefly.

44. First, although my proposal obviously departs from the Court's previous approach to classification cases, I do not think that it is entirely novel. As already mentioned, the Court's approach to questions of interpretation is pragmatic, and the Court will attempt to assist national courts, as far as possible, in resolving disputes turning on a point of Community law. In practice the Court's replies are, as would be expected, more specific where the questions referred are more concrete. Where the question referred is more abstract, the Court replies in more general terms, setting out the conditions required by the Community provisions in issue and often adding that it is for the national court to decide, in the light of the facts, whether those conditions are satisfied.

45. It is clear therefore that the Court has never attempted wholly to displace national courts, and traditionally leaves certain matters to be decided by the referring court. It seems to me that, if it is open to the Court to reformulate questions and to give a reply which, in some cases, significantly diverges from the terms of the question referred in order to focus on the relevant Community law issues, it must also be open to the Court to exercise self-restraint and to limit itself to more general issues of interpretation.

46. Secondly, the proposed self-restraint should not necessarily be restricted to the field of customs classification. There may well be other areas where a similar approach would be appropriate. At this stage I do not think that any systematic attempt can be made to define those areas. I will confine myself to mentioning three examples.

47. The first example is the classification of goods as waste for the purpose of Community legislation on waste. The Court has received a substantial number of references on this subject, and a number of principles

have been formulated in the case-law. [47] The stage may soon be reached when the Court will have gone as far as it can in assisting the national courts by providing general criteria and where it cannot usefully take its case-law further. It might then reply to future references relating to different goods by referring to its past case-law and stating that it is for the national courts to decide on the basis of that case-law whether the goods in issue are waste.

48. A second example is of a different kind, but the underlying problem is similar. Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [48] has given rise to a number of references on the meanings of 'transfers' of undertakings etc. The Court has given a series of rulings on the question, most recently in *Süzen*. [49] Those rulings contain detailed guidance to the national courts both on the criteria to be used and on how those criteria are to be assessed. It seems doubtful whether it would be useful for the case-law to be refined further.

49. A third example is from the area of Value Added Tax; again, although the area is very different, the underlying problem is similar. The Court has been confronted with the issue of how the taxable amount is to be determined in the case of transactions involving vouchers of various kinds. [50] Potentially there may be an almost infinite variety of such transactions which could form the subject of future references. It may be sufficient for the Court to state the basic principle that VAT is payable on the amount actually received by the taxable person for his supplies, and to state that it is for the national courts to decide on the basis of that principle how the taxable amount is to be assessed.

50. More generally, I would suggest that the purpose of Article 177 will best be served when there is a genuine need for uniform application of the law throughout the Community because the question is one of general interest, and that detailed answers to very specific questions will not always promote such uniform application. Such answers may merely provoke further questions. The question raised in a particular case will always, of course, have a specific application, but it will usually be obvious whether it also has a general significance going beyond the particular instance. The Court's function under Article 177, in my view, is not merely to give the national court the correct answer

47 — See most recently Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi* [1997] ECR I-3561.

48 — OJ 1977 L 61, p. 26.

49 — Case C-13/95 *Süzen*, judgment of 11 March 1997.

50 — See Case C-288/94 *Argos Distributors* v *Commissioners of Customs and Excise* [1996] ECR I-5311 and Case C-317/94 *Elida Gibbs* v *Commissioners of Customs and Excise* [1996] ECR I-5339.

in a given case, but to give rulings of general significance.

ate. It does not follow, therefore, that simply because a reference by a lower court was not appropriate, a reference by a court of last instance is not obligatory.

Self-restraint and the duty to refer for courts of last instance

54. It seems to me, however, that where a question of Community law is one which, on the view I take, this Court should not be called upon to decide because it should be left to the courts and tribunals of the Member States, then a court of last instance cannot be regarded as obliged to refer such a question.

51. Article 177 of the Treaty makes a distinction between courts and tribunals of the Member States, which, under the second paragraph, are empowered to refer questions of Community law to the Court, and courts and tribunals of Member States against whose decisions there is no judicial remedy under national law, which, under the third paragraph, are obliged to refer such questions.

55. Although the Court has not yet taken that view, support for it can be found in the Court's case-law. The Court has stated that:

52. The reference in the present case is made by the Bundesfinanzhof, which must be regarded as a court of last instance and therefore as having an obligation to refer under the third paragraph of Article 177 of the Treaty. The question therefore arises, on the view I have taken above, of the scope of that obligation in a case of the present type.

'In the context of Article 177, whose purpose is to ensure that Community law is interpreted and applied in a uniform manner in all the Member States, the particular objective of the third paragraph is to prevent a body of national case-law not in accord with the rules of Community law from coming into existence in any Member State.' [51]

53. Article 177 clearly envisages that a court of last instance may be under an obligation to refer, even in cases in which a lower court properly considered a reference inappropri-

51 — Case 107/76 *Hoffmann-La Roche* v *Centrafarm* [1977] ECR 957, paragraph 5 of the judgment and joined Cases C-35/82 and C-36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, paragraph 8.

The reference to 'a body of national case-law' shows that the Court had in mind a general question of interpretation going beyond the confines of a single case.

56. The leading authority on the scope of the obligation imposed by the third paragraph of Article 177 is the *CILFIT* case. [52] There the substantive issue of Community law was considered by the Italian court of last instance, the Corte Suprema di Cassazione, to be free from doubt, and the question referred was whether the obligation to refer under the third paragraph of Article 177 was conditional on a prior finding by the national court of 'a reasonable interpretative doubt'. In its reply to that question the Court first recalled that a reference might not be necessary (although it was still permissible) where previous decisions of the Court had already dealt with the point of law in question.

57. The Court then stated that:

'The correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.

To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

Finally, every provision of Community law must be placed in its context and interpreted

52 — Cited at note 10.

in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.'

58. The Court thus imposed strict conditions which had to be satisfied before a final court could be absolved of its obligation to refer. But the very fact that the Court imposed such strict conditions might suggest that the Court again had in mind questions of law of general interest and the need to avoid the development of 'a body of national case-law' inconsistent with Community law. In *CILFIT* the Court did not consider, and had no need to consider, whether all questions of Community law, however detailed and specific, should be subject to the conditions laid down in that judgment; the substantive issue in that case was a question of general importance, namely whether a health inspection levy was payable on imported wool. If the *CILFIT* judgment were applied strictly, then every question of Community law, including all questions of tariff classification, would have to be referred by all courts of last instance.

59. It is true that there is nothing in the *CILFIT* judgment to suggest that it is not intended to apply to all questions of Community law. However, even if that may have been the correct view when *CILFIT* was decided, it is necessary to interpret Article 177, like all other general provisions of Community law and in particular the provisions of the Treaty, in an evolutionary way. Indeed *CILFIT* itself refers, as has been seen, to the 'state of evolution [of Community law] at the date on which the provision in question is to be applied'.

60. If an evolutionary approach is adopted to the interpretation of Article 177, then it seems to me impossible to ignore a number of developments at least some of which should condition the interpretation of Article 177 today. Community legislation has recently extended to many new fields; and the volume of legislation has greatly increased. Excessive resort to preliminary rulings seems therefore increasingly likely to prejudice the quality, the coherence, and even the accessibility, of the case-law, and may therefore be counter-productive to the ultimate aim of ensuring the uniform application of the law throughout the European Union.

61. Even if those considerations were to be regarded as essentially pragmatic rather than matters of principle, another development which is unquestionably significant is the emergence in recent years of a body of case-law developed by this Court to which national courts and tribunals can resort in resolving new questions of Community law. Experience has shown that, in particular in many technical fields, such as customs and

value added tax, national courts and tribunals are able to extrapolate from the principles developed in this Court's case-law. Experience has shown that that case-law now provides sufficient guidance to enable national courts and tribunals — and in particular specialized courts and tribunals — to decide many cases for themselves without the need for a reference. I have sought to show above how that process might be taken further in the context of customs classification.

62. Moreover if the obligation to refer of courts of last instance is interpreted too strictly, then as Community law develops the incidence of that obligation will increasingly fall unevenly across the Member States, if only because their court systems are very different. In some Member States the courts of last instance may decide tens of thousands of cases a year; in another Member State — the United Kingdom — the court which is for most purposes the sole court of last instance — the House of Lords — may decide fewer than one hundred cases a year. A vastly greater number of references will therefore come from some Member States than from others. If however only cases raising a point of some general importance are referred to the Court, then a more balanced case-law — and a more balanced development of the case-law — is likely to result.

63. Finally I should mention that some commentators have favoured a strict interpretation of the obligation to refer under the influence of occasional instances where final courts have not only failed to refer but have adopted an interpretation of Community law which seemed clearly wrong. [53] It seems to me however disproportionate to base a general theory of Article 177 on isolated instances of what might amount to its improper application. Such a theory will in any event not resolve the problem if the national court is deliberately taking a different view. That theory would require the application of a sledge hammer without cracking the nut.

64. Returning therefore to the *CILFIT* conditions, I would suggest that they do not need to be reconsidered (except perhaps on one point) but that they should apply only in cases where a reference is truly appropriate to achieve the objectives of Article 177, namely when there is a general question and where there is a genuine need for uniform interpretation.

65. The one point on which the *CILFIT* conditions might in my view be reconsidered or refined is the statement that 'an interpretation of a provision of Community law ...

53 — See also the Opinion of Advocate General Capotorti in *CILFIT*, cited in note 10, at pp. 3436 to 3437; and see further, on this point, Anderson, *References to the European Court*, 1995, London, pp. 167 to 170.

involves a comparison of the different language versions'. Although the Court preceded that statement by pointing out that 'the different language versions are all equally authentic', I do not think that the *CILFIT* judgment should be regarded as requiring the national courts to examine any Community measure in every one of the official Community languages (now numbering eleven — or twelve, if the Treaties and certain other basic texts are in issue). That would involve in many cases a disproportionate effort on the part of the national courts; moreover reference to all the language versions of Community provisions is a method which appears rarely to be applied by the Court of Justice itself, although it is far better placed to do so than the national courts. In fact the very existence of many language versions is a further reason for not adopting an excessively literal approach to the interpretation of Community provisions, and for putting greater weight on the context and general scheme of the provisions and on their object and purpose. The reference in the *CILFIT* judgment would be better regarded, in my view, as an essential caution against taking too literal an approach to the interpretation of Community provisions and as reinforcing the point that they must be interpreted in the light of their context and of their purposes as stated in the preamble rather than on the basis of the text alone. The text can be particularly misleading in the case of technical legal terms, which, as the Court goes on to point out, may not have the same meaning in Community law as they have in the legal systems of the Member States.

Conclusion

66. For the reasons given above, I am of the opinion that the question referred by the Bundesfinanzhof should be answered as follows:

For the purpose of classifying nightdresses under the Common Customs Tariff, the national court should apply the principle that classification must be based on the objective characteristics and properties of the products in issue, and the principle that the intended use of a product may constitute an objective criterion for classification if it is inherent in the product and if that inherent character can be assessed on the basis of the product's objective characteristics.