OPINION OF ADVOCATE GENERAL LENZ
delivered on 22 September 1987 *

Mr President,
Members of the Court,

A — Facts

1. These proceedings arise from questions referred to this Court by the Divisional Court of the Queen's Bench Division of the High Court of Justice on the classification for customs purposes of stems of flue-cured Virginia tobacco, that is to say a particular type of tobacco which has been subjected to a specific method of curing.

2. First of all it is necessary to know — as the order of the national court explains — that after harvesting tobacco is generally processed in the country of origin before shipment and storage by threshing (or stripping), which consists in a separation of the leaf-stem from the rest of the leaf or lamina. Until 30 years ago, apparently, the stem was discarded but now it is used in the manufacture of cigarettes. It seems that the stem and lamina are subjected to different treatments before being brought back together in the desired mix.

3. Nowadays, we are told, stem and leaf (having been separated) are generally purchased together; by contrast, only small amounts of whole leaf are imported because threshing in the cigarette factory involves more loss of material.

4. It must further be mentioned that each year under the Community system of generalized preferences the Community determines for certain developing countries tariff quotas in respect of, *inter alia*, flue-cured Virginia type tobacco. The tariff quota for 1985 was set by Council Regulation No 3564/84.[1] Annex I thereto refers in particular to Order No 50.00.20, which in turn refers to Common Customs Tariff subheading 24.01 A, as set out in Regulation No 3400/84[2] ('flue-cured Virginia type and light air-cooled Burley type, including Burley hybrids; light air-cured Maryland and fire-cured tobacco'), and to Nimexe code Nos 24.01-02 and 24.01-09 (in the version set out in Regulation No 3529/84[3]), that is to say, not stripped or wholly or partly stripped flue-cured Virginia type tobacco.

5. In April 1985 the appellant in the main proceedings — Imperial Tobacco Ltd, a subsidiary of cigarette manufacturers Imperial Group plc — imported into the United Kingdom flue-cured Virginia tobacco stem. For that purpose a certificate of authenticity was presented having regard to the footnote to Common Customs Tariff subheading 24.01 A ('Entry under this subheading is subject to conditions to be determined by the competent authorities') and to Article 1 of Commission Regulation No 3035/79,[4] which provides that the entry under subheading 24.01 A of the Common

* Translated from the German.

1 — Official Journal 1984, L 338, p. 183.
2 — Official Journal 1984, L 320, p. 1.
3 — Official Journal 1984, L 337, p. 1.
4 — Official Journal 1979, L 341, p. 26.

Customs Tariff of, *inter alia*, flue-cured Virginia type tobacco is subject to presentation of a certificate of authenticity meeting the requirements specified in that regulation.

6. Whereas on previous occasions Her Majesty's Customs and Excise had invariably classified flue-cured Virginia tobacco stem in subheading 24.01 A, in the spring of 1985 they ceased to do so and held subheading 24.01 B ('Other') to be applicable. This change was the outcome of Commission Regulation No 3517/84,[5] which was adopted pursuant to Regulation No 97/69 of the Council on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff[6] after consultation of the Committee on Common Customs Tariff Nomenclature.[7] Article 1 of Regulation No 3517/84 provides that leave-stalks [*sic*], stems, ribs and trimmings (small particles produced in the threshing process) of tobacco leaves are to be classified in the Common Customs Tariff within subheading 24.01 Unmanufactured tobacco; tobacco refuse: B. Other. It should also be mentioned that it appears that Regulation No 3517/84 was adopted when the Commission, which had always been of the opinion that such stems should fall within subheading 24.01 *B*, became aware that in the United Kingdom stems of types of tobacco referred to in subheading 24.01 *A* were being classified in subheading 24.01 A and were therefore also being counted towards the aforementioned quota.

7. Imperial Tobacco Ltd considers that the classification adopted by Her Majesty's Customs and Excise in spring 1985 in reliance on Commission Regulation No 3517/84 was incorrect. It therefore brought an application for judicial review before the Divisional Court of the Queen's Bench Division of the High Court in which it sought a declaration that her Majesty's Customs and Excise had wrongly classified flue-cured Virginia tobacco stem in subheading 24.01 B.

8. The national court considers that Imperial Tobacco's claim raises the problem of the interpretation and possibly also the validity of Commission Regulation No 3517/84. Consequently by an order dated 29 April 1986 it stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Whether the correct interpretation of Commission Regulation (EEC) No 3517/84 is such as to place within subheading 24.01 B of the Common Customs Tariff tobacco stem covered by a certificate of authenticity which establishes that it is of flue-cured Virginia type.

(2) If so, whether the regulation is to that extent invalid in that it conflicts with the terms of Council Regulation (EEC) No 3400/84.'

9. Observations have been submitted by the appellant in the main proceedings, the United Kingdom, the Kingdom of Belgium and the Commission of the European Communities. Their views are summarized in the Report for the Hearing, to which I refer.

B — Analysis

I consider that the questions raised by the Divisional Court of the Queen's Bench Division of the High Court should be answered as follows:

5 — Official Journal 1984, L 328, p. 9.
6 — Official Journal, English Special Edition 1969 (I), p. 12.
7 — Article 1 of Regulation No 97/69.

10. *1.* Manifestly, Imperial Tobacco Ltd is concerned to *benefit under the aforementioned system* of generalized tariff preferences since under the Common Customs Tariff it certainly appears more advantageous — at least in many cases — for a product to be classified in subheading 24.01 *B.* However, this immediately raises the question whether the relevant Commission regulation has any bearing whatsoever on the main proceedings or in other words whether its interpretation and consideration of its validity are in fact relevant to the main proceedings.

11. As far as the scope of the system of generalized tariff preferences is concerned, Annex I and order No 50.00.20 (concerning flue-cured Virginia type tobacco) of Council Regulation No 3564/84 refer not only to the Common Customs Tariff, and hence to the relevant Commission regulation, but equally to the Nimexe goods nomenclature set out in Commission Regulation No 3529/84. However, reference to the Nimexe codes mentioned in Annex I to Council Regulation No 3564/84 reveals that only *not stripped* and *wholly or partly stripped* flue-cured Virginia type tobacco is covered. Contrary to the view of Imperial Tobacco Ltd (which considers that where the leaves are stripped, both the components resulting from stripping — stem and lamina — can be described as stripped tobacco) the expression 'wholly or partly stripped tobacco' can clearly only mean lamina without stem or lamina which has still some stem attached. It does not seem possible to regard stem as *stripped* tobacco; in fact it is logically impossible, as the Commission points out, to remove the stem from the stem and hence to speak of the stem being stripped.

12. It can therefore be stated that under the relevant *Council* rules it is clear that stem of flue-cured Virginia type tobacco was not eligible to benefit under the system of generalized tariff preferences. (This may perhaps appear hard to understand from the development policy point of view since the quota — as Imperial Tobacco Ltd has shown — apparently could not be completely used up by lamina alone, only relatively cheap lamina being of interest for the system of generalized tariff preferences. Furthermore, that interpretation may lead increasingly to whole leaf being imported, resulting in a manufacturing process leaving the developing countries. In fact that does not appear to be the case since it would be uneconomic, as Imperial Tobacco Ltd stated in the oral proceedings.) It can also be held in the light of this finding that it is indeed doubtful whether the questions concerning Commission Regulation No 3517/84 are relevant to the decision on the case.

13. However, I am not proposing that the national court should be answered in those terms only (and that its questions should not be given further consideration) because I am conscious of how extremely reluctant the Court is to go into such problems of relevance, as is shown by the judgment in Case 83/78 [8] where the Court stressed that the national court was in the best position to appreciate the relevance of the questions of law raised by the dispute before it. This has again been made clear in the more recent judgment in Case 166/84 [9] where the Court reiterated that it was for the national court to determine what the applicant's interest was in instituting proceedings and what useful purpose whould be served by the

8 — Judgment of 29 November 1978 in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347.

9 — Judgment of 26 September 1985 in Case 166/84 *Thomasdünger GmbH* v *Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001.

interpretation of Community law requested; the Court *stressed* in particular that it would refrain from answering questions referred to it only where the provision to be interpreted was clearly *inapplicable.* In fact this is probably not the case in these proceedings since Annex I of Council Regulation No 3564/84 on generalized tariff preferences also refers to the Common Customs Tariff. It is therefore quite conceivable that its scope is partly determined by Commission Regulation No 3517/84 on the Common Customs Tariff and for that reason it is not possible to refrain from answering the questions raised on that regulation.

14. *2.* Consequently as far as concerns the first question, on the *interpretation of Regulation No 3517/84,* that is to say whether, under the regulation, stems demonstrably of flue-cured Virginia type tobacco should be classified in subheading 24.01 B, I can see no difficulty in proposing that the question should be answered in the affirmative.

15. This inevitably follows simply from the wording of Article 1 of Regulation No 3517/84, which provides that leave-stalks, stems, ribs and trimmings of tobacco leaves generally, that is to say of *all* tobacco leaves, are to be classified in subheading 24.01 B. What is more, that is the only interpretation that makes sense. In contrast, it would make little sense for the regulation to mean simply that stalks, stems, etc. of types of tobacco classified in subheading 24.01 B are also to be placed in that subheading. That goes without saying in any case and therefore does not need to be stated. However, if the intention had been to make it clear that the said stalks, stems, etc. are to be classified in subheading 24.01 B only when they come from tobacco which falls within that subheading, some other wording would certainly have been chosen.

16. This is also clearly borne out by the preamble to Commission Regulation No 3517/84, where appropriate, in conjunction with the aforementioned Regulation No 3529/84 on Nimexe (from which it is evident that tobacco refuse is not to be classified in subheading 24.01 A but in 24.01 B). The preamble to Regulation No 3517/84 states that — irrespective of the type of tobacco from which they arise — all the products in question are to be regarded as tobacco refuse. But since, according to its title, heading No 24.01 covers unmanufactured tobacco and tobacco refuse and subheading 24.01 A mentions only tobacco, it must be assumed that under the system of the Common Customs Tariff tobacco refuse falls within subheading 24.01 B.

17. There can therefore be no doubt that the Commission intended Regulation No 3517/84 to make it clear that all tobacco stem should fall within subheading 24.01 B. Furthermore, it would not be possible to draw any other conclusion even if it were assumed that the Common Customs Tariff should be interpreted in another way (I shall return to this point shortly). Naturally there are limits on how far one can go in interpreting an explanatory regulation in the same way as the Common Customs Tariff in the interests of its validity, and any such attempt would, in this case, be bound to come to grief on those factors adduced above in connection with the interpretation of Commission Regulation No 3517/84.

18. *3.* In view of the outcome of the examination of the first question it must further be considered whether the *validity of Commission Regulation No 3517/84* can be called in question on the ground that it is

not consistent with the Common Customs Tariff as set out in Council Regulation No 3400/84.

19. As we have been informed, Regulation No 3517/84 was issued, with the approval of the Committee on Common Customs Tariff Nomenclature (only the United Kingdom representative dissenting), on the basis of Council Regulation No 97/69 under which provisions may be adopted at Community level in the interest of the uniform application of the Common Customs Tariff to specify the content of tariff headings or subheadings without, however, amending the text thereof. In this connection, the Court has repeatedly stated that the Commission has a *wide discretion* as to the choice between two or more tariff headings in which a given product might be classified, [10] which certainly also extends to the demarcation of two subheadings of the Common Customs Tariff. Accordingly — as is also evident from the comprehensive wording of Regulation No 97/69 ('Any matter concerning the nomenclature of the Common Customs Tariff') — it is not correct to say, as Imperial Tobacco does, that such explanatory regulations may only be issued in cases in which the customs tariff simply gives examples of a general definition and not an exhaustive list of products. The Commission is precluded only (as is shown also by the case-law) from going beyond the limits set by the text of the Common Customs Tariff; consequently, it may not come into conflict with the wording of the Common Customs Tariff [11] and adopt a provision which — to use the words of the judgment in Joined Cases 87, 112 and 113/79 [12] — is 'manifestly incorrect'.

20. Accordingly everything hinges on whether the Commission exceeded those limits when it adopted Regulation No 3517/84, in other words whether in placing leave-stalks, stems, ribs and trimmings of any tobacco in subheading 24.01 B as refuse it based itself on a wrong definition of the term 'refuse', on the ground that of the products referred to in the title of heading No 24.01 only specific types of tobacco, but not waste, are mentioned in subheading 24.01 A.

21. *(a)* One might feel justified in answering that question in the negative in view of the terms of the Customs Cooperation Council Nomenclature Explanatory Notes (which according to the case-law constitute an authoritative source for interpreting the Common Customs Tariff). The Explanatory Notes refer to tobacco refuse, such as stalks, midribs, trimmings, dust, etc. 'resulting from the manipulation of tobacco leaves, or from the manufacture of tobacco products', in other words *midribs*, etc., resulting from the manipulation of tobacco leaves, are expressly referred to as *refuse*.

22. It is rightly objected that the Explanatory Notes, which are not binding, go back to a time when the stem was discarded as being of no value and it was therefore

10 — Judgment of 28 March 1979 in Case 158/78 *P. Biegi* v *Hauptzollamt Bochum* [1979] ECR 1103, at p. 1117.

11 — Judgment of 23 October 1975 in Case 37/75 *Bagusat KG* v *Hauptzollamt Berlin-Packhof* [1975] ECR 1339; Judgment in Case 158/78, *loc. cit.*

12 — Judgment of 20 March 1980 in Joined Cases 87, 112 and 113/79 *Gebrüder Bagusat KG* v *Hauptzollamt Berlin-Packhof; Einkaufsgesellschaft der Deutschen Konservenindustrie mbH v Hauptzollamt Hamburg-Waltershof and Hauptzollamt Bad Reichenhall* [1980] ECR 1159, at p. 1171.

appropriate to refer to it as refuse. It is also objected that the Explanatory Notes fail to take into account subsequent technical developments (which are actually mentioned in the Court's judgment in Case 122/80 [13]), that is to say the fact that tobacco stem has been utilized in the manufacture of the end-product for 30 years (which may certainly be relevant for defining the term 'refuse' even though for the purposes of the Common Customs Tariff 'refuse' does not denote only goods *having no value whatsoever*).

23. *(b)* However, other references in the case-law clearly support the view that Commission Regulation No 3517/84 has not exceeded the limits laid down by the Common Customs Tariff (in which the term in question is not defined).

24. *(aa)* I would cite first the judgment in Joined Cases 69 and 70/76 [14] which was concerned with a product consisting of parts of fruit arising in the manufacture of fruit juice. In that case classification in Chapter 23 (residue and waste) was held to be correct. Furthermore, as far as the term 'fruit' (in Chapters 8 and 20 of the Common Customs Tariff) was concerned, the Court stressed that products falling within that chapter must still be identifiable as parts of fruit in demand as such and also that the concept of fruit could not be extended so as to cover products lacking the essential constituents of the natural product and not consisting of essential parts of the fruit (paragraph 5).

25. If those principles are transposed to tobacco, it is hard to argue that tobacco stem on its own contains the essential constitutents of the natural product. Consequently, it cannot be regarded as tobacco (a further argument to this effect is that stem on its own is not suitable for the manufacture of cigarettes, where it makes up a proportion of only 15-20%). Consequently, it can only be classed in the other category in heading No 24.01 as 'Refuse'.

26. *(bb)* I would also cite the judgment in Case 90/83 [15] concerning the term 'animal waste not intended for human consumption'. In that case importance was attached to what has to be regarded as the 'primary product' of animal slaughter (that is to say, the prime object of the production process) and it was held that this depended on the value of that 'primary product' in relation to other parts produced which were used in other industries.

27. Bearing in mind the facts that in the present case the process of threshing tobacco is indeed intended primarily to obtain tobacco lamina, which is of disproportionately greater importance for cigarette manufacture than tobacco stem, and also that the value of lamina as opposed to stem is in the ratio of 5:1 (during the oral proceedings the Commission even mentioned a ratio of 12:1), together with

13 — Judgment of 19 November 1981 in Case 122/80 *Analog Devices GmbH* v *Hauptzollamt München-Mitte and Hauptzollamt München-West* [1981] ECR 2781.

14 — Judgment of 15 February 1977 in Joined Cases 69 and 70/76 *Rolf H. Dittmeyer* v *Hauptzollamt Hamburg-Waltershof* [1977] ECR 231.

15 — Judgment of 22 March 1984 in Case 90/83 *Michael Paterson and Others* v *Weddel & Company Ltd and Others* [1984] ECR 1567.

the inference which may be drawn from the judgment in Joined Cases 69 and 70/76 (that even products of some value may constitute waste), it can only be concluded that the assessment expressed by the Commission in its regulation is not manifestly incorrect but definitely appropriate.

28. *(c)* Moreover, two further considerations support that view, whereas the arguments to the contrary adduced by Imperial Tobacco Ltd are not especially convincing.

29. *(aa)* It is to me significant that apparently all the other Member States adopted the Common Customs Tariff classification that the Commission considers to be correct (which is consistent with the fact that the Commission's draft regulation was endorsed by the representatives of all the Member States on the Common Customs Tariff Nomenclature Committee — with the exception of the Danish and Irish representatives, who abstained). It is not possible to detract from this simply by stating that undertakings in the other Member States are not interested to the same extent as the United Kingdom industry in imports from countries to which the system of generalized preferences applies.

30. It is also relevant that from next year onwards the Common Customs Tariff will be arranged in such a manner that heading No 24.01 will be divided into three subheadings (not stripped tobacco, wholly or partly stripped tobacco, and tobacco refuse) which, as has been shown, strongly supports the view that tobacco stem can only be regarded as refuse.

31. *(bb)* On the other hand, Imperial Tobacco's reference to the 1983 *Explanatory Notes to the Customs Tariff of the European Communities* and reliance on the examples of refuse given therein (which are all rather different from tobacco stem) is open to two objections: not only are those Explanatory Notes of course simply a non-exhaustive list of examples, but also they refer quite generally as regards the term 'tobacco refuse' to the Customs Cooperation Council Nomenclature Explanatory Notes mentioned in paragraph 21 above which in this respect are unequivocal.

32. In so far as Imperial Tobacco Ltd further refers to *General Rule A.3 (a)* for the interpretation of the nomenclature of the Common Customs Tariff ('The heading which provides the most specific description shall be preferred to headings providing a more general description'), it can be objected that that rule is inapplicable in the present case since subheading 24.01 A, which, in the view of Imperial Tobacco Ltd, provides the more specific description, covers only tobacco and not tobacco *refuse*. As a result, that general rule for the interpretation of the nomenclature of the Common Customs Tariff can certainly not be relied on to have stem of the types of tobacco specifically named in subheading 24.01 A also classified in that subheading — regardless of the scope of the term 'refuse'.

33. In so far as Imperial Tobacco further argues that the term 'refuse' may properly be used only to denote what remains following the combined use of lamina and stem in the *manufacture of tobacco products* whereas products — such as tobacco stem — which are used in the manufacture of tobacco products cannot be regarded as refuse, it must be stated that not only is it without any cogent basis in the Common Customs Tariff, but also that the Explanatory Notes to the Customs Tariff of the European Commmunities militate against that view (since they refer to refuse resulting from the manipulation of tobacco

leaves, which points to the threshing process and not to the manufacture of the end-product). In addition, it is certainly not appropriate here to base an *a contrario* argument as regards the term refuse on the wording used in the judgment in Case 90/83 (use in other industries). That it is unfounded is evident from the examples of tobacco refuse given in the Explanatory Notes to the Customs Tariff of the European Communities which are definitely products — such as, for instance, cuttings — which can be used in the tobacco industry itself.

34. While it is admittedly peculiar — especially in view of the system of generalized preferences — that stem should be treated differently depending on whether it is imported as part of whole tobacco leaves or in previously separated form, it must simply be recognized that this is the unavoidable result of the structure of the Common Customs Tariff and doubtless does not constitute a unique phenomenon limited to the tobacco sector. A correction can hardly be made by means of an appropriate interpretation of the Common Customs Tariff; if some correction is considered to be called for, the only solution is to modify the system of generalized preferences.

35. *(d)* Accordingly, it must be held as regards the second question that the validity of Commission Regulation No 3517/84 cannot be called in question on the ground that the Commission manifestly exceeded its discretion in this area.

C — Conclusion

In the light of the foregoing, I propose that the questions referred to this Court by the Queen's Bench Division of the High Court of Justice should be answered as follows:

36. '*(a)* Under Regulation No 3517/84 tobacco stem falls within subheading 24.01 B even where it is covered by a certificate of authenticity which establishes that it is of flue-cured Virginia type.

37. *(b)* No factors have been disclosed of such a kind as to cast doubt on the validity of the aforesaid Commission regulation on the ground that it disregards the terms of the Common Customs Tariff.'