(3) Consideration of the note has disclosed no factor of such a kind as to affect its validity.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 30 September 1982.

J. A. Pompe
Deputy Registrar

O. Due
President of the Second Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 15 JULY 1982

My Lords,

Howe & Bainbridge BV applied for a binding customs tariff ruling in respect of goods which they wished to import into Germany. On 22 May 1975 the Oberfinanzdirektion, Frankfurt am Main, ruled that the goods should be classified under tariff heading 51.04 A, "woven fabrics of synthetic textile fibres". The company objected that the classification should have been under heading 59.08 as "textile fabrics impregnated, coated, covered or laminated with preparations of cellulose derivatives or of other artificial plastic materials".

That objection having been disallowed, the company brought the issue before the Bundesfinanzhof. The argument centred on the proper construction of Note 2 (A) (a) of the Chapter Notes to Chapter 59 of the Common Customs Tariff which, it is accepted, are to be looked at for the purposes of construing the heading. That Note states that heading 59.08 does not cover "fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually Chapters 50 to 58 and 60); for the purpose of this provision, no account should be taken of any resulting change of colour". The French text of the Note,

so far as relevant, provides that goods shall not be classified under heading 59.08 if their impregnation, coating or covering "ne sont pas perceptibles à l'oeil nu".

The Bundesfinanzhof asks the Court to rule, pursuant to Article 177 of the Treaty, on the correct interpretation of this Note. In particular, it asks (a) whether the interpretation depends on the perception of "any observer, of an average or particularly experienced customs official, or that of an expert"; (b) whether the words "cannot be seen with the naked eye" mean that only a piece of fabric lying on a flat surface is to be visually appraised, or do they also allow the possibility of recognition by indirect visual means which point to the stiffness of the fabric as a result of impregnation, coating or covering; for example, lack of "fraying-out" at the cut edges, continued presence of creases in the fabric; and, (c) whether, if such interpretation depends upon the perception of any observer, or of an inexperienced customs official the Note is valid, "inasmuch as it confronts these persons with almost insoluble tariff classification problems".

Earlier editions of the Notes, which are based on the Chapter Notes to Chapter 59 of the Customs Cooperation Council ("CCC") Nomenclature, had excluded goods from the heading where the impregnation was "not apparent", and this was treated by the CCC Nomenclature Committee as meaning "not visible to the naked eye" (see Annex E to Document 13.812E, NC 17-Nov/66, which is included with the papers before the Court. The current phrase "cannot be seen with the naked eye", when incorporated in the Notes, was interpreted, and "strictly" by the CCC Nomenclature Committee as implying direct perception by visual inspection of the surface of the fabric. The fact that an invisible coating gave the material a certain stiffness was not sufficient to bring the material within the heading.

At the hearing counsel for the company has submitted that these words should be given their ordinary and natural meaning in the context in which they appear, if that is possible, but, that, if all the considerations which have been taken into account point to some other meaning then another meaning must be adopted. It is his submission that here it is not possible to give the ordinary literal meaning to these words. He says that a large proportion of residents in the Community, and therefore of customs officials, wear spectacles and, if the words are taken literally, those persons who wear spectacles would not be able to carry out this investigation. He also says that, in order to inspect the material, it is necessary for the material to be unpacked and unrolled, therefore, if the words are applied literally, all that can be seen is the outside packing of the material.

He goes on from that to say that since the material must be touched before it can be seen the words must be given some other meaning. It is right then to allow the customs officer to use any of his natural senses, such as touch and

smell and to hold the material up to the light, as well as inspection by the naked eye alone.

In my view, the words "cannot be seen with the naked eye" should be given in this context their natural and ordinary meaning which to me seems perfectly clear. For goods to be in the heading, it is the impregnation or coating which must be seen by the naked eye. If the coating itself cannot be seen it is not sufficient, in my view, that the material looks stiff, or that, when cut or bent round a tube, it has features which indicate that it has, in fact, been coated or impregnated. That it can be deduced from a visual or tactile examination of the material, that there is a coating, which cannot itself be seen, in my view, is not sufficient. The words used, seem to me to intend a simple test and to exclude any form of chemical or technical examination. I would accept the submission of counsel for the Commission that, if the goods do not satisfy that simply test, then they are outside the heading even if, in fact, the goods are impregnated or coated.

I would reject the submission that once it is known that there is a coating inside the material it is necessary to adopt other tests than that simply of the naked eye. The words are clear that it is only the naked eye which is to be used. The naked eye which is contemplated is that of someone having vision within the normal range without the aid of spectacles. Accordingly, it seems to me that if the particular individual carrying out the inspection does need spectacles to bring his vision within that normal range, then he may wear them for the purposes of examining the goods. I do not read the words as excluding the use of spectacles for this purpose. The officer, or person making the inspection, may not, however, use a magnifying glass or any other scientific or technical equipment. I would reject the ingenious argument that because the material has to be touched in order to be unrolled and to be inspected that that opens up the use of all senses. Quite plainly, what is contemplated is that, once the material can be seen for the purposes of inspection, then it is only the naked eye which is to be used.

Counsel for the company, I think, accepts that the test here is not that of any observer. Plainly, it is not. The test is to be carried out by a customs officer. In my view, the customs officer whose naked eye is contemplated as making the inspection is one who is *bona fide* considered by his superiors (who are responsible for allocating duties) to be reasonably competent and sufficiently experienced to make the decision as to which is the appropriate heading. It is not necessary that he should be a particular specialist in plastic coatings and it is not sufficient that he should be wholly without experience. Accordingly, in view of the nature of the simple visual inspection required, and even though there may be borderline cases, I do not accept that this construction produces insoluble tariff problems, or difficulties of such a kind that they render the Note invalid. I would accept arguments put on behalf of the Council that even if there are difficulties they do not, of

themselves, render the Note invalid. If the test is the simple one, which I consider it to be, I am not satisfied that those difficulties are of the magnitude which the referring court appears to contemplate.

Accordingly, in my opinion, the question asked should be answered on the basis that for goods to be within heading 59.08 there must be an impregnation, coating or covering which can be seen by the naked eye of the reasonably competent and experienced customs officer, wearing glasses, if necessary, to bring his vision within the normal range, and that Note 2 (A) (a) to Chapter 59 of the Common Customs tariff is valid.