On those grounds,

THE COURT (First Chamber)

in answer to the questions referred to it by the Tariefcommissie, Amsterdam, by order of 16 March 1983, hereby rules:

1. **A completely hydrogenated animal oil, manufactured from fish liver, which is at the same time an acyclic hydrocarbon, must be classified under subheading 29.01 A of the Common Customs Tariff.**

2. **In the absence of the authorization provided for by Commission Regulation No 1775/77 of 4 July 1977 (Official Journal, L 195, p. 5), such a product must be classified under subheading 29.01 A I.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 February 1984.

For the Registrar

H. A. Rühl

Principal Administrator

T. Koopmans

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 JANUARY 1984 [1]

Mr President,
Members of the Court,

In August 1980, Gerlach & Co. BV, whose registered office is in Amsterdam, the plaintiff in the main action, declared goods, which it was importing from Spain, as "fish-liver oil, subheading 15.04 A II" of the Common Customs Tariff. Accordingly, the Netherlands

1 — Translated from the German.

customs authorities classified the goods under this duty-free subheading. On the basis of tests carried out on a sample, however, the authorities concerned came to the conclusion that the imported goods, though described as perhydrosqualene ("Hexametil Tetracosano"), should be considered to be an acyclic hydrocarbon within the meaning of subheading 29.01 A I of the Common Customs Tariff. Since such goods were liable, at that time, to a 6.7% duty, the competent authority (Ontvanger der Invoerrechten en Accijnzen) issued a demand, on 23 October 1980, for payment of import duty in the amount of HFL 11 942.80.

The Netherlands Inspector of Customs and Excise (Inspecteur der Invoerrechten en Accijnzen) dismissed an objection to that decision, and Gerlach & Co. BV, then instituted proceedings seeking the annulment of the decision and a reduction *tot nihil* of the amount in question essentially on the ground principally that acyclic compounds falling under heading 29.01 must be derived from *mineral* hydrocarbons, while *in the present case,* the product was of *animal origin* and should therefore be classified under subheading 15.04 A II.

The defendant Inspector contends, however, that the imported product no longer displays the outward features of fish oil and as a result of the processing which it has undergone, it has, moreover, become a separate chemically defined compound, namely, an "acyclic hydrocarbon", which is expressly referred to in subheading 29.01 A. For the purposes of such a classification under the Customs Tariff, it is irrelevant whether the product is of natural or synthetic origin. Even if there is no question of its being used as a power or heating fuel, within the meaning of subheading 29.01 A I, the product must nevertheless be classified under that subheading since prior to importation the plaintiff failed to apply for authorization to classify it under subheading 29.01 A II — acyclic hydrocarbons for other purposes — which carries no duty.

The Tariefcommissie considers that in addition to the tariff headings already mentioned heading 15.12 of the Common Customs Tariff must also be taken into account in relation to this product, which it describes as transparent, colourless and odourless and which is mainly used in the cosmetic industry. It considers that the terms of subheading 29.01 A II allow the goods in question to be classified in principle under that subheading, but it points out that the authorization from the competent authorities provided for in Commission Regulation (EEC) No 1775/77 of 28 July 1977 determining the conditions under which certain petroleum products are eligible upon importation for a favourable tariff arrangement by reason of their end-use (Official Journal, L 195, p. 5) was not obtained, so that the conditions for classification under that subheading have not been met.

The Tariefcommissie therefore suspended the proceedings and, by an order of 16 March 1983, referred to the Court under Article 177 of the EEC Treaty the following preliminary questions:

"1. Under which heading of the Common Customs Tariff should the completely hydrogenated animal oil which is manufactured from fish liver and is at the same time an acyclic hydrocarbon compound be classified?

2. If a product of the kind referred to in Question 1 is to be classified under subheading 29.01 A of the Common Customs Tariff, does subheading I or II apply where, although the product is intended to be used otherwise than as a power or heating fuel, no authorization within the meaning of Commission Regulation (EEC) No 1775/77 of 28 July 1977 has been obtained?"

My opinion on those questions is as follows:

I — The first question

1. The plaintiff in the main action contends that the goods in question should be classified under subheading 15.04 A II of the Common Customs Tariff — fish-liver oils, because, as may be determined by the C-14 method, they are of animal origin and unlike purely synthetic perhydrosqualene, are contaminated with the compound $C_{30}H_{62}$ in addition to other hydrocarbons.

Heading 15.04 of the Common Customs Tariff, entitled "Fats and oils, of fish and marine mammals, whether or not refined", covers, according to the note on this heading in the Explanatory Notes to the Customs Cooperation Council Nomenclature, oils and fats derived from several varieties of fish or marine mammals, usually having a characteristic fishy smell and a disagreeable taste and whose colour varies from yellow to reddish-brown. The fifth paragraph of the same note says further that whilst refined fats and oils may be classified under this heading, those which have been hydrogenated or solidified or hardened by any other process belong under heading 15.12. Since the Tariefcommissie found that the product in question was transparent, colourless and odourless and must be considered as fully hydrogenated, it is no longer fish-liver oil and, as the Commission rightly contends, cannot, for this reason, be classified under heading 15.04.

2. Thus heading 15.12 must be taken into account. This heading covers animal or vegetable oils and fats, wholly or partly hydrogenated or solidified or hardened by any other process, whether or not refined, but not further prepared. As the Commission has told us, it is scarcely possible, without further preparation, to obtain a substance from fish-liver oil which does not have the typical fishy smell and taste and the yellow to reddish-brown colour. For this reason, heading 15.12 can also not be used.

3. I agree with the Commission and the Belgian Government, which also presented observations in this case, that heading 29.01 A, covering acyclic hydrocarbons, which we have still to consider, is relevant. The distinction between goods to be classified under Chapter 15 and those belonging to Chapter 29 is, as the Tariefcommissie has found, determined by Note 1 (d), to Chapter 15 and Note 1 (a) to Chapter 29. According to Note 1 (d), the goods therein listed and other goods falling within Section VI, including therefore those covered by Chapter 29, do not belong to Chapter 15. According to Note 1 (a) to Chapter 29 that chapter applies to separate

chemically defined organic compounds, whether or not containing impurities.

According to the Tariefcommissie's findings, the imported goods must be regarded as an acyclic hydrocarbon. It is thus a product of the kind described in heading 29.01 to Chapter 6 as a separate chemically defined organic compound. Note 6 to Chapter 29 in the Explanatory Notes to the Customs Tariff of the European Communities provides that the level of purity must be at least 95%. It is sufficient therefore if the goods to be classified consist as to at least 95% of acyclic hydrocarbons.

However, nothing in either heading 29.01 or in the Explanatory Notes suggests, as the plaintiff in the principal action contends, that only acyclic hydrocarbon compounds derived from mineral hydrocarbons may be classified under this heading. Consequently, I must agree with the Tariefcommissie, the Belgian Government and the Commission, that the animal origin of the product described in Question 1 is no obstacle to its being classified under heading 29.01 A of the Common Customs Tariff.

II — The second question

It now remains to discuss the second question, under which heading the acyclic hydrocarbon is to be classified, since first it is common ground that it is not intended to be used as a power or heating fuel within the meaning of subheading 29.01 A I and secondly the conditions for classification under subheading 29.01 A II have not been met.

(a) The footnote in this subheading provides that classification under it is subject to conditions to be determined by the competent authority. The Commission determined these conditions in the aforementioned Regulation No 1775/77 which is itself based on Regulation (EEC) No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (Official Journal, English Special Edition, 1969 (I) p. 12) Article 1 of Regulation No 1775/77 provides that in principle, subject to some special provisions, Commission Regulation (EEC) No 1535/77 of 4 July 1977 determining the conditions under which certain goods are eligible upon importation for a favourable tariff arrangement by reason of their end-use (Official Journal, L 171, p. 1) applies to petroleum products and this includes, amongst others, products covered by heading 29.01. Article 3 (1) of Regulation No 1535/77 provides however that the benefit of the favourable tariff arrangement upon importation by reason of their end-use shall be conditional upon the grant by the competent authorities of the Member State in which the goods are declared for entry into free circulation of a written *authorization* to the person importing those goods. As the Tariefcommissie has found that the plaintiff in the prinipal case cannot produce such an authorization, it now remains to consider the consequences of the failure to meet this condition.

It should be recalled in this context that, as the Commission has also pointed out, the classification of one and the same product under different headings according to its end-use allows different rates of duty to be charged to take account of

the special end-use of the product, if the conditions laid down in the aforementioned regulation have been met. It follows that when those conditions have not been met, the product in question cannot benefit from the favourable tariff arrangement and therefore cannot be charged to duty at the rate appropriate to that heading. In concrete terms, this means that if the conditions for a favourable tariff arrangement have not been met, the goods in question, which, *whatever their end-use*, remain an acyclic hydrocarbon, cannot be classified under a more favourable tariff heading. Accordingly, since the conditions laid down by Regulations Nos 1535/77 and 1775/77 have not been met, the product in question, even though it is not intended for use as a power or heating fuel, must be charged to duty at the rate provided for under heading 29.01 A I.

(b) This raises another question as to whether, as the Belgian Government contends, the conditions for a favourable tariff arrangement can be met in the case of already imported goods by the issue by the competent authorities of the Member States of a written authorization with the necessary retroactive effect.

I am of the same view as the Commission, however, that the Community rules, and in particular Regulation No 1535/77, exclude such a possibility. The terms of Article 3 of the aforementioned regulation provide that the authorization permitting a favourable tariff arrangement must be granted, at the very latest, when the goods are brought into free circulation in a Member State. This is particularly clear from the German text, which makes the benefit of the favourable tariff arrangement dependent upon the condition that "a written authorization *has been issued*" to the importer ("... eine schriftliche Bewilligung *erteilt worden ist*"). It is also obvious from Article 2 of that regulation that the conditions for allowing specific goods to benefit from a favourable tariff arrangement must have already been met at the time of import, because it is provided that "amounts of uncollected import duties" shall mean the difference between, on the one hand, the amount of import duties which result from the application of the favourable tariff arrangement referred to in Article 1 and, on the other hand, the amount of import duties which would be due if that arrangement did not apply. The operative date for determining the amount of uncollected import duties is to be the date of *acceptance* by the competent authorities of the *entry* for release of the goods into free circulation.

Finally, Regulations Nos 1535/77 and 1775/77 provide for a detailed procedure for the grant of favourable tariff arrangements upon importation, which is meant on the one hand to facilitate the task of the customs authorities and on the other to reduce the incidence of fraud. As the Commission in particular points out, this objective would be endangered if an importer could still apply for an authorization permitting importation under a favourable tariff arrangement even after the goods had been cleared though customs for free circulation.

III — In view of the above considerations, I agree with the Commission in proposing that the questions submitted by the Tariefcommissie be answered as follows:

1. A completely hydrogenated oil manufactured from fish liver, hardened or refined but not further prepared, should be classified under subheading 15.12 of the Common Customs Tariff.

2. Completely hydrogenated perhydrosqualene, manufactured from fish-liver oil, with a purity level of 95 % or more should be classified under tariff subheading 29.01. A as an acyclic hydrocarbon.

3. A product which is to be classified under tariff subheading 29.01 A and which is not intended to be used as a power or heating fuel, but in respect of which the conditions for the grant of an authorization permitting importation under a favourable tariff arrangement within the meaning of Commission Regulation (EEC) No 1775/77 of 28 July 1977 have not been met at the time of the customs declaration, is to be charged to duty at the rate assigned to subheading 29.01 A I.