OPINION OF ADVOCATE GENERAL LÉGER

delivered on 9 November 1995 *

1. The High Court of Justice, Queen's Bench Division, has referred five questions to the Court for a preliminary ruling in a case concerning the customs procedure for importation into the United Kingdom of shrimps and prawns from the Faroe Islands. The questions concern the rules for determining the origin of the imported goods and the procedure for post-clearance recovery of import duties not initially demanded from the person liable for payment.

2. It appears that, at the end of 1994, similar disputes concerning Føroya Fiskasøla, one of the applicants in the main action, were pending in other Member States (Belgium, Denmark, Germany, France and the Netherlands). [1]

3. I shall start by referring briefly to the constitutional position of the Faroe Islands and their relationship with the Community.

4. Under a Danish Law, the Hjemmestyrelov No 137 of 23 March 1948, the Faroe Islands constitute an autonomous community linked to the Kingdom of Denmark. The Faroese are persons of Danish nationality residing in the Faroe Islands. The Home Government of the Faroe Islands is entrusted, in particular, with questions concerning customs duties. The home authorities also have jurisdiction over rules on the use of the Faroese flag on vessels registered in the Faroe Islands.

5. Under Article 227(5)(a) of the EEC Treaty, in the version resulting from Article 15(2) of the Council Decision of 1 January 1973 adjusting the instruments concerning the accession of new Member States to the European Communities, [2] the Kingdom of Denmark had the option of notifying the Community, by 31 December 1975 at the latest, that the EEC Treaty was applicable to the Faroe Islands. It did not exercise that option, and the EC Treaty therefore does not apply to those islands.

Legislative background to the main action

6. Council Regulation (EEC) No 2051/74 of 1 August 1974 on the customs procedure

* Original language: French.

1 — See the observations on behalf of the applicants, paragraph 11.

2 — OJ 1973 L 2, p. 1.

applicable to certain products originating in and coming from the Faroe Islands [3] forms part of a process of progressive removal of customs duties on imports from the Faroe Islands.

7. Under Article 2(2) of, and Annex II to that regulation, crustaceans and molluscs originating in the Faroe Islands are imported into the United Kingdom free of customs duty.

8. Annex IV to the regulation defines the term 'originating products' for products covered by the common organization of the markets in the fishery products sector:

'I. [...] the following products [...] shall be considered as originating in the Faroe Islands:

(a) [...]

(b) products taken from the sea by Faroe Island vessels;

[...]

3 — OJ 1974 L 212, p. 33.

The term "Faroe Islands" shall apply only to vessels:

— which are registered in the Faroe Islands;

— which sail under the flag of the Faroe Islands;

— which are at least 50% owned by nationals of Member States of the Community or of the Faroe Islands or by a company with its head office in one of those States

[...];

— of which the captain and all the officers are nationals of the Member States of the Community or of the Faroe Islands;

— of which at least 75% of the crew are nationals of the Member States of the Community or of the Faroe Islands.'

9. Article 4(1) [4] provides:

'For the purposes of applying this regulation the concept of original products is defined according to the procedure provided for in Article 14 of Council Regulation (EEC) No 802/68 of 27 June 1968 on the common definition of the concept of the origin of goods, [5] dependent upon the special rules set out in Annex IV and the provisions of paragraph 2.'

10. Article 14 of Regulation No 802/68 defines the procedure followed by the Committee on Origin that was established by that regulation.

11. Article 4(2) of Regulation No 2051/74 makes the granting of tariff reductions conditional upon the production of an EUR.1 movement certificate, of which a specimen is given in Annex V to the regulation. The article states that the certificate is to be issued by the authorities of the Faroe Islands when the goods to which it refers are exported.

12. Commission Regulation (EEC) No 3184/74 of 6 December 1974 concerning the definition of the concept of 'originating products' and methods of administrative cooperation for the application of the customs procedure applicable to certain products originating in and coming from the Faroe Islands [6] lays down the conditions under which products acquire originating status and the mode of proof and verification of such status.

13. Article 2(1)(a) of that regulation provides that 'products wholly obtained in the Faroe Islands' are to be regarded as products originating in the Faroe Islands.

14. Article 3 provides:

'The following shall be considered as wholly obtained [...] in the Faroe Islands [...]:

[...]

(f) products of sea fishing and other products taken from the sea by their vessels;

[...]'

4 — Formerly Article 5, now Article 4 pursuant to Article 1(2) of Council Regulation (EEC) No 2612/79 amending Regulation (EEC) No 2051/74 on the customs procedure applicable to certain products originating in and coming from the Faroe Islands (OJ 1979 L 301, p. 1).

5 — OJ, English Special Edition 1968(I), p. 165. That regulation was repealed, following consolidation, by Article 251 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), which entered into force on 1 January 1994.

6 — OJ 1974 L 344, p. 1.

15. Explanatory Note 4 of Annex I to Regulation No 3184/74 incorporates in substance the definition of 'Faroe Island vessels' contained in Annex IV to Regulation No 2051/74.

16. Article 7(1) of Regulation No 3184/74 provides:

'Proof of the originating status of products shall be given by production of a movement certificate EUR.1 [...] issued by Føroya Gjaldstova [...] .' [7]

17. Article 9 adds that the movement certificate is to be issued only on application in writing by the exporter. It is the responsibility of Føroya Gjaldstova to take any steps necessary to verify the origin of the goods and to check the other statements on the certificate (Article 22(2)). Subsequent verifications of EUR.1 certificates may be carried out at random or whenever the customs authorities of the importing Member States have reasonable doubt as to the authenticity of the document or the accuracy of the information regarding the true origin of the goods in question (Article 46(1)). The customs authorities of the importing Member State then return the certificate to Føroya Gjaldstova, giving the reasons of form or substance for an inquiry (Article 46(2)). The results of the subsequent verification are communicated to those authorities, and must be such as to make it possible to determine whether the movement certificate applies to the goods actually exported and whether those goods do in fact have the status of originating products (Article 46(3)).

18. Where the competent authorities of a Member State find that all or part of the amount of the import duties legally payable has not been required of the person liable for payment, they are to take action to recover the duties not collected, pursuant to Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties. [8]

19. Under the second subparagraph of Article 2(1) [9] of that regulation, such action may not be taken after the expiry of a period of three years from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to those goods was incurred.

7 — The name of the Faroese customs authority at the date of the regulation.

8 — OJ 1979 L 197, p. 1. That regulation was repealed, following consolidation, by Article 251 of Regulation No 2913/92, cited above, which entered into force on 1 January 1994.

9 — Essentially incorporated in Article 221(3) of the current Community Customs Code.

20. In addition, under the first subparagraph of Article 5(2): [10]

'The competent authorities may refrain from taking action for the post-clearance recovery of import duties [...] which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.'

21. The conditions for the implementation of that article were laid down by Commission Regulation (EEC) No 1573/80 of 20 June 1980, [11] which was repealed and replaced, as from 1 September 1989, by Commission Regulation (EEC) No 2380/89 of 2 August 1989, [12] itself replaced, as from 1 September 1991, by Commission Regulation (EEC) No 2164/91 of 23 July 1991. [13]

22. Article 4 of each of those three regulations made subsequent waiver of customs duties amounting to ECU 2 000 or more conditional upon a decision to that effect by the Commission, taken after consulting the Committee on Duty-Free Arrangements.

Facts and procedure in the main action

23. Faroe Seafood Co. Ltd ('Faroe Seafood') is a limited liability company incorporated under English law, and is a 100% subsidiary of L/F Føroya Fiskasøla ('Føroya Fiskasøla'), which, at the time of the events material to this case, was a cooperative under Faroese law, [14] the members of which were owners of Faroese-registered trawlers and local fisheries. Faroe Seafood imported grey and pink shrimps and prawns, which came mainly from Føroya Fiskasøla.

24. John and Celia Smith, a married couple, trading as Arthur Smith (a firm, hereinafter 'Arthur Smith'), carried on business as shipping agents, stevedores and customs clearing agents. [15]

10 — Essentially incorporated in Article 220(2)(b) of the current Community Customs Code.

11 — OJ 1980 L 161, p. 1.

12 — OJ 1989 L 225, p. 30.

13 — OJ 1991 L 201, p. 16.

14 — Since 31 December 1993, L/F Føroya Fiskasøla has been a holding company holding only assets in a limited liability company called P/F Føroya Fiskasøla (see paragraph 18, note 16 of the applicants' observations).

15 — See paragraph 44 of the applicants' observations.

25. Between 16 September and 4 October 1991, officials from the Commission's DG XXI, accompanied by a United Kingdom customs officer and a Danish customs officer, visited the Faroe Islands, with the prior consent of the customs authorities of the latter, in order to verify whether all the shrimps and prawns imported into the Community under cover of the EUR.1 certificates were in fact of Faroese origin.

26. On completion of that visit, a report dated 3 October 1991 was submitted to the Faroese customs authorities, containing the following findings:

— the crew of Faroese vessels which fished in the exclusive economic zone of Canada under charter agreements included Canadian fishermen and occasionally Canadian officers, who participated in fishing activities;

— for a number of fishing tours, the percentage of third-country nationals was thus higher than the 25% allowed by Regulation No 3184/74;

— shrimps and prawns bought from Faroese and foreign vessels were delivered to two Faroese factories and processed into peeled shrimps and prawns intended mainly for export to the Community, but without having been segregated on account of their origin either at the time of landing or later during storage.

27. The UK customs authorities took the view that the imported products could not be regarded as being of Faroese origin for the purposes of the relevant provisions, and that the consignments in question did not therefore qualify for preferential treatment on importation.

28. Between 23 April and 11 May 1992, the UK customs authorities demanded payment from Føroya Fiskasøla and Faroe Seafood totalling UKL 493 888.44 by way of customs duty in respect of imports from the Faroe Islands between 9 May 1989 and 10 September 1991. On 21 September 1992, they demanded payment from Arthur Smith of the sum of UKL 1 158 030.14. Those demands for payment were issued on the basis of Regulation No 1697/79.

29. It is those demands for payment that are challenged in the proceedings before the national court.

30. In those proceedings, the applicants argued that:

— the imported products were of Faroe Islands origin;

— the UK customs authorities had no power to set aside the proof furnished in that respect consisting of the EUR.1 certificates, which the Faroese customs authorities expressly maintained in force, notwithstanding the report of 3 October 1991;

— Article 5(2) of Regulation No 1697/79 should be applied to them.

31. Arthur Smith argued further that the demand issued to the firm was invalid in its entirety, since part of the debt claimed was time-barred pursuant to Article 2(1) of Regulation No 1697/79. They argued that such invalidity resulted from a rule of English law whereby an assessment for a sum is invalid in its entirety where any component of that sum is irrecoverable.

32. Considering that the resolution of the disputes raised certain difficulties as to the interpretation of Community law, the High Court of Justice, Queen's Bench Division, decided to stay the proceedings and refer the following questions to the Court:

'1. (a) Where the competent authorities of a Member State claim post-clearance recovery of customs duties on imports pursuant to Council Regulation 1697/79 on the ground that the goods did not originate in the jurisdiction specified in the relevant EUR.1 certificate, is it for national law or for Community law to prescribe the rules determining

— the party bearing the burden of proving that the goods did not originate there; and

— the standard of proof applicable in the matter?

(b) If it is for Community law to prescribe those rules, what are those rules?

2. On the proper interpretation of Council Regulation 2051/74, Commission Regulation 3184/74 and Council Regulation 1697/79, may the competent authorities of a Member State levy post-clearance customs duties on consignments imported from the Faroe Islands, where

— those authorities did not levy customs duty at the time of importation in reliance on EUR.1 certificates declaring the consignments to be of Faroese origin;

— those EUR.1 certificates were issued in good faith by the competent Faroese authorities;

— a mission of enquiry comprising officials of the Commission accompanied by a Danish and a British official reported that the consignments in question did not meet the rules of origin because the factories supplying the consignments in question had processed originating and non-originating materials without segregating those materials and because documentation relating to the status of the raw materials used was not attached to the related application forms;

— the mission concluded that "these certificates EUR.1 ... are wholly or partially cancelled";

— the Faroese authorities do not accept the conclusions of the mission of enquiry and maintain that the certificates are in force;

— there has been no reference to the Committee on Origin of the issues in the mission report disputed by the Faroese authorities;

— pursuant to the mission's report, there has been a reference to the Committee on Origin of other issues arising from the mission of enquiry?

3. (a) Are the conditions which define Faroe Island vessels in Annex IV of Council Regulation 2051/74 and Explanatory Note 4 of Commission

Regulation 3184/74 to be read conjunctively or disjunctively?

(b) If those conditions are to be read conjunctively, does the word "crew" when used in those contexts include persons not forming part of the normal complement of the vessel who are engaged on a particular voyage or part of a voyage, pursuant to a joint venture agreement with an undertaking in a third country, to work on the vessel as trainees or as unskilled hands working below decks, paid either by the operator of the vessel or by the undertaking in the third country?

(c) Where a fish-processing factory fails to separate raw materials according to their several origins as defined by Regulation 3184/74, may the customs authorities in a Member State levy duty on imports derived from that factory in an amount equal to the duty that would have been payable if the origins of the goods in each consignment had been proportionally correspondent to the origins of the raw materials imported into the factory in the year in which the import occurred?

4. (a) Where the authorities of a Member State issue a single post-clearance demand note for a global sum and part of the sum so demanded is irrecoverable pursuant to Article 2(1) of Regulation 1697/79, is it for national law or for Community law to determine whether the demand note must be considered to be void in its entirety?

(b) If that matter is governed by Community law, under what circumstances (if any) must the demand note be considered as void in its entirety?

5. On the proper construction of Article 5(2) of Council Regulation 1697/79 and Article 4 of Commission Regulation 2164/91, are the competent authorities of a Member State free to proceed to post-clearance recovery of import duties which were not collected on the importation of goods, without first referring the matter to the Commission, where:

— the exporter, acting in good faith, declared the goods to be of Faroese origin;

— save in so far as the previous indent might be held to indicate otherwise, the exporter observed all the provisions in force concerning the customs declaration;

— the competent authorities of the jurisdiction from which the goods were exported, acting in good faith, certified on movement certificates "EUR.1" that the goods originated there and continued at all material times to maintain those movement certificates in force;

— the competent authorities of the Member State to which the goods were imported, acting in good faith, originally accepted that the origin of the goods was as declared in the movement certificates;

— the persons liable for payment at all times believed in good faith that the origin of the goods was as declared in the movement certificates;

— the competent authorities of the Member State of importation do not claim to have considered the claim to waiver of customs duty before issuing demands for post-clearance recovery of duty;

— those competent authorities decided not to refer the matter to the Commission because they did not consider that the conditions for waiver of duties under Article 5(2) were satisfied inasmuch as the competent authorities considered that it is the importer or the agent which runs the risk of the EUR.1 certificate being found to have been wrongly issued and the competent authorities considered that an importer wholly owned by an exporter, and the agent for such an exporter, ought to be able to establish the origin of the goods in question?'

Preliminary observations

The declaration of Føroya Fiskasøla's insolvency in the course of the proceedings

33. It appears from the Court's file that insolvency proceedings were commenced on 31 July 1995, during these proceedings for a preliminary ruling, in respect of Føroya Fiskasøla.

34. That event can have no impact on the course of the proceedings before the Court, first because the national court has not officially informed the Court that the main proceedings have been extinguished, suspended or interrupted in relation to Føroya Fiskasøla following its insolvency, and secondly because other parties to the main action are involved in the present proceedings, it being stated in the file that the insolvency does not affect Faroe Seafood, a subsidiary of Føroya Fiskasøla.

The alleged infringement of the fundamental right to property

35. Before analysing the questions referred, the applicants argue that post-clearance recovery of the duties in question constitutes an infringement of the fundamental right to property laid down by Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950, as interpreted by the European Commission and Court of Human Rights.

36. They argue that the possibility, reserved by the second paragraph of that article, of enforcing such laws as may be necessary, in particular, to secure the payment of taxes or other contributions must be used subject to compliance with the principle of proportionality.

37. They submit that the principle of proportionality has been disregarded in the circumstances of the present case, since:

— the importations were made in good faith, in reliance on certificates issued by the authorities of the exporting territory, without the three traders in question having any doubts as to the correctness of the interpretation of the rules by those authorities;

— the duties are no longer recoverable from the buyer of the products, who would have had to bear them if they had been levied at the time of importation in the normal way, so that retrospective recovery from the applicants would seriously undermine their property rights, possibly forcing Arthur Smith into insolvency owing to the size of the amount claimed;

— the applicants had no financial interest in preferring one particular interpretation of the relevant Community regulations to another.

38. They refer to those arguments again in their analysis of Question 5.

39. In so doing, they ask the Court to examine the problems raised in the light of a rule of law not mentioned by the referring court.

40. The examination of secondary Community legislation in the light of general principles of Community law, including fundamental rights, is normally carried out in the context of a reference for a ruling as to validity or of a direct action for annulment.

41. The present reference to the Court concerns the interpretation, rather than the validity, of the Community regulations in question. Parties, institutions and Member States which submit observations to the Court may not alter the content of the question submitted by the national court or add further questions.

42. The Court may, however, declare of its own motion that a provision which it was merely called upon to interpret is invalid. [16]

43. The applicants do not expressly ask the Court to rule on the validity of one of the Community regulations in question. They seem to be basing their argument on interpretative grounds when they state [17] that the interpretation of Community legislation by the Court should not 'conflict' with the rights guaranteed to them by the European Convention on Human Rights and its Protocols.

44. In reality, it seems to me that the first two grounds relied upon by the applicants in support of their argument merely fall within an analysis of the normal conditions for applying Regulation No 1697/79, which is the subject-matter of Question 5. I will therefore examine them in that context. As for the third ground, alleging the absence of any pecuniary interest in preferring one particular interpretation of Regulations Nos 2051/74 and 3184/74 to another, I would merely make the point here and now that exporters and importers obviously derive an economic advantage, in terms of competitiveness on the market of the importing State, when they import goods free of duty rather than subject to duty at the normal rate.

16 — See the judgments in Case 62/76 *Strehl* v *Pensioenfonds Mijnwerkers* [1977] ECR 211 and in Case 145/79 *Roquette Frères* v *French Customs Administration* [1980] ECR 2917.

17 — See paragraph 45 of their written observations.

Question 1

45. In its first question, the national court effectively asks whether, for the purposes of applying Regulations Nos 2051/74 and 3184/74, the rules concerning the burden of proof and the methods of proving the originating or non-originating status of the goods are to be determined in accordance with Community law or national law. In the former case, it asks what those rules are.

46. The answer is to be found by examining the specific provisions and the general structure of Regulation No 2051/74 and its implementing regulation, No 3184/74.

47. Regulation No 2051/74 aims at the progressive elimination of customs duties on imports originating in and coming from the Faroe Islands. It seeks to confer preferential treatment on such imports, in derogation from the ordinary provisions of Community law in this area.

48. It therefore involves a requirement of proof that the conditions for applying that derogation are fulfilled. Article 4(2) [18] expressly requires that, as a condition for allowing the products in question to benefit from tariff reductions, an EUR.1 certificate issued on exportation by the Faroese customs authority must be produced. In those circumstances, it necessarily imposes the burden of proving the originating status of the products on the exporter. Article 21 of Regulation No 3184/74 confirms that it is for the exporter or his authorized representative to request the issue of a movement certificate and to submit any appropriate supporting document proving that the goods to be exported qualify for the issue of such a certificate.

49. Thus, Community law governs the burden of proving the originating status of goods. It also governs the methods of proof; originating status may be established by any method ('any ... supporting document') *vis-à-vis* the Faroese customs authorities, which then issue an EUR.1 movement certificate that constitutes for the trader carrying out the import formalities the proof, *vis-à-vis* the customs authorities of the importing State, of the Faroese origin of the products.

50. By providing for the possibility of verification, either at the time of the request for issue of an EUR.1 certificate or subsequently, Articles 25 and 46 of Regulation No 3184/74 leave open the possibility of proof to the contrary, the burden of which is to be borne by the competent customs authorities.

18 — See footnote 4 above.

By not imposing any specific requirement, the regulation also authorizes such proof to the contrary to be adduced by any method.

51. It follows from the foregoing that:

— the burden of proving originating status, the procedure for adducing proof to the contrary, and the methods of proof which are authorized are governed not by national law but by Community law;

— the burden of proving the originating status of the goods lies with the exporter *vis-à-vis* the Faroese customs authorities and with the trader responsible for carrying out the import formalities *vis-à-vis* the importing State;

— *vis-à-vis* the Faroese customs authority, a Faroese exporter may establish the origin of the exported goods by any method;

— *vis-à-vis* the importing State, the originating status of the goods is to be established by production of an EUR.1 certificate issued by the Faroese customs authority;

— proof to the contrary, the burden of which is to be borne by the competent customs authorities, may be adduced by any method.

52. It is for the national court to ensure that those rules are complied with and to assess the probative value of the matters relied upon by each of the parties in discharging the burden of proof which they bear.

Question 2

53. In this question, the national court essentially asks whether the customs authorities of an importing Member State may, without referring the matter to the Committee on Origin referred to in Article 4(1) [19] of Regulation No 2051/74, set aside EUR.1 movement certificates on the strength of their own view, based on the report of a mission of inquiry carried out by the Commission, that those certificates are not valid, even though the customs authority of the Faroe Islands challenges the conclusions of the report and confirms the validity of the certificates issued.

54. In other words, the Court is essentially being asked whether an importing Member

19 — Ibid.

State may regard an EUR.1 certificate as invalid without the consent of the Faroese customs authority or, in the absence of such consent, without referring the matter to the Committee on Origin.

55. In its judgment in Case 218/83 *Les Rapides Savoyards and Others* v *Directeur des Douanes et Droits Indirects*, [20] the Court interpreted provisions fairly similar to those at issue in this case, concerning the issuance of EUR.1 movement certificates referring to originating products and contained in Protocol No 3 annexed to the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 [21] ('the EEC-Switzerland Agreement'), as amended, in particular, first by Decision No 10/73 of the EEC-Switzerland Joint Committee of 12 December 1973, implemented in the Community by Council Regulation (EEC) No 3600/73 of 27 December 1973, [22] and secondly by Decision No 1/77 of the EEC-Switzerland Joint Committee of 14 December 1977, implemented in the Community by Council Regulation (EEC) No 2933/77 of 20 December 1977. [23]

56. The Court found [24] that under the relevant provisions as a whole the determination of the origin of goods according to Protocol No 3 is based on a division of powers between the customs authorities of the parties to the free-trade Agreement inasmuch as origin is established by the authorities of the exporting State and the proper working of that system is monitored jointly by the authorities concerned on both sides.

57. The Court considered, [25] however, that that mechanism could only function if the customs authorities of the importing State accepted the determinations legally made by the authorities of the exporting State. That deduction was based [26] on the observation that there was no danger of abuses in so far as Articles 16 and 17 of Protocol No 3, in the version current at the time of the dispute, set out in detail the methods of cooperation between the customs authorities concerned in cases of dispute as to origin or of fraud on the part of exporters or importers. The same deduction was also based [27] on the observation that the functioning of the system did not encroach upon the fiscal autonomy of the Community and its Member States or of the non-member countries concerned, since the rules laid down in Protocol No 3 were established on the basis of reciprocal obligations placing the parties on an equal footing in their dealings with each other.

58. In its judgment in Case C-12/92 *Huygen and Others*, [28] concerning Protocol No

20 — [1984] ECR 3105.

21 — Council Regulation (EEC) No 2840/72 of 19 December 1972 (OJ, English Special Edition 1972 (31 December), p. 190).

22 — OJ 1973 L 365, p. 135.

23 — OJ 1977 L 342, p. 27.

24 — Paragraph 26.

25 — Paragraph 27.

26 — Paragraph 28.

27 — Paragraph 29.

28 — [1993] ECR I-6381, paragraphs 24 and 25.

3 annexed to the Agreement between the European Economic Community and the Republic of Austria of 22 July 1972, [29] a protocol similar to that annexed to the EEC-Switzerland Agreement, the Court confirmed that determination of the origin of goods is based on a division of powers between the customs authorities of the parties to the Agreement, and that the mechanism can only function if the customs authorities of the importing State accept the determinations legally made by the authorities of the exporting State. The Court simply stated [30] that, if the customs authorities of the exporting State are not in a position to carry out the subsequent verification provided for in the Protocol in the normal way, there is nothing in the Protocol to prevent the authorities of the importing State from achieving the aim of such verification, namely to check the authenticity and correctness of the EUR.1 certificate, by taking other proof of the origin of the goods into consideration.

59. Despite the considerable similarity between the system established by Protocol No 3 annexed to the EEC-Switzerland Agreement and that established by Regulations Nos 2051/74 and 3184/74, there are a number of fundamental differences which, in my view, do not permit the interpretation in the *Rapides Savoyards* judgment, cited above, to be adopted in this case.

60. In the first place, the system under Protocol No 3 is laid down by an international agreement which is binding upon the Community and a non-member country on the basis of reciprocal obligations.

61. By contrast, Regulations Nos 2051/74 and 3184/74 constitute unilateral acts by the Community which do not imply any obligation on the part of the Faroe Islands.

62. Secondly, the second subparagraph of Article 17(3) of Protocol No 3, in the version resulting from Decision No 1/77 of the Joint Committee, cited above, expressly provides a procedure for settling any disputes which might arise between the customs authorities of the importing State and those of the exporting State, in the following terms: 'Where such disputes cannot be settled between the customs authorities of the importing State and those of the exporting State or where they raise a question as to the interpretation of this Protocol they shall be submitted to the Customs Committee.' That Customs Committee is the Joint Committee established by Article 29 of the Agreement. It consists of representatives of the Community, on the one hand, and of Switzerland, the other contracting party which is a non-member country, on the other (Article 30). It is 'responsible for the administration of the Agreement' and is to 'ensure its proper implementation'. It takes decisions in the cases provided for in the Agreement (Article 29).

63. By contrast, although Article 46 of Regulation No 3184/74 substantially incor-

29 — OJ, English Special Edition 1972 (31 December), p. 3.
30 — Paragraph 27.

porates the provisions of the amended Article 17 of Protocol No 3 which refer to administrative cooperation in matters of subsequent verification, it does not incorporate the principle of settling disputes by a Customs Committee, as provided for by the second subparagraph of Article 17(3) of the Protocol. The Committee on Origin referred to in Article 4(1) of Regulation No 2051/74 consists only of representatives of the Member States and a representative of the Commission (Article 12 of Regulation No 802/68), to the exclusion of representatives of non-member countries. According to the eleventh recital in the preamble to Regulation No 802/68, the committee was established to provide a Community procedure for adopting the necessary provisions for implementing the regulation, with a view to ensuring its uniform application. In that connection, Article 14 of the regulation confers upon the committee only the role of advising on draft implementing provisions submitted by the Commission's representative, such provisions then being adopted either by the Commission or by the Council. As for Article 4(1) of Regulation No 2051/74, it defines the concept of original products by reference to that procedure under Article 14 of Regulation No 802/68 only '*dependent upon* the special rules set out in Annex IV', [31] or in other words the rules specifying the 'definition of the term "originating products" for products covered by the common organization of markets in the *fishery products sector*'. [32]

64. Thus the two essential considerations underlying the interpretation in the *Rapides Savoyards* judgment, cited above, namely the existence of reciprocal obligations and a procedure for the settlement of disputes, are not to be found in Regulations Nos 2051/74 and 3184/74.

65. Although those regulations unilaterally established an administrative cooperation mechanism applicable to the issuance of movement certificates, designed to facilitate and homogenize proof of the origin of products and subsequently to verify the authenticity of those certificates, they could not unilaterally lay down a joint system for the arbitration, case by case, of any disputes that might arise. The advisory powers of the Committee on Origins, which is a purely Community body, may be exercised only for the general definition of the concept of original products by means of implementing provisions adopted by the Commission or the Council, and expressly subject to the definition of the originating status of fishery products, laid down by Annex IV to Regulation No 2051/74.

66. In that context, the regulations cited above have not, even implicitly, recognized the assessments by the Faroese customs authority at the time of the issue of the EUR.1 certificates or of their subsequent verification as definitive and unchallengeable. Such recognition would effectively make it impossible to verify whether a particular assessment by the Faroese customs authority, whatever it might be, was well founded. The Community would thus be obliged in principle to resolve each dispute by amending Community legislation. That cannot have been the intention of the Community legislature.

31 — Emphasis added.
32 — Emphasis added.

67. Under Regulations Nos 2051/74 and 3184/74, the customs authorities of the importing Member State may make a different assessment from that of the Faroese customs authority on receipt of the results of a subsequent verification carried out by that authority or else, as in the present case, on the basis of a report drawn up by a Community mission of inquiry pursuant to Article 15b of Council Regulation (EEC) No 1468/81 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters, [33] as amended by Council Regulation (EEC) No 945/87 of 30 March 1987. [34]

68. The interpretation which I propose preserves the possibility of resolving any disputes which might arise without systematically resorting to the amendment of legislation; a trader may challenge the decision of the authorities of the importing State in proceedings before the competent national court, while the uniformity of Community law can subsequently be ensured in the context of the preliminary ruling procedure.

69. It should be noted that the problem of interpretation raised by Question 2 no longer arises as from 1 January 1992, the date on which the Agreement of 2 December 1991 between the European Economic Community of the one part and the Government of Denmark and the Home Government of the Faroe Islands of the other part, approved on behalf of the Community by Council Decision 91/668/EEC of 2 December 1991, entered into force. [35] Article 30 of the Agreement established a Joint Committee responsible for administering it and ensuring its proper implementation. The Committee takes decisions in the cases provided for in the Agreement. It consists of representatives of the Contracting Parties and acts by mutual agreement (Article 31 of the Agreement). Article 25 of Protocol No 3 to the Agreement establishes a comprehensive system of administrative cooperation. It substantially incorporates the provisions of Articles 16 and 17, as amended, of Protocol No 3 to the EEC-Switzerland Agreement, and in particular provides in paragraph (5): 'Disputes which cannot be settled between the customs authorities of the importing State or territory and those of the exporting State or territory, or those which raise a question as to the interpretation of this Protocol, shall be submitted to the Customs Committee.' The Court's judgment in *Les Rapides Savoyards* should therefore be applied only to that Agreement.

Question 3

70. In this question, the national court first asks whether, for the purposes of Annex IV to Regulation No 2051/74 and Explanatory Note 4 of Annex I to Regulation No 3184/74, the criteria defining Faroe Island 'vessels' are to be read conjunctively. If they are, it then asks for a definition of one of those criteria, concerning the concept of

33 — OJ 1981 L 144, p. 1.
34 — OJ 1987 L 90, p. 3.
35 — OJ 1991 L 371, p. 1.

'crew'. Thirdly, it asks by implication whether shrimps and prawns caught by Faroe Island vessels have to be processed separately from shrimps and prawns coming from non-member countries, or whether they can be processed simultaneously with only separate bookkeeping being necessary. Fourthly, and lastly, it asks whether, if the shrimps and prawns were processed simultaneously without physical separation, customs duties may be levied as if the origins of the goods in each consignment corresponded proportionally to the origins of the raw materials brought into the factory in the year in which the import occurred.

71. I shall examine those four points in turn.

Are the criteria defining Faroe Island vessels conjunctive or disjunctive?

72. Annex IV to Regulation No 2051/74 and Explanatory Note 4 of Annex I to Regulation No 3184/74, which define the term 'vessels', lay down five conditions, to which I have referred in point 8 above.

73. The following examples, supplied by the Commission [36] and the United Kingdom, [37] demonstrate that unusual results would follow if those conditions were held to be disjunctive:

— all Community vessels would have to be regarded as Faroe Island vessels;

— a vessel of any nationality which fulfilled only one of the conditions would be regarded as a Faroe Island vessel;

— in particular, a vessel registered in Canada and flying the Canadian flag, the owner and crew members of which were of Greek nationality, would be a Faroe Island vessel.

74. Nevertheless, on the basis of Article 4 of Protocol No 2 to the Act concerning the Conditions of Accession to the European Economic Community and to the European Atomic Energy Community of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, [38] and of Article 227(5)(a) of the Treaty, the applicants maintain that the conditions in question are necessarily disjunctive. In their submission, it follows from a combined reading of those provisions that Danish

36 — Paragraph 4 of its observations.

37 — Paragraph 6.1.2 of its observations.

38 — OJ L 73, Special Edition, 27 March 1972.

nationals residing in the Faroe Islands are not nationals of a Member State of the Community, with the result that no vessel with a Faroese crew on board would ever fulfil the condition in Explanatory Note 4 of Annex I to Regulation No 3184/74, which requires that 'at least 75% of the crew [be] *nationals*, whether or not resident in the Faroe Islands, *of Member States of the Community*'. [39]

75. It is true that, under Article 4 of Protocol No 2, cited above, 'Danish nationals resident in the Faroe Islands shall be considered to be nationals of a Member State within the meaning of the original Treaties only from the date on which those original Treaties become applicable to those islands.'

76. It is also true that, as stated in point 5 of this Opinion, the Kingdom of Denmark did not notify the Community by 31 December 1975 that the EEC Treaty was applicable to the Faroe Islands, with the result that Danish nationals resident in those islands are not nationals of a Member State.

77. However, that apparent difficulty is doubtless due to the fact that Regulations Nos 2051/74 and 3184/74 were adopted before 31 December 1975, the end of the period allowed to the Kingdom of Denmark for giving notification. The regulations were drafted on the assumption that the EEC Treaty would apply to the islands, hence the use of the words 'nationals, whether or not resident in the Faroe Islands, of Member States of the Community' in Annex IV to Regulation No 2051/74 and Explanatory Note 4 of Annex I to Regulation No 3184/74. Beyond a purely literal reading, that unsatisfactory phrase must be interpreted as covering, on the one hand, nationals of the Member States and, on the other, Danish nationals resident in the Faroe Islands.

78. The drafting problem thus raised and analysed cannot constitute a criterion for an interpretation which requires the conditions for qualifying as a 'Faroe Island vessel' to be read disjunctively.

79. In my view, therefore, the criteria defining 'Faroe Island vessels' are to be read conjunctively.

Definition of the term 'crew'

80. The term 'crew' must be understood as covering all persons engaged in the navigation and servicing of a ship, including the performance of tasks linked to the economic activity carried out on board.

39 — Emphasis added.

81. The crew includes persons employed, in the words of the national court, 'to work on the vessel' as trainees or as unskilled hands below decks. Those persons all participate to a certain extent in the navigation and servicing of the vessel. It does not matter whether they are paid by the operator of the vessel or by an undertaking from a non-member country, or whether their link to the vessel is permanent or temporary. The decisive criteria relate to the activity actually carried out on the vessel and not to the legal descriptions chosen when the employment relationships were entered into.

82. The Community regulations in question are designed progressively to remove customs duties only in favour of products taken from the sea by fishing units that have very close links with the Faroe Islands. To adopt a broad definition of vessels following on a restrictive interpretation of the concept of crew would be to disregard the purpose of Regulations Nos 2051/74 and 3184/74.

83. To exclude trainees and unskilled hands below decks would enable the conditions imposed by Community law to be easily circumvented. It would be enough simply to use persons hastily classified in such categories.

84. The concept of crew cannot be restricted, as the applicants contend, to 'the normal complement of the vessel'. The term 'crew' covers a functional reality, namely effective participation in the activity of the vessel. Its definition is not linked to the number of persons of whom it is made up. The adjustment of the complement to the vessel's needs is determined by economic ratios dependent on various objective parameters, or occasionally on subjective considerations which are not of such a kind as to restrict the primary concept of crew.

Methods of processing shrimps and prawns of varying origins

85. Article 2(2) of Regulation No 2051/74 reserves the preferential customs procedure established by the regulation for 'products ... originating in and coming from the Faroe Islands'. Article 4(2) makes the application of that procedure conditional upon the production of a certificate attesting to the Faroese origin of the products. Point I(b) of Annex IV to that regulation treats as originating products those which are 'taken from the sea *by Faroe Island vessels*'. [40]

86. Article 2(1)(a) of Regulation No 3184/74 treats as originating products 'products *wholly* obtained in the Faroe Islands'. [41]

40 — Emphasis added.
41 — Emphasis added.

87. Article 2(1)(b) of the same regulation also treats as originating products of the Faroe Islands those which are obtained in those islands and in the manufacture of which products from third countries are used, provided those products have undergone sufficient working or processing within the meaning of Article 4.

88. Article 4(3)(e) of the regulation provides that *'simple mixing of products, whether or* not of different kinds' where one or more components of the mixture cannot be regarded as originating in the Faroe Islands is in any event to be considered insufficient to confer originating status on the finished products.

89. Therefore, shrimps and prawns originating in non-member countries contained in a mixture which also comprises shrimps and prawns originating in the Faroe Islands would not confer upon the product as a whole the status of an originating product within the meaning of Article 2(1)(b) of Regulation No 3184/74, that is to say, a product manufactured in the Faroe Islands out of ingredients of varying origins.

90. *A fortiori*, they cannot confer upon the product as a whole the status of an originating product within the meaning of Article 2(1)(a), namely a product wholly obtained in the Faroe Islands.

91. Nor, I would add, does mere working which consists in the preparation or preservation of crustaceans without originating status, of the kind carried out in the factories referred to in the main action in the case of products falling within Chapter 3 of the Common Customs Tariff, confer originating status on the products in question (see Annex II, List A, heading 16.05 of Regulation No 3184/74). It merely entails a change in tariff heading, namely from heading 03.03 to heading 16.05.

92. Let me add finally that Article 19(1) of Regulation No 3184/74 provides that products used in manufacture not originating in the Faroe Islands cannot be granted drawback or remission from customs duties of any kind.

93. It follows from the above that the Community legislature intended, by means of numerous legislative restrictions, to reserve the benefit of the preferential procedure solely for those shrimps and prawns genuinely originating in the Faroe Islands within the meaning of the rules it laid down. The exporter, who bears the burden of proof, must establish with certainty the Faroese origin of the products.

94. The physical separation of shrimps and prawns of Faroese origin in the course of processing is undoubtedly the most effective means of guaranteeing such origin.

95. The applicants argue that an undertaking may well process both originating and non-originating products during any given year, but that does not necessarily mean that they process the two categories simultaneously.

96. This consideration is really concerned with the burden of proof. It is for the exporter to establish, when applying for the issue of an EUR.1 certificate, that a particular consignment comprises originating shrimps and prawns. The particular way in which the factory that carried out the processing functions does not give rise to any presumption in favour of the trader that the products imported into the United Kingdom are of Faroese origin. It does not alter the burden of proof.

97. If a single factory processes originating and non-originating shrimps and prawns at different times, in other words separately, it is for the trader to prove, by any method, that the shrimps and prawns imported into the United Kingdom have originating status.

98. If the processing of shrimps and prawns of varying origins takes place simultaneously, resulting in mixtures, the trader also has to establish by any method, especially by bookkeeping procedures, the exact proportion and thus the quantity of the shrimps and prawns of Faroese origin contained in the finished product. In that event, the use of bookkeeping is not in any way meant to confer originating status on the non-originating shrimps and prawns contained in the exported consignments. It merely forms part of the way in which the burden of proof is discharged as to the quantities of shrimps and prawns of Faroese origin that are actually contained in those consignments. Its effect is to isolate those products which are alone entitled to benefit from the preferential system.

99. Regulations Nos 2051/74 and 3184/74 create exceptions to the customs procedure under ordinary law, and must therefore be interpreted strictly. They cannot authorize a system, described as separate accounting, [42] which would allow originating status to be conferred upon consignments as a whole, when they contain mixtures of products caught by Faroe Island vessels and products of non-member countries.

The consequences of common processing of raw materials

100. The simultaneous processing of shrimps and prawns in a factory prevents it a priori from being regarded as established, in respect of a given consignment, that the products contained therein were 'wholly obtained' in the Faroe Islands and thus have originating status.

42 — The details of the system, moreover, have not been specified in the written observations submitted to the Court.

101. Where EUR.1 movement certificates have been issued without adequate justification and subsequent verification shows that mixing of products of varying origins has taken place, the burden of proof is reversed. The certificate may no longer be regarded as sufficient proof of the originating status of the products. The trader must then establish for each disputed consignment, by accounting methods having probative value, the proportion of shrimps and prawns caught by Faroe Island vessels actually contained in that consignment.

102. If the Faroese origin of a specific proportion of each consignment is not confirmed, the trader may not in principle benefit from the preferential system to the extent of his entitlement. In the *Huygen* judgment, [43] the Court held that when subsequent verification does not confirm the origin of the goods stated in the EUR.1 certificate, those goods cannot benefit from the preferential system.

103. The competent customs authorities would therefore be entitled to levy customs duty at the full rate on all the consignments.

104. However, in circumstances such as those of this case (subsequent verification covering complete years), the principle of proportionality allows the competent authorities to levy duty in an amount equal to that which would have been payable if the origins of the goods in each consignment had corresponded proportionally to the origins of the raw materials brought into the factory in the year in which the import occurred. It should be stressed that a concession of that sort to the person liable for payment does not seem to me to be possible unless the authorities have obtained, either by their own means or from the person liable, definite information as to the various quantities concerned. Otherwise, it follows from the rules governing the consequences of the burden of proof that the person liable is to be subject to duty on the consignments in their entirety.

Question 4

105. In this question, the national court essentially asks, first, whether the conditions for the validity of measures taken by national authorities for the post-clearance recovery of import duties under Regulation No 1697/79 are governed by Community law or national law. Secondly, it asks whether, if those conditions are governed by national law, Community law precludes a national rule from providing that a demand for payment of a debt, of which part only is time-barred pursuant to Article 2(1) of Regulation No 1697/79, is void in its entirety.

43 — Cited above, at paragraph 17 of the judgment.

106. In its judgment in Joined Cases 66/79, 127/79 and 128/79 *Amministrazione delle Finanze* v *Salumi and Others*, [44] the Court held that it is for the national legal system of each Member State, in so far as Community law has made no provision in the matter, to lay down the detailed rules and conditions for the collection of Community revenues and to determine the authorities responsible for collection and the courts having jurisdiction to decide any disputes to which such collection may give rise, but that such procedures and conditions may not make that system for collecting Community charges and dues less effective than that for collecting national charges and dues of the same kind. The Court added [45] that national legislation must be applied in a non-discriminatory manner having regard to the procedural rules relating to disputes of the same type, but purely national, and that procedural rules cannot have the result of making it impossible in practice to exercise rights conferred by Community law. By way of such rights, the Court envisaged [46] in particular those which the public authorities derive from the direct effect of a provision of Community law, notably the power to institute proceedings for recovery of Community charges or dues which ought to have been levied.

107. The first subparagraph of Article 2(1) of Regulation No 1697/79 requires the competent authorities of a Member State which find that import duties have not been collected to take action to recover those duties. The second subparagraph imposes a time-limit of three years for such recovery. Article 2(2) provides that action is to be taken by notifying the person concerned of the amount of import duties for which he is liable. Article 4 provides generally that action is to be taken 'subject to the relevant provisions in force'.

108. Community law has thus merely made provision for a three-year limitation period and for a recovery procedure commencing with 'notification', without specifying any further procedural requirements.

109. It follows that proceedings for recovery are governed by national law, within the limits laid down by the *Salumi* judgment, cited above.

110. The grounds on which such rights of action might be void fall within that system.

111. It is true that a national rule which holds a demand to be invalid in its entirety when a part of the debt thereby claimed is irrecoverable makes the system of collecting Community charges and dues less effective. However, since there is no discrimination involved, it does not make that system less effective than the corresponding system for recovering national charges, the rule being

44 — [1980] ECR 1237, paragraph 18.
45 — Paragraph 20.
46 — Paragraph 13.

applied equally to the latter. Moreover, it does not make it impossible in practice to exercise rights conferred by Community law. The authorities may prevent a demand from becoming invalid in its entirety by not incorporating in it at the outset debts which are time-barred or, in cases of invalidity, where national law permits the subsequent regularization of an invalid measure in respect of national charges as well, they may prevent debts for which the time-limit has not yet expired from becoming time-barred by making a fresh demand.

112. In its judgment in Case 118/76 *Balkan Import-Export* v *Hauptzollamt Berlin-Packhof*, [47] the Court held that a national rule which hindered the recovery of Community charges could not be applied in so far as its effect would be to modify the scope of the provisions of Community law concerning the basis of assessment, the manner of imposition or the amount of the charge introduced by that law. In particular, the Court pointed out [48] that a national authority cannot grant an application for exemption on grounds of natural justice if the reasons for such application relate to the economic justification for the charge in question.

113. In my view, a national rule such as that to which the national court refers does not modify the scope of Community law concerning the basis of assessment, the manner of imposition or the amount of the customs duty in dispute.

114. In its judgment in Case 265/78 *Ferwerda* v *Produktschap voor Vee en Vlees*, [49] the Court further stated that it is necessary to determine whether a general principle or specific provision of Community law precludes the application of a national rule which prevents the recovery of a Community debt.

115. It seems to me that, in a case such as this, there is no general principle of Community law which precludes the application of the national rule relied upon.

116. As for Article 4 of Regulation No 1697/79, whereby action for recovery is to be taken by the competent authorities 'subject to the relevant provisions in force', that is clearly not a 'specific provision' of the kind envisaged by the Court in *Ferwerda*, cited above, which would substitute for the reference to national law a Community rule imposing an unconditional obligation on the trader in question. [50]

117. In short, therefore, I conclude, first, that the conditions for the validity of measures taken by national authorities for the post-clearance recovery of import duties are governed by national law, and secondly that Community law does not preclude a national

47 — [1977] ECR 1177, paragraph 5.
48 — Ibid.
49 — [1980] ECR 617, paragraph 14.
50 — Ibid., paragraphs 18 and 20.

rule from providing that a demand for payment of a debt, of which part only is time-barred pursuant to Article 2(1) of Regulation No 1697/79, is void in its entirety.

Question 5

118. In this question, the national court essentially asks whether Article 4 of Regulation No 2164/91 [51] must be interpreted as meaning that, where the uncollected duties amount to ECU 2 000 or more, the national authorities are not obliged to refer to the Commission for a decision as to the possibility of not taking action for post-clearance recovery of customs duties if they consider that the conditions in Article 5(2) of Regulation No 1697/79 are not met. The national court is also effectively asking, in circumstances such as those of the main action, what the conditions for applying Article 5(2) of Regulation No 1697/79 are, so as to enable the national court to determine whether the applicants were entitled to waiver of post-clearance recovery and whether, therefore, the competent national authorities were obliged to refer the matter to the Commission.

119. *Ex hypothesi*, that question arises only if, following subsequent verification, the EUR.1 movement certificates are found to be invalid.

Reference to the Commission

120. Article 5(2) of Regulation No 1697/79, which is set out in point 20 of this Opinion, seems to confer on the competent authorities a discretionary power not to recover the duties when the three conditions laid down by that provision are satisfied. It provides that: 'The competent authorities may refrain from taking action for ... post-clearance recovery'.

121. However, in accordance with a settled line of authority, that provision must be interpreted as meaning that, where the prescribed conditions are satisfied, the person liable for payment has a right to the waiver of the action for recovery. [52] It thus confers on the competent national authorities a non-discretionary power. [53]

122. As for reference to the Commission, that is provided for in the first paragraph of

51 — Cited above, in point 21 of this Opinion.

52 — See the judgments in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck Ost* [1987] ECR 4199, paragraph 22; Case 378/87 *Top Hit Holzvertrieb* v *Commission* [1989] ECR 1359, paragraph 18; Case 161/88 *Binder* v *Hauptzollamt Bad Reichenhall* [1989] ECR 2415, paragraph 16; Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 12; and Case C-292/91 *Weis* [1993] ECR I-2219, paragraph 15.

53 — See the *Mecanarte* judgment, cited above, at paragraph 14.

Article 4 of Regulation No 2164/91, in cases where the uncollected sum amounts to ECU 2 000 or more, in the following terms:

'Where [...] the competent authority of the Member State in which the error was committed either considers that the conditions laid down in Article 5(2) of the basic regulation are fulfilled or is in doubt as to the precise scope of the criteria of that provision with regard to a particular case, that authority shall submit the case to the Commission, so that a decision may be taken in accordance with the procedure laid down in Articles 5 to 7.'

123. The purpose of that article is to lay down the conditions for applying Article 5(2) of Regulation No 1697/79, which permits recovery to be waived in certain cases. In accordance with the Court's case-law [54] concerning Article 4 of Regulation No 1573/80, [55] which was successively replaced by Regulation No 2380/89, [56] and then by Regulation No 2164/91 couched in the same terms, it follows that the first paragraph of Article 4 of Regulation No 2164/91 does not cover a case in which the competent authorities are convinced that the conditions in Article 5(2) of Regulation No 1697/79 are not fulfilled and therefore consider themselves bound to effect recovery.

124. In other words, where the competent authorities consider themselves bound to effect recovery on the ground that the person liable is not entitled to claim dispensation from the duties payable, they are not obliged to refer the matter to the Commission. In such a case, it is open to the person concerned to challenge their decision in proceedings before the national courts; the uniformity of Community law can then be ensured by the Court of Justice through the preliminary-ruling procedure. [57]

The conditions for waiving post-clearance recovery of customs duties

125. As the Court stated, in particular in the *Foto-Frost* judgment, cited above, [58] and in its judgment in Case C-250/91 *Hewlett Packard France*, [59] Article 5(2) of Regulation No 1697/79 makes the waiver of post-clearance recovery by the competent authorities subject to the three cumulative conditions which follow:

— the failure to collect the duty must have been the result of an error made by the competent authorities themselves;

54 — See the judgments in Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, paragraph 12, and in *Mecanarte*, cited above, paragraph 32.

55 — Cited in point 21 of this Opinion.

56 — Ibid.

57 — See the judgments in *Deutsche Fernsprecher*, cited above, at paragraph 13, and in *Mecanarte*, also cited above, at paragraph 33.

58 — Paragraphs 24 to 26.

59 — [1993] ECR I-1819, paragraph 13.

— the person liable must have acted in good faith; in other words, he must have been unable to detect the error made by the competent authorities;

— the person liable must have observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.

126. Where reference is made to the Court of Justice for an assessment of the validity of a Commission decision taken under Article 6 of Regulation No 2164/91, implementing Article 5(2) of Regulation No 1697/79, the Court has the power to verify the existence of the facts on which the measure is based and the legal inferences which the Community institution has drawn therefrom where they are alleged to be incorrect. [60]

127. In references for a preliminary ruling on interpretation in cases where the matter has not been raised with the Commission first, the Court of Justice, which has already explained the content of the three conditions laid down by Article 5(2) of Regulation No 1697/79 to a considerable extent, has repeatedly pointed out that it is for the national court to assess whether, having regard to the circumstances of the case before it, those conditions are satisfied. [61]

128. In these proceedings for a preliminary ruling, therefore, it is for the national court to assess whether the three conditions laid down by the Court in the *Foto-Frost* and *Hewlett Packard France* judgments, cited above, have been fulfilled, having regard to the relevant circumstances alone, in those respects, in the case before it.

129. I now propose to examine those three conditions in turn in relation to the question referred by the national court.

(a) Error by the competent authorities themselves

130. In the *Mecanarte* judgment, cited above, the Court observed [62] that Article 5(2) of Regulation No 1697/79 is intended to protect the legitimate expectation of the person liable that all the information and criteria underlying the decision whether or not to recover customs duties is correct.

131. The Court found, [63] first, that the concept of error is not limited to mere calculation or copying errors but includes any kind of error which vitiates the decision in question, such as, in particular, the misinterpretation or misapplication of the relevant rules of law.

60 — *Foto-Frost* judgment, cited above, at paragraph 23.

61 — See the *Deutsche Fernsprecher* judgment, cited above, at paragraph 23, and the judgments in Case C-371/90 *Beirafrio* v *Alfândega do Porto* [1992] ECR I-2715, paragraph 21; Case C-187/91 *Belovo* [1992] ECR I-4937, paragraphs 17 and 20; and the *Hewlett Packard France* judgment, cited above, at paragraph 22.

62 — Paragraph 19.

63 — Ibid., paragraph 20.

132. Secondly, it found [64] that any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may thus cause the person liable to entertain legitimate expectations, must be regarded as a 'competent authority'. That applies in particular to the customs authorities of the exporting Member State which deal with the customs declaration.

133. Thirdly, the Court found [65] that the legitimate expectations of the person liable attract the protection provided for in Article 5(2) only if it was the competent authorities 'themselves' which created the basis for his expectations, or, in other words, if the errors were attributable to acts of the competent authorities.

134. The applicants plead that there has been an error of interpretation or application committed by both the Faroese and United Kingdom customs authorities.

135. As for the customs authorities of the importing State, I do not believe it can be maintained that they commit such an error where they grant the benefit of the preferential treatment merely on sight of an EUR.1 movement certificate, without being aware of the particular circumstances capable of precluding the products from qualifying for originating status, namely the composition of the crew of certain vessels and the practice of processing shrimps and prawns of varying origins simultaneously. *Ex hypothesi*, an EUR.1 certificate is accepted only subject to the subsequent verifications provided for by Community legislation.

136. As for the competent authorities of a non-member country or territory, the error committed in issuing EUR.1 certificates, irrespective of the failure by an exporter to produce documents regarding the status of the raw materials (a situation emphasized by the report of the Community mission of inquiry), is indeed an error of interpretation and application when, even after taking note of the findings of a mission of inquiry, they maintain that the certificates issued are valid, that is to say, that the products should be regarded as originating products.

137. In its reply to the Court's questions, the Commission refers [66] to a note of 5 July 1990, in which the General Directorate of Customs in the Faroe Islands reminded Faroese undertakings that they could not

64 — Ibid., paragraph 22.

65 — Ibid., paragraph 23.

66 — Answer to Question 2(c).

request the issue of EUR.1 certificates for shrimps and prawns obtained from raw materials coming from non-member countries. I would observe that such a fact, if true, would be capable of constituting proof that there was no error on the part of the competent authorities, thus precluding the application of Article 5(2) of Regulation No 1697/79.

138. The main question which arises in a case such as this is whether the customs authority of a non-member country or territory may be regarded as a 'competent authority' within the meaning of Article 5(2) of Regulation No 1697/79.

139. In the *Mecanarte* judgment, cited above, the Court appears to have given a broad definition of the expression 'competent authority' by referring in general terms to 'any authority', without expressly limiting that concept to the competent authorities of a Member State. That is borne out, for example, by the Court's subsequent reference to the customs authorities of the exporting Member State 'in particular'.

140. The possibility cannot therefore be excluded in principle that a customs authority of a non-member country or territory which, pursuant to specific provisions of Community legislation, the Community involves in the task of furnishing information relevant to the recovery of customs duties, may be regarded as a competent authority within the meaning of Article 5(2) of Regulation No 1697/79. That is so even if Community law allows the competent authorities of the importing Member State, on completion of a subsequent verification procedure, not to be absolutely bound by the assessments made by the authority of the non-member country or territory. The fact remains that, in the first part of the customs procedure, the latter authority has been entrusted by Community law with the legal classification of products under the customs procedure in question — an assessment which, subject to further verification, has been recognized and complied with and has been used in applying that procedure.

(b) Error reasonably capable of being detected by the person liable

141. The examination of this condition covers the first two points raised by the applicants in support of their allegation that the fundamental right to property has been infringed. [67]

142. In the *Deutsche Fernsprecher* judgment, cited above, [68] the Court observed that it is necessary to look specifically at all the circumstances of the case in order to determine whether or not the error was capable of

67 — See point 37 of this Opinion.
68 — Paragraphs 18 and 19.

being detected by the trader in question, and that, in that regard, account must be taken, in particular, of the precise nature of the error and the practical experience of, and the care taken by, the trader.

143. As regards the precise nature of the error, the question to be determined is whether the rules concerned are complex. [69] A simple reading of Regulations Nos 2051/74 and 3184/74 shows that no category of personnel is subject to any exception or reservation as regards the definition of the concept of 'crew'. Nor is there any provision in those regulations which authorizes or even mentions recourse to a system of separate accounting, designed to confer originating status on the whole of a consignment containing an indeterminate proportion of shrimps and prawns originating in non-member countries. In the absence of any ambiguity in the Community legislation, therefore, it seems to me to be irrelevant whether or not the error of the competent authority was linked to indications contained in internal circulars, such as the Danish circulars of 1981 and 1989 referred to by the applicants, the meaning and scope of which have, moreover, been widely discussed in the course of the written procedure. I would add for good measure that the applicants state in their observations [70] that they adopted an interpretation, and thus a practice, endorsing separate accounting 17 years previously, in other words, well before the circulars referred to and as from the time when the Community legislation came into force. Finally, and in any event, I note that circulars are being relied upon in relation to the question of separate accounting but not in relation to the composition of the crew.

144. As far as the practical experience of the trader is concerned, the question to be determined is whether or not the trader involved is one whose activity essentially consists in import and export operations, and whether he already had some experience of trading in the goods in question. [71]

145. As far as the care taken by the trader is concerned, it should be noted that, when organizing their system of customs declarations under a particular procedure, experienced and prudent traders are in a position to detect errors of interpretation such as those at issue in the main action by reading the numbers of the *Official Journal of the European Communities* in which Regulations Nos 2051/74 and 3184/74 were published and acquainting themselves with the unambiguous terms of the legislation in question. As the Court has already held, a trader must, by reading the relevant issues of the Official Journal, acquaint himself with the provisions of Community law applicable to the transactions he undertakes. [72]

69 — Ibid., paragraph 20.

70 — Paragraph 20.

71 — *Deutsche Fernsprecher* judgment, cited above, at paragraph 21.

72 — See the *Binder* judgment, cited above, at paragraph 22, and the judgment in Case C-80/89 *Behn Verpackungsbedarf* [1990] ECR I-2659, paragraph 14.

146. There can be no doubt, moreover, that an export cooperative is either aware of all the relevant facts concerning the origins of the shrimps and prawns or is in a position to establish those facts without difficulty. As it is responsible under Article 21 of Regulation No 3184/74 for accomplishing the formalities leading to issue of the movement certificates, it must take care to demand from its suppliers full supporting evidence of the Faroese origin, in whole or in part, of the products supplied, if necessary by accounting methods. After testing the relevant facts against the applicable Community legislation, it must, in appropriate cases, refrain from applying for the issue of EUR.1 certificates for consignments which do not fulfil the prescribed conditions.

147. As for an importer which is a 100% subsidiary of the exporter, it may also be regarded as having the possibility of gaining access to the relevant factual information for the purposes of the application of Regulations Nos 2051/74 and 3184/74.

148. Finally, a customs agent, by the very nature of his functions, renders himself liable both for the payment of import duty and for the validity of the documents which he produces to the customs authorities. [73] The fact that certificates of origin may have been issued in error is one of the professional risks which a customs agent runs. [74]

149. It is for him either to take that risk into account in the rates he charges, or to insert such special terms as may be necessary in the contract with his principal in order to ensure a right of action against the latter in case that risk should materialize.

150. In any event, Regulation No 1697/79 is not intended, any more than is Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, [75] as amended by Council Regulation (EEC) No 3069/86 of 7 October 1986, [76] to protect customs agents in all circumstances against the insolvency of their clients [77] or against the sheer impossibility of passing on to those clients duties recovered *ex post facto*.

151. Similarly, Regulation No 1697/79 is not intended to protect an exporter or an importer, in all circumstances, against the impossibility of passing on to their clients the burden of duties recovered *ex post facto*,

73 — See the judgment in Joined Cases 98/83 and 230/83 *Van Gend & Loos and Expeditiebedrijf Wim Bosman* v *Commission* [1984] ECR 3763, paragraph 16.

74 — Ibid., paragraph 17.

75 — OJ 1979 L 175, p. 1. That regulation was repealed, after consolidation, by Article 251 of Regulation No 2913/92.

76 — OJ 1986 L 286, p. 1.

77 — *Van Gend & Loos* judgment, at paragraph 16, referring to Regulation No 1430/79.

which is a risk that is capable, within certain limits, of being dealt with by special contractual terms.

152. That regulation is intended to protect the persons liable themselves against their property rights being affected only in cases where the error of the competent authorities could not reasonably have been detected.

153. In any event, in the *Hewlett Packard France* judgment, cited above, [78] the Court was called upon also to give a ruling on the interpretation of Article 13(1) of Regulation No 1430/79.

154. That article provides as follows:

'1. Import duties may be repaid or remitted in special situations ... which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.'

155. In its judgment, the Court considered that that provision and Article 5(2) of Regulation No 1697/79 pursue the same objective, namely to limit the post-clearance payment of import or export duties to cases where such payment is justified and compatible with a fundamental principle such as the principle of the protection of legitimate expectations. The Court found that the existence of an error capable of being detected within the meaning of Article 5(2) of Regulation No 1697/79 corresponds to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79.

156. In that connection Article 4(2)(c) of Commission Regulation (EEC) No 3799/86 of 12 December 1986 laying down provisions for the implementation of Articles 4a, 6a, 11a and 13 of Council Regulation (EEC) No 1430/79 on the repayment or remission of import or export duties [79] provides, as regards Article 13 of Regulation No 1430/79:

'2. The following situations shall not by themselves be special situations resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned:

...

78 — Paragraph 46.

79 — OJ 1986 L 352, p. 19.

(c) production, even in good faith, for the purpose of securing preferential tariff treatment of goods entered for free circulation, of documents subsequently found to be forged, falsified or not valid for the purpose of securing such preferential tariff treatment.'

157. That provision viewed in conjunction with the *Hewlett Packard France* judgment, cited above, therefore precludes any finding in principle that the issue of invalid certificates of origin might render the error of the competent authorities not reasonably capable of being detected.

158. Before going on to examine the content of the third condition for the application of Article 5(2) of Regulation No 1697/79, it can already be deduced from the foregoing observations that the suggested approach to the problem as an infringement of the fundamental right to property is inappropriate.

159. That is because a national court, having regard to the criteria for interpretation supplied by the Court of Justice and to the facts of the case before it, will either:

— hold that the error of the competent authorities was reasonably capable of being detected, implying that allegations such as the first two made by the applicants in this case [80] were unfounded; or

— hold that the error of the competent authorities was not reasonably capable of being detected, with the result that the persons liable were entitled to the waiver of post-clearance recovery, [81] in which case the alleged infringement of the fundamental right to property will be irrelevant.

(c) Observance of all the provisions laid down by the rules in force as far as the customs declaration is concerned

160. This third condition means that the person making the declaration is obliged to supply the competent customs authorities with all the information necessary for the customs procedure in question to be applied.

161. In the case of a preferential system which is conditional upon the originating

80 — See point 37 of this Opinion.

81 — If, in addition, the third condition for the application of Article 5(2) of Regulation No 1697/79 is also satisfied.

status of the goods, a trader who applies for the issue of movement certificates must, in particular, produce full supporting evidence of the origin of those goods.

162. If a consignment simultaneously includes originating and non-originating products, the trader must indicate the origin of, and provide evidence of its distribution as between, the various parts of the consignment.

Conclusion

163. I therefore propose that the Court give the following answers to the questions submitted by the High Court of Justice, Queen's Bench Division:

1. For the purposes of applying Council Regulation (EEC) No 2051/74 of 1 August 1974 on the customs procedure applicable to certain products originating in and coming from the Faroe Islands and Commission Regulation (EEC) No 3184/74 of 6 December 1974 concerning the definition of the concept of 'originating products' and methods of administrative cooperation for the application of the customs procedure applicable to certain products originating in and coming from the Faroe Islands, the rules concerning the burden of proof and the methods of proving the originating or non-originating status of the goods are a matter for Community law.

They are as follows:

— the burden of proving the originating status of the goods lies with the exporter *vis-à-vis* the Faroese customs authorities and with the trader responsible for carrying out the import formalities *vis-à-vis* the importing State;

— *vis-à-vis* the Faroese customs authority, a Faroese exporter may establish the origin of the exported goods by any method;

— *vis-à-vis* the importing State, the originating status of the goods is to be established by the production of an EUR.1 certificate issued by the Faroese customs authority;

— proof to the contrary, the burden of which is to be borne by the competent customs authorities, may be adduced by any method.

It is for the national court to ensure that those rules are complied with and to assess the probative value of the matters relied upon by each of the parties in discharging the burden of proof which they bear.

2. The customs authorities of an importing Member State may, without referring the matter to the Committee on Origin referred to in Article 4(1) of Regulation No 2051/74, set aside EUR.1 movement certificates on the strength of their own view, based on the report of a mission of inquiry carried out by the Commission, that those certificates are not valid, even though the competent customs authority of the Faroe Islands challenges the conclusions of the report and confirms the validity of the certificates issued.

3. (a) The criteria defining Faroe Island vessels in Annex IV to Council Regulation No 2051/74 and Explanatory Note 4 of Annex I to Commission Regulation No 3184/74 are to be read conjunctively.

(b) The term 'crew' where it appears in those regulations must be understood as covering all persons engaged in the navigation and servicing of a vessel, including the performance of tasks linked to the economic activity carried out on board. It includes persons employed under a contract with an undertaking from a non-member country to work on the vessel as trainees or as unskilled hands below decks, irrespective of whether they are paid by the operator of the vessel or by the undertaking from the non-member country, and of whether their link to the vessel is permanent or temporary.

(c) Where raw fishery products are not processed separately by reference to their originating or non-originating status, it is for the exporter to establish, by any method, especially by bookkeeping procedures, the exact proportion and thus the quantity of originating products contained in the

finished product, that quantity alone being entitled to benefit from the preferential system established. If, in the event of subsequent verification, it appears that such proof has not been adduced for each consignment, the competent authorities of the importing Member State may levy duty in an amount equal to that which would have been payable if the origins of the goods in each consignment had corresponded proportionally to the origins of the raw materials brought into the factory in the year in which the import occurred.

4. The conditions for the validity of measures taken by national authorities for the post-clearance recovery of import duties pursuant to Council Regulation (EEC) No 1697/79 of 24 July 1979, on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties, are governed by national law. Community law does not preclude a national rule from providing that a demand for payment of a debt, of which part only is time-barred pursuant to Article 2(1) of Regulation No 1697/79, is void in its entirety.

5. (a) Article 4 of Commission Regulation (EEC) No 2164/91 of 23 July 1991 laying down provisions for the implementation of Article 5(2) of Regulation No 1697/79 must be interpreted as meaning that, where the uncollected duties amount to ECU 2 000 or more, the national authorities are not obliged to refer to the Commission for a decision as to the possibility of not taking action for post-clearance recovery of customs duties if they consider that the conditions in Article 5(2) of Regulation No 1697/79 are not met.

(b) Article 5(2) of Regulation No 1697/79 must be interpreted as meaning that:

— the error of the competent authorities may be an error of calculation, copying, interpretation or application committed, in certain cases, by the customs authorities of a non-member country or territory which the Community involves in the task of furnishing information relevant to the recovery of customs duties;

— in order to determine whether the error was reasonably capable of being detected by the person liable for payment, it is necessary:

— to inquire whether the rules in question are complex or, on the contrary, unambiguous;

— to take into account the practical experience of the trader concerned;

— to assess the care taken by the trader, by taking account where appropriate of such possibility as he had of acquainting himself with the relevant provisions of Community law and of himself ascertaining or establishing without difficulty the relevant facts to which those provisions apply, and also by considering whether, by the very nature of his functions, that trader renders himself liable both for the payment of duties and for the validity of the documents which he produces to the customs authorities;

— the person liable must have complied with all the provisions laid down by the rules in force concerning his customs declaration; in particular, he must have supplied the competent customs authorities with all the information required for the customs procedure in question to be applied, if necessary on the basis of the distribution as between each part of a consignment of products falling within the scope of different provisions.

It is for the national court to assess whether, on the basis of those criteria for interpretation, the conditions for applying Article 5(2) of Regulation No 1697/79 are satisfied.