OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 19 September 1996 *

Introduction

1. This preliminary reference raises the question whether dried, salted fish made from the species *Molva molva*, known in English as ling, but imported into Italy for use in the traditional dish, *baccalà*, should have benefited from the former suspension of import duties in respect of dried, salted cod. The *Molva* genus is related to the *Gadus* genus, of which the members are indisputably cod, as both genera are members of the family of *Gadidae*. However, *Molva molva* is not among the species listed in the exempting Regulation after 1981. The Court is asked, in the alternative, to interpret the provisions of Community law on the post-clearance recovery of unpaid duties.

Legal context

2. The Council Decision of 13 February 1960 approving part of the first Common Customs Tariff (hereinafter 'the Tariff' or 'the CCT') defined heading No 03.02 of the Tariff as follows:

'Fish simply salted or in brine, dried or smoked:

A. Dried, salted or in brine:

I. Whole, headless or in pieces:

...

b) Cod, including stockfish and klippfisch.

c) Other.

* Original language: English.

II. Fillets:

a) Cod, including stockfish and klippfisch.

b) Other.' [1]

In Schedule XL to the Geneva Protocol of 16 July 1962 [2] to the General Agreement on Tariffs and Trade (hereinafter 'the GATT'), the European Economic Community's tariffs as regards position 03.02 reproduced the above-quoted descriptions, in so far as is relevant. The quotas and rates of duty set out in Schedule XL were reproduced in Council Regulation (EEC) No 950/68 of 28 June 1968 on the Common Customs Tariff. [3] However, the latter employed the term 'Cod' on its own, omitting the reference to stockfish and klippfisch.

3. Customs duties were suspended in respect of the import of dried or salted cod and cod fillets by Article 16 of Council Regulation (EEC) No 2142/70 of 20 October 1970 on the common organization of the market in fishery products. [4] This suspension was confirmed by Council Regulation (EEC) No 1/73 of 19 December 1972 amending Regulation (EEC) No 950/68 on the Common Customs Tariff [5] and by Article 17 of Council Regulation (EEC) No 100/76 of 19 January 1976 on the common organization of the market in fishery products. [6]

4. The 22nd recital in the preamble to Council Regulation (EEC) No 3796/81 of 29 December 1981 on the common organization of the market in fishery products (hereinafter 'the Regulation') [7] states, in relevant part:

'Whereas, however, it is in the Community interest that application of Common Customs Tariff duties should be totally suspended for certain products; ... whereas for economic and social reasons the maintenance of traditional supplies of basic foodstuffs, such as salted and dried cod, is also justified.'

This recital reproduces the texts of the 16th recital in the preamble to Regulation No 2142/70 and of the 17th recital in the preamble to Regulation No 100/76, save

1 — Journal Officiel 1960 No 80, p. 1537. The tariff was specified as corresponding to list G in Annex I to the EEC Treaty, on which rates of duty were to be negotiated between Member States.

2 — 440 UNTS 1 and 441 UNTS 1.

3 — OJ, English Special Edition 1968 (I), p. 275.

4 — OJ, English Special Edition 1970 (III), p. 707.

5 — OJ 1973 L 1, p. 1.

6 — OJ 1976 L 20, p. 1.

7 — OJ 1981 L 379, p. 1.

for the addition of economic to the *social* reasons earlier given for the suspension of the duty.

5. Article 19 of the Regulation amends the Tariff in accordance with Annex VI to that Regulation. As thus amended, heading No 03.02 of the Tariff reads:

'Fish, dried, salted or in brine; smoked fish, whether or not cooked before or during the smoking process:

A. Dried, salted or in brine:

I. Whole, headless or in pieces:

...

b) Cod (*Gadus morrhua,* [8] *Boreogadus saida, Gadus ogac*)

...

f) Other.

II. Fillets:

a) Of cod (*Gadus morrhua, Boreogadus saida, Gadus ogac*)

...

d) Other.'

6. This heading was altered in turn by Council Regulation (EEC) No 3759/87 of 30 November 1987 amending Regulation (EEC) No 3796/81 on the common organization of the market in fishery products. [9] It refers, under heading No 0305 30 (following the new harmonized commodity coding system), to fillets, dried, salted or in brine, '[o]f cod (*Gadus morhua, Gadus ogac, Gadus macrocephalus*) and of fish of the species *Boreogadus saida*'. As regards whole dried fish, whether or not salted, heading No 0305 51 governs 'Cod (*Gadus morhua, Gadus ogac, Gadus macrocephalus*)', while heading No 0305 59, 'Other', includes 'Fish of the species *Boreogadus saida*'. [10]

8 — The standard spelling of the first species is *Gadus morhua*. This spelling will be employed in the present Opinion, except where quoting from texts employing a different spelling.

9 — OJ 1987 L 359, p. 1.

10 — Even under this altered description and coding system, the species *Gadus morhua, Gadus ogac* and *Boreogadus saida* remained subject to a common duty regime, including a duty exemption within the limit of an annual tariff quota, different from that applicable to dried fish of the species *Gadus macrocephalus*.

7. Article 20(1) of the Regulation states:

'The Common Customs Tariff duties applicable to the products listed in the table below shall be totally suspended as follows:

CCT Heading	No.	Description
...	...	...
03.02	A I b)	Cod
03.02	A II a)	Fillets of cod.'

This reproduces, in relevant part, the text of Article 17 of Regulation No 100/76. [11] The total suspension of duties was ended by Council Regulation (EEC) No 3655/84 of 19 December 1984, [12] with effect from 1 July 1985.

8. The rules for the interpretation of the nomenclature of the Common Customs Tariff (hereinafter 'the interpretative rules') applicable during the period material to the present case are set out in Section I A of Part I of the CCT in a number of consecutive Council Regulations amending Regulation (EEC) No 950/68 on the Common Customs Tariff. [13] They state, in relevant part:

'Interpretation of the nomenclature of the Common Customs Tariff shall be governed by the following principles:

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relevant Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

...

3. When for any reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

11 — Cited in footnote 6 above.

12 — OJ 1984 L 340, p. 1.

13 — See Council Regulation (EEC) No 3300/81 of 16 November 1981, OJ 1981 L 335, p. 1; Council Regulation (EEC) No 3000/82 of 19 October 1982, OJ 1982 L 318, p. 1; Council Regulation (EEC) No 3333/83 of 4 November 1983, OJ 1983 L 313, p. 1; Council Regulation (EEC) No 3400/84 of 27 November 1984, OJ 1984 L 320, p. 1. The respondent quotes similar but differently numbered rules in its pleadings, without citation, which appear to be drawn from a later version adopted in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ 1987 L 256, p. 1.

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

...

4. Goods not falling within any heading of the Tariff shall be classified under the heading appropriate to the goods to which they are most akin.

5. The above Rules shall also apply *mutatis mutandis* when determining the appropriate subheading within a heading.'

9. Article 5(2) of 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 (hereinafter 'the Regulation on recovery') [14] states:

'The competent authorities may refrain from taking action for the post-clearance recovery of import duties or export 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.

The cases in which the first subparagraph can be applied shall be determined in accordance with the implementing provisions laid down in accordance with the procedure provided for in Article 10.'

Factual and procedural context

10. Foods Import dei Fratelli Monti S. r. l. (hereinafter 'the respondent') is a family enterprise which specializes in the import of preserved fish, which it describes as klippfisch or *baccalà*, into Italy. Klippfisch is formed by salting cod; it may also be dried by exposure to air. [15] The dried, salted fish in question was ling (*Molva molva*). The respondent stated at the oral hearing that this fact was normally clearly indicated by it in the customs documentation relating to the 46 consignments imported from Norway which are in question. In each case, it was

14 — OJ 1979 L 197, p. 1.

15 — Stockfish is formed by drying cod in the air without added salt.

permitted to import the fish free of duty. Indeed, it states that klippfisch has been exempt from duty from time immemorial. On 23 April 1985, the respondent was informed by the customs authorities of San Benedetto del Tronto of the commencement of the process of revision of the duties owed in respect of imports from Norway between June 1982 and April 1985. On 15 May 1985, these authorities demanded the payment of LIT 508 260 820 in import duty and fines of LIT 4 046 331 800 for customs fraud and LIT 80 925 900 for fiscal fraud, on the grounds that the Regulation had limited the suspension of duties in respect of dried cod and cod fillets to the species inserted at heading No 03.02 A I b) and II a) of the Tariff, viz. *Gadus morhua, Boreogadus saida* and *Gadus ogac.*

11. Following an unsuccessful appeal to the Customs Authority in Rome, the respondent commenced an action against the Ministero delle Finanze dello Stato (hereinafter 'the appellant') before the Tribunale Civile e Penale di Ancona. That court declared that the duties were not owed by the respondent, relying upon the provisions of the GATT, and, in particular, on Schedule XXVII approved by the Annecy Protocol of 10 October 1949. [16] That Schedule recorded the commitment by Italy to a total suspension of customs duties on salted, dried and smoked fish: cod and similar fish (haddock, klippfisch, stockfish).

12. The appellant appealed to the Corte di Appello (Court of Appeal), Ancona (hereinafter 'the national court'), which, by order of 19 October 1994, suspended the proceedings before it, and referred the following questions to the Court for a preliminary ruling in accordance with Article 177 of the EC Treaty:

'1. Is the list given in Council Regulation (EEC) No 3796/81 of 29 December 1981 (and repeated in Council Regulation (EEC) No 3333/83 of 4 November 1983), Annex VI to which reproduces Chapter 3 of the Common Customs Tariff in which cod appears under heading No 03.02 A I and fillets of cod under heading No 03.02 A II, supplemented by the mention "*Gadus morrhua, Boreogadus saida, Gadus ogac*", exhaustive or illustrative and, accordingly, is the dried cod scientifically classified as "*Molva*" covered by that list?

2. If the Court holds that list to be exhaustive, does Article 20 of Council Regulation (EEC) No 3796/81 of 29 December 1981, suspending certain Common Customs Tariff duties, apply only to the three subspecies of cod referred to in Question 1 ("*Gadus morrhua, Boreogadus saida, Gadus ogac*") to the exclusion of other subspecies such as "*Molva*"? [17]

16 — 62 UNTS 122.

17 — The term *Molva*, without further qualification, relates to a genus, and the terms *Gadus morhua, Boreogadus saida* and *Gadus ogac* relate to species rather than to subspecies.

3. In any event, must Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979, giving debtors the right (see the Court's judgment in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199) to benefit from the fact that the competent authorities may refrain from taking action for the post-clearance recovery of duties, be applied also in the present case in which the customs authorities failed to collect the relevant duties on account of an error, having regard also to the conduct of the alleged debtor who had observed all the provisions laid down by the rules in force as far as his customs declaration was concerned?'

Observations

13. Written and oral observations have been submitted by the respondent, the Italian Republic and the Commission.

Analysis

The first and second questions

14. It is convenient to discuss the first and second questions together, as they both affect the central issue of whether the respondent should have paid duty at the time of customs clearance.

15. I note at the outset that there is a broad consensus about the ichthyological background to the present case. All of the fish species mentioned are members of one family, the *Gadidae*, although not, as will be seen, of the same sub-family or genus. As the Commission stated, and as is confirmed by the numerous ichthyological texts submitted by both the Commission and the respondent, the fish species listed in the heading at issue differ in appearance and geographical distribution. However, some of the more important diagnostic features are internal, and it appears from the respondent's observations and from the literature that dried, salted fillets of these different species are distinguishable from each other only by skilled dissection, the use of X-ray photographs or other scientific tests. [18] The principal species discussed are, *Gadus morhua* (cod, or Atlantic cod); *Gadus ogac* (Greenland cod); and *Gadus macrocephalus* (Pacific cod). Each of these belongs to the genus *Gadus*, described as 'true cods'. [19] Secondly, *Boreogadus saida*

18 — D. M. Cohen, T. Inada, T. Iwamoto & N. Scialabba, *FAO Species Catalogue, Vol. 10 Gadiform Fishes of the World* (FAO, Rome, 1990), p. 7.

19 — Ibid., p. 4.

(Polar cod, or Arctic cod) belongs to the genus *Boreogadus*, but also belongs, with *Gadus*, to the sub-family *Gadinae*. Thirdly, *Molva molva* (ling) belongs to the genus *Molva* and to the distinct sub-family *Lotinae*. [20]

16. The respondent argues that, for customs purposes, the term 'cod' should be interpreted broadly so as to include all members of the family of *Gadidae*, of which *Gadus morhua* is simply the best known; this, it states, was the understanding of the term in practice before the adoption of the relevant amendment to the CCT in 1981, and for some time thereafter. In support of this reading, the respondent points out that the practice in Community texts is very varied as regards the appellation of fish, sometimes referring simply to cod, [21] sometimes qualifying the term cod by the use only of the scientific name *Gadus morhua*, and sometimes referring to a number of scientific names, such as the three employed in the Regulation, as well as *Gadus macrocephalus*. The inclusion of the species *Boreogadus saida* in the heading at issue in the Regulation shows that the term 'cod' was not intended to apply only to the genus *Gadus*, as it is a member of the distinct genus *Boreogadus*; its distinct character was recognized in the revised heading in Regulation No 3759/87, quoted above.

Furthermore, no reason was indicated for the amendment, which implies that it was not intended to alter the pre-existing regime. Therefore, the list of species in the relevant Tariff heading should be seen as being only indicative.

17. As regards the particular product in question, the respondent states that klipfisch (*baccalà*) has long been made from ling, as well as from a number of other fish of the *Gadidae* family — principally cod (in the more limited sense of *Gadus morhua*), forkbeard (*Phycis phycis*) and tusk (*Brosme brosme*). [22] Its quality is determined by factors such as the age and dimensions of the fish employed rather than the particular species. The respondent argues that the Court's case-law indicates that products should be differentiated for customs purposes in accordance with their objective characteristics, which should be capable of being verified when examined by the customs authorities. This requirement is not satisfied, it submits, in view of the difficulty in distinguishing between dried, salted fillets of these different species.

18. The respondent also contests the legality of the imposition of duty on a cod species such as *Molva molva*, which, it asserts, is

20 — See Commission of the EC, *Multilingual Illustrated Dictionary of Aquatic Animals and Plants* (Office for Official Publications of the EC, Brussels, Luxembourg, 1993), pp. 109 to 114.

21 — See, for example, Commission Regulation (EEC) No 3583/86 of 24 November 1986 concerning the stopping of fishing for cod by vessels flying the flag of the United Kingdom; OJ 1986 L 332, p. 6.

22 — The latter two species are members of the sub-families of *Phycinae* and *Lotinae* respectively.

contrary to Article II(1)(b) of the GATT, is discriminatory relative to similar products (that is, dried, salted fish of the three species listed in the Tariff heading at issue), and constitutes a misuse of powers in so far as it is an attempt to gain ammunition for fisheries negotiations with third countries (an object which is noted in the Opinion of the Economic and Social Committee on the proposed amendment of the Regulation in 1984 which ended the suspension of duties). [23]

19. The Commission argues that *Molva molva* should not at any time have been considered to be a cod (*Gadus*), because of its different morphological and organoleptical characteristics (longer, thinner body and different distribution of fins), the inferior quality of its flesh, its different geographical distribution (Mediterranean, seas off the Iberian peninsula and western France, as well as the more northerly seas to which the others are confined) and its membership of a different sub-family (*Lotinae* rather than *Gadinae*). The list of species was adopted in 1981 in order to add greater precision to the relevant CCT heading, rather than to amend its proper scope. Italy adds that under heading No 03.01 of the CCT concerning fresh, chilled and frozen fish, also found in Annex VI to the Regulation, 'Cod (*Gadus morrhua, Boreogadus saida, Gadus ogac*)' occupies position B I h), while 'Ling (*Molva* spp.)' is found at the distinct position B I m).

20. The Commission stated, in response to a written question from the Court, that the heading had been amended because true, traditional *baccalà* was made only with the species listed and that dried, salted ling was only a substitute for *baccalà*; thus, there had been no need to refer expressly to the amendment in the relevant recital in the preamble to the Regulation, which speaks only of 'traditional supplies of ... salted and dried cod'. When questioned during the oral hearing about the inclusion at this stage of *Boreogadus saida* and the exclusion of *Gadus macrocephalus*, and about the further amendment of the heading in 1987, the agent for the Commission stated that the latter change constituted a further scientific refinement, but that this did not undermine its contention that true *baccalà* or klippfisch could be made only from these species of the *Gadinae* subfamily.

21. Both the Commission and Italy submit that the inclusion of scientific names in the CCT heading under examination has the effect of confining it to those particular species of cod. As this interpretation conforms to interpretative rules 1 and 5, it is not neces-

23 — OJ 1985 C 44, p. 5; the Opinion preceded Regulation No 3655/84, cited above.

sary to examine any of the other rules. If it had been intended that the category 'cod' should remain open, the scientific names given would have been preceded by terms such as 'of the species', or succeeded by the notation 'spp.'

22. The respondent submits that even if the list of species at issue was intended to be exhaustive, interpretative rules 3(a) or 4 should be applied, in order to include *Molva molva* in the more specific category 'Cod' rather than the more general 'Other' or, in the alternative, because, of all the categories indicated, *Molva molva* is 'most akin' to 'Cod'. In response to a written question from the Court, the Commission submitted that interpretative rule 3(a) applies only where goods appear to be classifiable under two or more CCT headings, while rule 4 concerns situations in which goods do not appear to be classifiable under any Tariff heading. Neither applies in this case, it asserts, because dried, salted ling and ling fillets are members of the class 'Other' under Tariff heading No 03.02 A I and II.

23. Regarding the second question, the Commission argues that no question has been referred regarding the validity of the Regulation or its compatibility with the GATT. The Commission and Italy submit that the list of products in Article 20 of the Regulation, which mentions simply 'Cod' at heading No 03.02 A I b) and II a), must be read by reference to the content of that heading in the CCT; thus, it should be construed as being confined to the three species listed, the unqualified term 'cod' being merely indicative. The respondent did not make any observations on this textual difference between Article 20 and Annex VI to the Regulation.

24. I will first deal with the respondent's claims based on the GATT. I do not think they are sustainable. First, as the Commission has observed, the questions referred by the national court relate only to the interpretation, and not to the validity, of the Community measures in question. Secondly, the Court has held that the provisions of the GATT, as constituted in the period material to the present case, cannot, due to their great flexibility, be invoked by individuals or by Member States to challenge the lawfulness of a Community act. [24] Thirdly, the Protocol to the GATT adopted on 16 July 1962 subsequent to the Tariff Conference of 1960/61 [25] records, *inter alia*, the renegotiation of existing concessions consequent upon the establishment of the European Economic Community. In Schedule XXVII, annexed to the GATT by the Protocol, Italy withdrew

24 — See, for example, Joined Cases 21/72 to 24/72 *International Fruit Company* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219; Case C-280/93 *Germany* v *Council* [1994] ECR I-4973. For arguments on the possible direct effect of the GATT following its amendment in 1994 by the Marrakesh Agreement establishing the World Trade Organisation, see P. Lee and B. Kennedy, 'The WTO — will it bite in Europe? The potential direct effect of GATT 1994 in European Community law' (1996) 30, 1 *Journal of World Trade* 67.

25 — Cited in footnote 2 above.

(subject to certain immaterial exceptions) the concessions previously made in that Schedule, which were replaced by those contained in the European Economic Community Schedule XL. Thus, even if the provisions of the GATT can legitimately be invoked to guide the interpretation of Community acts which operate in the same field, [26] the GATT provisions relied upon by the respondent have long been superseded. In any event, the post-1962 provisions of the GATT in respect of 'Cod, including stockfish and klippfisch', mentioned above, are not themselves unambiguous, in the light of the Commission's submissions about the ingredients of 'true' klippfisch or *baccalà*, so there is little advantage in looking to them to help resolve the present interpretative problem.

25. If the ling (*Molva molva*) imported by the respondent under the description of klippfisch or *baccalà* traditionally enjoyed exemption from duty, the explanation may be found in some way to arise from the continued application in Italy of the former Annecy arrangements under the GATT, mentioned in paragraphs 11 and 24 above. At least, the Tribunale Civile e Penale di Ancona seems to have been ready to give effect to these provisions in the respondent's favour even after the amendment made to the Community regime in 1981. Italy has not taken a position on whether it regarded the Regulation as changing the existing position in Community law, although the respondent states that the customs authorities explained the process of revision of duties by reference to treatises on ichthyology recently discovered. The Commission, on the other hand, originally submitted that the Regulation did make a change, but it modified its stance at the oral hearing. It now claims that, properly interpreted, neither the term 'cod', as it appeared, unqualified, in the pre-1981 version of the CCT, nor the suspension of duties, ever included ling.

26. The Court is not required in the present case to interpret definitively either the pre-1981 or the post-1987 Tariff. It is well known that the ordinary-language names of fish can be inconsistent and a single word may have a broad or narrow meaning depending on language or country or even on the particular context. While greater precision is required in matters of tariff classification, even here usage is not always consistent. Thus, while the term 'cod' may on occasion be restricted to the single genus *Gadus*, or even the single species *Gadus morhua*, it has at times been used, as in the case of *Boreogadus saida*, to include other species of the *Gadinae* sub-family. In such circumstances, it seems futile, and is, in any event, unnecessary, to define with precision

26 — While Case 70/87 *Fediol* v *Commission* [1989] ECR 1781 concerned a Community act which referred expressly to trade practices 'which are incompatible with international law or with generally accepted rules', certain passages in paragraphs 19 to 21 of the judgment of the Court could be relied upon to argue for a generally applicable principle of interpretation in harmony with the Community's international obligations under an agreement which is not directly effective, such as the GATT.

the scope of what is, objectively, cod. [27] I am, however, convinced that *Molva molva* or ling, both by scientific classification and by ordinary usage, falls outside the meaning of the term 'cod'. The Court has received extensive information about the terms used in many languages. It appears to me that the name of ling clearly distinguishes it from other fish species and, in particular, that there is no significant overlap with any of the species of cod.

27. Heading No 03.02 A I b) and II a) of the CCT, as amended by the Regulation, is unambiguous: it applies only to the three species mentioned, *Gadus morhua, Boreogadus saida* and *Gadus ogac*. The 1987 amendment excluded *Boreogadus saida* from the general class 'Cod' (thereafter confined to members of the *Gadus* genus) but continued to link it with *Gadus morhua* and *Gadus ogac* under a single Tariff heading and duty regime. Thus, at no stage did the heading extend beyond the sub-family *Gadinae*. Furthermore, only one of the three species listed in 1981 is outside the genus *Gadus* or 'true cod'. Species which might, in other contexts, be considered to be cod are therefore relegated to the heading reserved for 'other' fish. I am confirmed in this view by the omission of any qualifying indication from the list, such as 'spp.' [28]

28. I also accept the view of the Commission, outlined above, that interpretative rules 3(a) and 4 do not apply to the present interpretative problem. As heading No 03.02 A, on its face, excludes *Molva molva*, and thus consigns it to the position 'Other', this is not a situation in which goods appear to be classifiable under more than one heading or sub-heading, which might be regulated by rule 3(a). Nor is it a situation in which the goods in question do not fall under any heading or sub-heading, as the position 'Other' is sufficiently capacious to accommodate *Molva molva*. As this species falls within one of the positions provided for in the Tariff, there is, in accordance with rule 1, no need to have regard to any further interpretative rules.

29. I now turn to the arguments that the amended CCT heading No 03.02 A I b) and

27 — I might add that the similar question of what is, objectively, 'true' or 'traditional' klippfisch is not directly germane to the instant problem, as the term does not even appear in the Tariff.

28 — On the other hand, the fact that the same list accompanies the term 'Cod' under heading No 03.01, which contains a separate position, 'Ling (*Molva* spp.)', is not, to my mind, conclusive. A separate position for 'Ling' in respect of fresh, chilled and frozen fish could simply constitute a specific exception to a more general position, 'Cod', rather than a proof that the latter cannot include the former even when no distinct position for 'Ling' is provided.

II a) should continue to be read widely because no reason was stated for any alteration of its pre-existing scope and because, if read more narrowly than before, consequent upon the 1981 amendment, it would be invalid by reason of discrimination against essentially similar products and of improper reasoning. The first of these arguments assumes, of course, that the pre-existing heading, which referred only to 'Cod', was properly interpreted widely to include dried, salted ling. As I have already said, the Court is not called upon in this case to interpret definitively that superseded provision. However, if the heading should, even before amendment, have been construed as referring only to fish of the sub-family *Gadinae*, or to only some species of that sub-family, as the Commission contends, then the amendment was purely textual and clarificatory rather than substantive. As stated at paragraphs 27 and 28 above, I agree.

30. If, on the other hand, the amendment was designed to effect a narrowing of the class of fish governed by the heading, the statement of reasons contained in the recitals does not contradict such an interpretation. As was noted above, economic reasons were added in 1981 to the formerly merely social reasons mentioned in the recitals to the successive Regulations which provided for the suspension of duties on dried and salted cod. The Economic and Social Committee, in its Opinion on the Commission proposal which led to the adoption of the Regulation, referred to the connection between access to the Community market and the granting of access for Community vessels to the economic or fishing zones of non-member countries. [29] Changes in the conditions of supply, whether or not linked to increased access to third-country fisheries, would constitute economic reasons for an alteration in the Community import duty regime.

31. I would not, in any event, accept the contention that an alteration of the regime with a view to securing such concessions constitutes a misuse of power. Customs duties perform a number of legitimate functions; they act as, *inter alia*, the currency of international trade negotiations. Nor am I convinced by the charge of unlawful discrimination. The respondent relied upon two cases which concerned the Council's exercise of the power under Article 28 of the EEC Treaty to alter or suspend duties in the CCT, *Ethicon* v *Hauptzollamt Itzehoe* and *Texas Instruments* v *Hauptzollamt München-Mitte*. [30] While the Court stated in both cases that it would review measures which disadvantaged certain traders or were discriminatory, it is evident that a wide margin of discretion is left to the Council. Flexibility is necessary in order to be able to respond appropriately to international trading circumstances. In *Ethicon*, in which the Council had suspended duties on one product and not on another, having the same properties and intended for the same use but of an

29 — OJ 1981 C 159, p. 7; see paragraph 2.3.1. of the Opinion.

30 — Case 58/85 [1986] ECR 1131 and Case 227/84 [1985] ECR 3639 respectively.

objectively different composition from the first, the Court found no misuse of power or manifest misjudgment of the economic situation, even though the decision was taken in ignorance of the import need for the latter product. In *Texas Instruments*, the suspension of duties only in respect of electronic memories (Eproms) not exceeding a certain size was not found to have been intended to place certain traders at an advantage or disadvantage, or to have been discriminatory. It is worth noting, for the purposes of the discussion of reasons for amendment immediately above, the Court's remark that '[c]ustoms regulations may be altered for a variety of reasons, such as progress in technical knowledge or commercial developments and changes in the economic situation which have occurred in the meantime'. [31] In the light of these decisions, the differentiation for customs purposes between fish of two different sub-families, with different objective characteristics such as appearance and geographical distribution, does not appear to me to be unlawful, even if the fish, once dried and salted, are used for similar culinary purposes.

32. This brings me to consider the respondent's contention that the exclusion of dried, salted ling from heading No 03.02 A I b) and II a) would be in breach of the requirement that products should be differentiated for customs purposes in accordance with their objective characteristics. In this regard, it is worth noting the statement of the Court in *Ethicon* that 'the descriptions of goods on which customs duties have been suspended must be interpreted according to objective criteria *derived from their wording* and that they may not be applied contrary to their wording to other goods even if their properties and application are no different from those covered by the suspension'. [32] The requirement of objective criteria is conditioned by the difficulties posed by subjective characteristics such as the intended use of a product. [33] While compliance with the objective criteria should be verifiable at the customs clearance stage, it is not necessary that similar goods governed by different Tariff headings should be immediately visually distinguishable from each other; indeed, this will often be impossible, because the criteria may be highly technical and may relate to the chemical, zoological or genetic make-up of goods. In such cases, the Court has accepted the need for verification by highly specialized analysis. [34] In the circumstances, the similar outward appearance of fillets of dried, salted ling and cod of the species listed in heading No 03.02 A II a) is not determinative of the classification of ling, as expert

31 — Paragraph 15 of the judgment.

32 — Paragraph 13 of the judgment, emphasis added.

33 — See, for example, Case 38/76 *LUMA* v *Hauptzollamt Duisburg* [1976] ECR 2027; Case C-219/89 *Wesergold* [1991] ECR I-1895.

34 — See, for example, Case C-393/93 *Stanner* v *Hauptzollamt Bochum* [1994] ECR I-4011, paragraphs 4 and 20 of the judgment; Case 80/72 *Koninklijke Lassiefabrieken* v *Hoofproduktschap voor Akkerbouwprodukten* [1973] ECR 635, paragraph 64; Case C-233/88 *Van De Kolk* [1990] ECR I-265, paragraphs 13 to 15.

analysis should be able to identify them as members of different species, genera or sub-families.

33. The reference simply to 'Cod' and 'Fillets of cod' in Article 20 of the Regulation, rather than to cod accompanied by the list of three species set out in the amended CCT in Annex VI, is not enough to indicate, in my view, that the suspension of duties continued to apply to a wider class of fish, including ling. The terms used are simply abbreviated descriptions of the goods in question. Thus, for example, it is nowhere mentioned that the fish and fish fillets in question must be dried, salted or in brine. It is the reference to the relevant CCT heading numbers which is determinative. In the present case, it shows that the heading in question applies only to a narrow class of cod fish, namely *Gadus morhua, Boreogadus saida* and *Gadus ogac*. This conclusion is, I think, confirmed by the fact that footnote (a) to the relevant heading mentions the total suspension of duties for an indefinite period, evidently only in favour of fish of the species governed by that heading.

34. The answers to the first two questions referred by the national court emerge clearly from the foregoing. Ling, or *Molva molva*, is not covered by the Tariff classification at issue and, consequently, the imports effected by the respondent did not benefit from suspension of duty.

The third question

35. As regards the third question, the respondent submits that it acted in good faith, that the consignments of dried, salted fish that it imported were declared as such to the customs authorities, including references to the species from which they were derived, and that the authorities repeated their error in the course of 46 transactions. Italy argues that the question is inadmissible, as the order for reference does not disclose the information necessary to decide whether the conditions set out in Article 5(2) of the Regulation on recovery are satisfied. The Commission states that it is for the national court to make such a finding, but attempts to provide guidance for the interpretation of that provision by reference to the case-law of the Court.

36. I do not think that the instant question is inadmissible. Sufficient information is available from the order for reference and from the case-file, including the earlier judgment of the Tribunale Civile e Penale di Ancona, to indicate the factual background of the case. This enables the Court to provide the national court with a useful answer in the

light of the circumstances of the case, rather than give a purely abstract interpretation of the applicable law.

37. The constant case-law of the Court shows that it is for the national court to apply Article 5(2) of the Regulation on post-clearance recovery of duties in the light of the facts of the case. [35] The competent authorities are not entitled to take action after customs clearance to recover duties which have not been collected if the three conditions set out in Article 5(2) are satisfied. [36]

38. The respondent's assertion that its customs declarations were complete and accurate (except as regards the Tariff heading applicable and duty payable), which has been confirmed in the question by the national court, is relevant both to the question whether it observed all the provisions laid down by the rules in force as far as its customs declarations were concerned and to that of whether it acted in good faith. As regards the latter condition, this fact would suggest that the respondent honestly believed, throughout the 46 transactions in question, that dried, salted ling was entitled to favourable customs treatment. This situation is comparable, in my view, to that in *The Queen* v *Commissioners of Customs and Excise*, ex parte *Faroe Seafood*, in which the Court considered that the fact that a trader did not alter a particular fish processing procedure tended in practice to show an honest belief that that procedure was consistent with the rules. [37] Ultimately, of course, it is only the national court that can decide.

39. Error on the part of the competent authorities can be established where those authorities were in possession of all the information necessary to establish that a particular Tariff heading should not have been applied to the goods in question but, notwithstanding that knowledge, raised no objections concerning the statements made in the trader's declarations. [38] This is especially true where no objection was raised to the erroneous declaration of the Tariff heading applicable and duty payable in the course of several transactions over a relatively long period. [39] This condition is, of course, linked to that of accuracy in the trader's declarations.

35 — See, for example, Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535; Case C-371/90 *Beirafrio* v *Serviço da Conferência final da Alfândega do Porto* [1992] ECR I-2715; Case C-187/91 *Belgian State* v *Belovo* [1992] ECR I-4937.

36 — Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199; Case 378/87 *Top Hit Holzvertrieb* v *Commission* [1989] ECR 1359.

37 — Joined Cases C-153/94 and C-204/94 [1996] ECR I-2465, paragraph 105 of the judgment.

38 — *Foto-Frost*, cited above, paragraph 24 of the judgment; *Faroe Seafood*, cited above, paragraph 95.

39 — Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 20 of the judgment.

40. The question whether any error on the part of the customs authorities could have been reasonably detected by the person liable requires the national court to have regard to 'the nature of the error, the professional experience of the traders concerned and the degree of care which they exercised'. [40] As regards the nature of the error, the fact that the authorities persisted in error over a period of some three years would suggest that the issue was not a simple one. [41] It should also be recalled that, while the addition of the list of three species to the pre-existing Tariff heading 'Cod' is, in my view, decisive, the term 'cod' itself has no fixed meaning and is open to much wider interpretation. It appears that a wider interpretation had, historically, been applied in Italy, possibly arising from the former GATT provisions considered at paragraphs 11, 24 and 25 of this Opinion. This could have been misleading to a trader unfamiliar with legislative interpretation, even if he was professionally experienced and exercised considerable care. Again, this is a question of fact within the exclusive domain of the national judge.

Conclusion

41. In accordance with the above analysis, I recommend that the Court answer the questions referred by the national court as follows:

(1) The dried fish scientifically classified as *Molva* was not covered by heading No 03.02 A I b) and II a) of the Common Customs Tariff, as amended by Council Regulation (EEC) No 3796/81, which heading applied at the time of the facts giving rise to the present case only to cod of the species *Gadus morhua, Boreogadus saida* and *Gadus ogac*.

(2) Article 20 of Regulation No 3796/81 applied only to cod of the species *Gadus morhua, Boreogadus saida* and *Gadus ogac*, to the exclusion of other genera such as *Molva*.

40 — See, for example, *Faroe Seafood*, cited above, paragraph 99 of the judgment; *Deutsche Fernsprecher*, cited above, paragraph 24; *Hewlett Packard France*, cited above, paragraph 22.

41 — See *Faroe Seafood*, cited above, paragraph 104 of the judgment; *Deutsche Fernsprecher*, cited above, paragraph 20.

(3) It is for the national court to establish whether the criteria for the application of Article 5(2) of Council Regulation (EEC) No 1697/79 are fulfilled. Error on the part of the competent authorities may be shown where these raised no objection to the inaccurate declaration in the course of several transactions over a relatively long period, where those authorities were in possession of all the information necessary to establish that a particular Tariff heading should not have been applied to the goods in question. In order to determine whether such an error could not reasonably have been detected by the person liable, account must be taken, in particular, of the nature of the error, the professional experience of the trader concerned and the degree of care which he exercised.