Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to Regulation No 160/66/EEC of the Council laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products, especially Articles 2 and 10 and the first paragraph of Article 16;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question refered to it by the Finanzgericht, Hamburg, by order of that court of 12 March 1969, hereby rules:

**By 'customs duty . . . bound under GATT' and in respect of tariff headings 17.04-C and 18.06-B appearing in Schedule XL of Annex B to the Protocol to the General Agreement on Tariffs and Trade embodying the results of the Tariff Conference of 1960-1961, the first paragraph of Article 16 of Regulation No 160/66/EEC of the Council includes not only the 27% duty provided for by the abovementioned provisions of that Protocol, but also the 'additional duty on sugar' mentioned in footnote (a) to the said headings.**

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 15 October 1969.

A. Van Houtte
Registrar

R. Lecourt
President

## OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 18 SEPTEMBER 1969[1]

*Mr President,*
*Members of the Court,*

In October and November 1967 Markus & Walsh imported into the Federal Republic of Germany sugar confectionary and food preparations containing cocoa (headings 17.04-C and 18.06-B of the Common Customs Tariff) from third countries, in the present case the United Kingdom and the Republic of Ireland. On that occasion the customs office imposed,

1 — Translated from the French.

in addition to the German tax on sugar and the turnover equalization tax, the tax laid down by Regulation No 160/66 of the Council laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products and the costs of production of which are consequently influenced by the price of these products.

By Article 10 of the regulation, the tax which is substituted for the customs duties levied by the importing State is composed of two components:

— A fixed component consisting of an *ad valorem* duty, identical for all the Member States, and intended to protect the industry producing the goods in question. It was fixed by Regulation No 83/67 of the Council which defines the tariff applications relating to these goods and determines the quantities of basic agricultural products considered as having been incorporated in their manufacture:

— a variable component intended to reflect the difference between the prices of the basic products in the importing Member State and the prices of imports from third countries. It is fixed quarterly by the Commission for each Member State; at the time of the imports in dispute, it had been fixed for the fourth quarter of 1967 by Regulation No 630/67 of the Commission.

In certain cases, however, an upper limit for the tax is laid down in Article 16 of Regulation No 160/66 in the following terms:

> 'If upon the entry into force of this regulation the customs duty applicable to goods to which it applies is bound under GATT, and for as long as such binding continues, the total amount of the tax mentioned in Article 10, expressed as a percentage of the import price of the goods in question, may not exceed the rate of the consolidated Common Customs Tariff duty in relation to third countries.'

The proceedings pending between Markus & Walsh and the customs authorities arises from this provision and the Finanzgericht, Hamburg, asks you for your interpretation of it.

In fact although, according to Schedule XL of Annex B to the Protocol to the General Agreement on Tariffs and Trade signed at Geneva on 16 July 1962, the duty for the products in question is 27%, the customs office, in calculating the maximum rate mentioned in Article 16 of the regulation, has also taken into account an additional duty on the sugar. Undoubtedly, according to footnote (a) relating to tariff headings 17.04 and 18.06 of the Schedule XL of Annex B to the Protocol to GATT, 'The Community reserves the right to levy, in addition to the bound duty, an additional duty on sugar, corresponding to the charge borne on importation, and applicable to the quantity of various sugars (calculated in sucrose) contained in these products'. But Markus & Walsh disputes that this additional duty can be taken into consideration in determining the maximum duty, because Regulation No 160/66 fixes the maximum as the *customs duty bound under GATT* and does not mention the additional duty on sugar which the Community has reserved the right to levy.

Faced with this difficulty, the Finanzgericht asks you to rule whether the concept of a customs duty bound under GATT within the meaning of Article 16 of Regulation No 160/66 must be understood solely to mean the duty of 27% applicable to the products comprised in tariff headings 17.04-C and 18.06-B or whether that concept also covers the additional duty which, according to footnote (a) to those tariff headings, may be levied on the sugar contained in the products.

## II

The case before you therefore displays a special feature since in order to interpret Article 16 of the regulation—which

you are certainly empowered to do—you cannot disregard the GATT Protocol, at least to the extent to which Article 16 refers to it. Both before the German court and before you the plaintiff in the main action has asked that the appropriate GATT authorities should be consulted as to the meaning of the words 'bound customs duty' in the practice of that organization. It seems doubtful whether an official reply can be obtained when this point has not given rise to a disagreement or dispute between the Community and another contracting party. In any case, it is not permissible for you yourselves to put the question. Moreover, what you are asked to decide is not the meaning of this term in the doctrine or the practice of GATT, but its *meaning in Article 16 of Regulation No 160/66*, and your reply will only apply within the limits of that regulation.

Having said that, we are faced with two arguments which have been developed by Markus & Walsh and by the Commission respectively (the Council did not consider that it need submit observations on the meaning which it gives to its own regulation).

1. The first argument certainly keeps closer to the wording of the provisions. It is based on the expressions employed in footnote (a) relating to tariff headings 17.04 and 18.06 of Schedule XL of Annex B to the Protocol. There the Community reserves the right to levy, *in addition to the bound duty*, an additional duty on sugar calculated in the manner which I have mentioned; therefore, for the annex it is necessarily only the duty of 27% which represents the bound duty, and the additional duty does not have this characteristic.

Assuming that this is so, one need only return to Article 16 of Regulation No 160/66. This refers to the customs duty bound under GATT; how can it be disputed that this expression has the same meaning there as in Schedule XL, in other words, that, in order to determine the upper limit of the duty imposed under Article 10, only the customs duty 'properly so-called' of 27% may be taken into account, to the exclusion of the additional duty on sugar?

2. The Commission's argument is quite different.

It observes first that the words 'binding' and 'bound' are not technical terms employed in the original text of GATT which resorts by preference to the concept of tariff concession. On the other hand, these expressions are frequently used in the vocabulary of international commercial law, precisely in relation to GATT. They imply in this case the concept of 'bound with regard to the contracting parties', or 'fixing in accordance with the rules of GATT'.

A tariff concession, made by a contracting party, is said to be bound because it can only be withdrawn in accordance with the rules of GATT. It is well known that the GATT system provides in particular for the deposit by each contracting party, after negotiations which from being bilateral have become multilateral, of lists of products in respect of which the corresponding customs duties have been fixed. On the one hand, according to Article II of GATT, a State may not subject products imported from other contracting parties to import duties higher than those resulting from the tariff concession shown in the list which it has deposited. On the other hand, under Article XXVIII, the lists may in principle be modified only every three years and according to a special procedure.

The Commission also point out that although Article XXVIIIa — introduced several years after the signature of the original agreement—employs the expression 'binding', the meaning which it gives to it is in reality wider than appears at first sight and is compatible with that which I have just mentioned. Dealing with the object which the periodical negotiations may have, this article mentions the binding of duties at the level existing at the time of the negotiations,

in addition to the reduction of duties and the undertaking not to raise particular duties above a certain level; it does not follow from this, it says, that the standstill undertaking alone constitutes a binding; the lowering of duties and the undertaking not to raise them above a certain level also display this characteristic. This argument seems to me to be correct.

Then, applying Article 16 of Regulation No 160/66 to the concept of binding in the form which it seems to the Commission must be accepted for the purposes of GATT, the Commission considers that the maximum duty laid down in that article is constituted by the *concession* made by the Community within the framework of GATT with regard to its customs tariff. The basic purpose of this provision is in fact to guarantee the rights vested in the contracting parties by virtue of the tariff concessions which had previously been made. This results both from the wording of the article and the recital preceding it.

Thus it remains to see what tariff concession was granted for the tariff headings in question, 17.04-C and 18.06-B. According to Schedule XL, the Community may impose a 'duty' of 27%, described in footnote (a) as a 'bound duty', to which may be added an additional duty on sugar.

It is obvious from this that by virtue of these provisions the Community did not undertake in respect of the contracting parties to limit the duty on these goods to 27%, but may impose a higher charge by reason of the existence of the additional duty.

The question then arises whether it is bound not only as far as the above-mentioned 27% is concerned, but also with regard to the additional duty. It seems that the answer must be that the undertaking—that is to say, the binding—also covers the additional duty, for if it were otherwise, the undertaking would be deprived of all real effect, and Article 16 would not introduce any ceiling. Since the tariff concession precisely constitutes a ceiling, the object of the binding constitutes a whole, and it is not possible to consider a part of the charge as bound if the whole is not bound.

It is true that it may be objected here that, if the additional duty is also bound and may not therefore exceed the charge on sugar upon importation without infringing the principles of GATT, this charge is not itself bound in the Protocol. However, so long as sugar is subject to a certain charge, the limit of the additional duty and, consequently, the limit of the total charge are fixed; it may therefore be considered that within these limits there is a tariff concession.

In other words, the Community may not, with regard to the contracting parties to GATT, levy for the tariff headings in question a duty greater than 27% *and* the additional duty on sugar. The tariff concession which it has thus granted must be considered as constituting the bound customs duty under GATT and forms the limit of the charge mentioned in Article 16 of Regulation No 160/66.

3. It is necessary now to choose between these two diametrically opposed interpretations of a provision, which to tell the truth is badly drafted. And it will be observed here that the solution adopted will not be limited to imports from third countries, but will extend *mutatis mutandis* to intra-Community transactions. In fact, according to the second paragraph of Article 16, the total amount of the charge levied on these transactions may not exceed 9/10ths of the charge levied on imports from third countries. There is therefore a direct connexion between the two systems.

In favour of the applicant's argument it may be said that it is certainly closer to the wording of the provisions and that it offers more guarantees for importers. In fact, since the variable component is fixed every three months, the

amount of the charge cannot be calculated by them in a precise manner at the time when they conclude transactions with third countries. The limitation on the charge to a single duty of 27% would permit them to make more accurate calculations as the additional duty introduces an additional element of uncertainty. And since we are concerned with customs law one might be tempted to say that a charge imposed on the taxpayer should be fixed in an unequivocal fashion, which would lead to a restrictive interpretation of the provision in question.

However, this is not the conclusion to which I shall finally come. In fact, the rules of GATT permit the Community to levy both the duty of 27% and the additional duty on sugar. Since the purpose of Regulation No 160/66 is to protect the economy of the Member States, it may be assumed that its authors intended to use all the powers available to them as against the rights of the other contracting parties. Then again, as the Commission has pointed out, the same rule has been applied—often in a clearer form—to goods subject to an organization of the agricultural markets: as a whole, the ceiling on the charge is only limited by the observance of the Community's commitments in the framework of GATT. One may reasonably interpret Regulation No 160/66 in the same manner.

In these circumstances I am of the opinion that the answer to the question asked by the Finanzgericht, Hamburg, should be that customs duty bound under GATT within the meaning of Article 16 of Regulation No 160/66 must be understood to mean, in addition to the duty of 27% applicable to the products under tariff heading 17.04-C and 18.06-B, the additional duty which by virtue of footnote (a) to those tariff headings, may be imposed on the sugar contained in the product.