importation has been prohibited should be prohibited in the territory of all the constituent parts, it must at least be possible to conclude from the applicable rules, taken as a whole, that their purpose is, in substance, to prohibit the manufacture and marketing of those products.

That is not the case of rules under which such goods may be manufactured freely and marketed subject only to an absolute prohibition on the transmission of such goods by post, a restriction on their public display and, in certain areas, a system of licensing of premises for the sale of those goods to customers aged 18 years and over.

2. Article 234 of the EEC Treaty must be interpreted as meaning that an agreement concluded prior to the entry into force of the EEC Treaty may not be relied upon in order to justify restrictions on trade between Member States. That provision, which is intended to ensure that the application of the Treaty does not affect either the duty to observe the rights of non-member countries under an agreement previously concluded with a Member State, or the observance by that Member State of its obligations under that agreement, concerns only the rights and obligations established between the Member States and non-member countries.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 21 January 1986

My Lords,

On 7 and 11 October 1982 Conegate Ltd. sought to import into the United Kingdom through Heathrow Airport a number of articles which were described on the air waybills and the invoices as 'window display models'. The company has contended that, because of their realistic physical features, they were sold for use as models for the display of ladies' dresses and underwear. The customs authorities however inspected the consignments and found that they contained a number of rubber dolls inflatable to life size and variously described as 'Love Love Dolls', 'Miss World Specials' and 'Rubber Ladies'; there were in addition a number of what are called 'Sexy Vacuum Flasks'.

The customs authorities seized the articles as being indecent or obscene within the meaning of Section 42 of the Customs Consolidation Act 1876 and thereby liable to forfeiture under the Customs and Excise Management Act 1979. In proceedings, which are civil in nature, they obtained an order from magistrates on 11 May 1983 that the goods be forfeited, an order which was upheld on appeal by the Crown Court. Both the Magistrates' Court and the Crown

Court found that these were obscene articles within the meaning of section 42 of the 1876 Act. The Crown Court said: 'The dolls when inflated show nearly life-size images of the developed female form with orifices, one with a vibrator being some electrical device attached to the head (and) with simulated pubic hair.' This Court is not of course concerned whether these articles were obscene or indecent. The Crown Court, however, also held that their forfeiture was not inconsistent with the proper application of Articles 30 and 36 of the EEC Treaty.

This latter issue came before the Queen's Bench Division of the High Court on an appeal by way of case stated. The court considered that in order to give judgment it was necessary for certain questions falling within Article 177 of the Treaty to be decided. Four questions have been referred, the first three of which read as follows:

(1) Where certain articles are subject to a national absolute prohibition on importation into a Member State from another Member State, on the grounds that they are indecent or obscene, in order to constitute within the Member State of importation an *absence* of 'lawful trade' in the articles in question, as referred to in paragraphs 21 and 22 of the judgment of the European Court of Justice in Case 34/79 *Henn & Darby* (1979) ECR 3795

(a) is it sufficient that these articles may be manufactured and marketed within the Member State of importation, subject only to

(i) an absolute prohibition on their transmission by post

(ii) a restriction on their public display and

(iii) a system of licensing of premises for their sale to customers aged 18 years and over, in certain areas of the Member State and which licensing system in no way affects the substantive law on indecency or obscenity in that Member State;

or

(b) is it necessary that there be an absolute prohibition on their manufacturing or marketing within the Member State of importation?

(2) If there is a 'lawful trade' within a Member State of importation in articles subject to a national absolute prohibition on importation from another Member State, on the grounds that they are indecent or obscene, is the Member State of importation, in such circumstances, justified on the grounds of public morality under Article 36 of the European Economic Community Treaty, in prohibiting the importation from another Member State, of such articles, on the basis that they are indecent or obscene, or does such a prohibition constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States?

(3) Does the prohibition on the importation of indecent or obscene articles by section 42 of the Customs Consolidation Act 1876 constitute a means of arbitrary discrimination or a disguised restriction on trade within the meaning of Article 36 of the European Economic Community Treaty insofar as it applies to articles prohibited under that Act but not prohibited under the Obscene Publications Act 1959?

The essential question thus turns on the applicability of Article 36 of the Treaty, as

interpreted by the Court in Case 34/79 *Regina* v *Henn and Darby* [1979] ECR 3795, it being agreed between the company, the United Kingdom Government and the Commission that the exercise of this power of seizure constitutes *prima facie* a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

Although the questions posed begin with the Court's judgment in *Henn and Darby*, it seems to me to be more convenient to begin by considering Article 36 of the Treaty, which provides *inter alia* that the provisions of Article 30 'shall not preclude prohibitions or restrictions on imports . . . justified on grounds of public morality, public policy or public security ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

For my part I think that the first question to be asked under Article 36 is whether a measure is justified on grounds of public morality. Only if it is does the second question, whether such prohibition is a means of arbitrary discrimination or a disguised restriction on trade between Member States, arise. The latter question might, for example, arise if it was suggested that public morality or public policy, although available as justifications, were not the true reason for a prohibition being adopted.

In deciding what I take to be the first question, it is plain from the Court's judgment in *Henn and Darby* that in the present state of Community law it is for the Member States themselves to lay down their own standards of public morality and to legislate accordingly, even if in the result legislation of one Member State is more restrictive than that adopted by other Member States, since attitudes vary from place to place and, indeed, from time to time.

It is also in my view plain that restrictions or prohibitions on obscene and indecent publications, articles or activities are capable of being justified on the grounds of public morality.

On the other hand, Article 36 of the Treaty has always been strictly construed and applied, and it seems to me that it is for the Member State relying on the prohibition to justify it. When public morality is in issue, although the Member State is entitled to set its own standards it must, in my view, in justifying a prohibition on imports, do so in the light of the circumstances prevailing, and against the standards which it adopts, in its own territory in respect of its domestic production and distribution.

The United Kingdom Government contends, on the basis of the Court's judgment in *Henn and Darby*, that it is entitled, within Article 36, to adopt what is called a 'unitary approach'. It may have the same standards, in relation to limitations on imports, for the whole of the United Kingdom, even if that standard is not applied equally everywhere within the United Kingdom in respect of domestic production and distribution. To be effective everywhere, it is said, the ban on imports may, indeed must, be equal to the strictest test which is applied internally.

In my view this argument is justified when it is clear that, even if there are differences in the legislation applicable in various parts of a Member State, and even if exceptions may exist, there exist laws which ban or restrict,

on grounds of public morality, the domestic production and distribution of goods the importation of which it is also sought to prevent. That, as I understand it, was broadly the position in *Henn and Darby* where this Court accepted that the prohibition was justified on the grounds of public morality since domestic standards were being enforced.

As the Court said, at paragraph 21 of its judgment, 'Whatever may be the differences between the laws on this subject in force in the different constituent parts of the United Kingdom, and notwithstanding the fact that they contain certain exceptions of limited scope, these laws, taken as a whole, have as their purpose the prohibition, or at least the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character.'

I do not read the reference to 'articles' in that passage as meaning all articles. The case was principally concerned with the Obscene Publications Act 1959, of which section 1 (2) provides that 'article means any description of article containing or embodying matter to be read or looked at or both, any sound record and any film or other record of a picture or pictures'. In the case before it the Court was concerned with articles in that sense, namely with publications and films and not with other articles of the type which are involved here. Moreover, it is plain from the opinion of the Advocate General, at p. 3819, that the films and photographs were of a very different kind from the articles involved in this case. In particular, they portrayed activities which were themselves, in any event, punishable by the criminal courts, quite apart from the fact that the reproductions were found to be obscene or indecent.

On the other hand, it does not seem to me that a prohibition on imports can be justified within Article 36 on the grounds of public morality unless a broadly comparable standard is accepted, whether by statute or administrative act, for imports and domestic production. To have one rule for imports and a different one for the sale of domestically-manufactured goods, which between them exclude imports from other Member States but permit the sale of domestic products is, in my view, insufficient to establish the justification of a prohibition on imports within the meaning of Article 36.

Such an approach seems to me to be consistent with, and to flow from, the approach adopted by the Court in relation to public policy, as found in the Court's judgment in Joined Cases 115 and 116/81 *Adoui and Cornuaille* v *Belgium* [1982] ECR 1665. In paragraph 8 of that judgment, the Court said: 'Although Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct.'

It would be quite wrong to have a different approach, in respect of public morality, from that which is adopted in respect of public policy, as counsel for the United Kingdom Government rightly accepts.

In looking to see whether broadly comparable standards are adopted one should not of course look through the eyes of a mediaeval schoolman, nor should one demand that the same techniques or provisions be adopted in respect of domestic production as in respect of imports; nor, as I see it, does a ban on domestic production and sales have to be absolute to justify a prohibition on imports. Limited exceptions may be acceptable, as the Court found in *Henn and Darby* where in domestic law, though not in regard to imports, publications might be exempted on literary or scientific grounds. As I see it, it is the substance of the standards adopted which matters.

What then is the position in United Kingdom law? The High Court found, as had the Crown Court, that the goods in question in this case could lawfully be manufactured in the Member State and could be traded or sold in certain shops.

The interpretation of that domestic legislation is not for this Court, but it is agreed between the parties that different legislation applies to different parts of the United Kingdom.

At one end of the scale is Northern Ireland; the only relevant legislation apparently being the Post Office Act 1953 which merely prohibits obscene and indecent articles from being sent by post. At the other end of the scale is the Isle of Man, which I understand to be part of the United Kingdom for present purposes. There the sale, distribution and exhibition for gain of obscene and indecent material is prohibited by virtue of the Isle of Man (Obscene Publications and Indecent Advertisements) Act 1907.

There is disagreement between Conegate Ltd on the one hand, and the United Kingdom Government and the Commission on the other hand, as to the position in Scotland. The United Kingdom Government and the Commission contend that in addition to the legislation applicable to England and Wales, section 51 of the Civic Government (Scotland) Act 1982 forbids the sale of obscene and indecent articles, such as those in the present case. Conegate Ltd does not accept that that is the effect of the section. The greater part of the United Kingdom, however, is to be found in England and Wales. It is accepted by those who have appeared before the Court that the manufacture and sale of these articles is not prohibited by the Obscene Publications Act 1959, which was the relevant statute in *Henn and Darby*. No further statutory or other prohibition on the manufacture or possession of goods of this kind is relied on, nor is there any overriding prohibition on the sale or distribution of goods of this kind, accepting them to be obscene or indecent, though they may not be sent by post and they may not be displayed either in a public place or so as to be visible in a public place, by virtue of the Indecent Displays (Control) Act 1981.

Moreover, under the Local Government (Miscellaneous Provisions) Act 1982 local authorities are empowered to bring into effect Schedule 3 to that Act. If they do so, no person may use premises as a sex shop

without a licence and only subject to compliance with terms laid down by the local authority. A sex shop is defined as 'premises . . . used for a business which consists to a significant degree of selling, hiring, exchanging, lending, displaying or demonstrating (a) sex articles, or (b) other things intended for use in connection with or for the purpose of stimulating or encouraging (i) sexual activity.' A breach of those provisions is a criminal offence. Although the interpretation of this legislation affecting England and Wales is, as I said, a matter for the national court, it seems, as is accepted by the parties, and as is stated in summary form in the court's order, that where the Schedule has been adopted, goods of the kind in question may be sold in licensed sex shops subject to compliance with prescribed conditions, and in any event not to persons under 18 years of age, and in unlicensed premises so long as the sale of such articles does not comprise to a significant degree the business of the premises.

That only deals with part of the picture. Where the Schedule has not been adopted the goods may be sold, it appears, from any premises. No figures are available as to how many local authorities have adopted this legislation, but it seems to be agreed that a substantial percentage, if not a majority, have not done so.

Thus, although there is no doubt that the United Kingdom legislation against obscene and indecent material is adopted in the interests of public morality and that it has become increasingly restrictive in recent years, in so far as it relates to the licensing of premises for the sale of articles like the present, it is only in the Isle of Man, and possibly in Scotland, that there is a prohibition on sale comparable with the prohibition on imports, which is authorized by the customs legislation relied on.

Thus, broadly speaking, it is agreed that two different standards are applied, one for imports and one for domestic production and sale. It is not, in my view, an answer to this difference between the two standards to say that it is not known that these particular goods are made in the United Kingdom. These and other obscene goods may lawfully be manufactured and sold, even if subject to restrictions as to retail outlet. Nor is there any cogent evidence that all goods of this kind (and one should not limit oneself to these particular items) which are imported in breach of the prohibition, are seized from retail outlets, even if there exists a power to do so.

In my view, contrary to the argument put forward by the United Kingdom Government, it is not sufficient to say that there is a general hostility to obscene and indecent articles if there are no effective means of preventing their manufacture and sale from domestic outlets in the United Kingdom. It seems to me accordingly that the prohibition in question is not shown to be justified since no bar comparable to that on imports exists in respect of the manufacture and sale of domestic products by laws which are applicable to the greater part of the United Kingdom.

If I had come to the view that the ban was justified on the grounds of public morality, the question would arise as to whether the ban was a means of arbitrary discrimination or a disguised restriction on trade between

Member States. It is to be noted that in the *Henn and Darby* case the Court said that in the light of the existing laws in relation to obscene publications: 'in these circumstances it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such goods in the United Kingdom. A prohibition on imports which may in certain respects be more strict than some of the laws applied within the United Kingdom cannot therefore be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type depending on whether they are produced within the national territory or another Member State'.

Accordingly, it answered the fourth question in that case by saying that 'if a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose, the enforcement of that prohibition cannot' — and then come the words on which the argument has turned — 'in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36'.

In other words, as I read it, on a comprehensive view there was in that case no lawful trade in the publications and films, even if there were limited exceptions and variations, because the legislation sought to prohibit, or at least restrain, both the manufacture and the marketing of publications and films of an obscene or indecent character.

In this case, the same may be true of Scotland and of the Isle of Man in respect of these articles. It cannot, in my view, on the statement of the law summarized in the order for reference, be said of England and Wales and Northern Ireland. So far as England and Wales are concerned, there is not so much a prohibition on sale as a power to restrict and control the outlets of retail sale, a power which has been only partly implemented. The power, though — for the reasons given by counsel for the United Kingdom Government — not completely analogous, can in my view, be compared with restrictions on outlets for the sale of other products such as alcohol and tobacco.

Accordingly, in my view, if as the law stands it is lawful, albeit disapproved, for the sale to take place of such goods retail, in areas where Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 has been adopted, other than to persons under 18 in licensed premises and in premises where the trade in such goods is not a significant part of the business, and generally at premises in other areas, so long as there is no unlawful display, then it does not seem to me possible to say that there is no lawful trade in such goods in the United Kingdom within the meaning of the judgment in *Henn and Darby*.

It follows, in my view, that even though the customs legislation was clearly not adopted with the intention of discriminating against goods from other Member States in order to protect domestic production, there is here in fact arbitrary discrimination within the meaning of Article 36, which removes the protection afforded by the first sentence of that Article if the prohibition is justified under the first sentence of the Article.

This result does not of course mean that goods in this case can be sold freely in the United Kingdom. They are subject to such controls and limits as apply generally to the sale and distribution of other obscene and

indecent articles of a similar kind in the United Kingdom. Nor, of course, is Community law concerned with imports from other countries. Nor, finally, does the conclusion that I have reached after very full written and oral argument, mean that Community law compels the United Kingdom to admit these objects from other Member States indefinitely. It merely does so as long as there is no effective ban on the manufacture and sale of domestic products of the same kind.

Question 4 referred by the national court reads as follows:

'Notwithstanding the answers to the questions above, if, acting in accordance with its international obligations under the Geneva Convention 1923 for the Suppression of Traffic in Obscene Publications, and the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976) a Member State imposes an absolute prohibition on the importation from another Member State of articles which are classed as indecent or obscene, is such a prohibition thereby consistent with Article 234 of the European Economic Community Treaty?'

The parties did not, in their oral argument, deal with this final question. It is doubtful whether the two conventions have any immediate relevance, not least because this case is not concerned with publications with which the Geneva Convention is primarily concerned, nor were these goods sent by post so that the Universal Postal Convention does not apply.

The Commission has drawn attention to the fact that in any event the Federal Republic of Germany denounced the Geneva Convention before the relevant facts in this case, and argued that since the Universal Postal Convention, as renewed, was concluded after the accession of the United Kingdom to the European Economic Community, Article 234 of the Treaty is not relevant. It seems to me that the obligations under those two Conventions cannot, in any event, override the obligations of one Member State to another, whatever be the effect of those Conventions in relation to third States. In any event, it seems to me that the question adds nothing to that which was posed as the final question in the *Henn and Darby* case, and I would answer it in the same terms.

Accordingly, in my view the questions which have been posed fall to be answered on the lines that:

(1) A ban on the imports of particular products cannot be justified on the grounds of public morality within the meaning of Article 36 of the EEC Treaty unless comparable restrictions on the domestic manufacture and sale of such products exist and are applied. Such restrictions need not be absolute but, even if subject to limited exceptions, must have the overall object and effect of rendering unlawful such domestic manufacture and sale.

(2) There is no absence of lawful trade in such products, within the intendment of the Court's judgment in *Henn and Darby* merely by reason of the fact that they may not be sent by post, that there exists a restriction on their public display, and that a system of licensing premises for their sale exists, which does not otherwise render unlawful their manufacture and sale.

(3) In so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 of the Treaty, the provisions of Article 234 do not preclude that State from fulfilling the obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and from the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976).

The costs of Conegate fall to be dealt with by the national court. The costs of the Commission and the United Kingdom are not recoverable.