REPORT FOR THE HEARING
delivered in Case 141/86 *

I — Facts and legislative background

A — *The facts*

1. The applicant in the main proceedings, Imperial Tobacco Ltd, is a wholly-owned subsidiary of Imperial Group plc which manufactures, in particular, cigarettes. It is responsible for all activities of Imperial Group plc in the tobacco sector. Accordingly, it regularly imports substantial quantities of tobacco into the United Kingdom and is the largest manufacturer of cigarettes intended for the United Kingdom domestic market.

2. The national court states that the tobacco is grown in a large number of foreign countries. After it is harvested it undergoes a number of processes before shipment to the manufacturer. It is first cured, then threshed and dried before finally being packed. None of these is a process of manufacture; they are simply processes necessary to prepare the tobacco for shipment and storage. In the threshing stage the leaf-stem, which bisects the leaf and attaches it to the plant, is separated from the rest of the leaf, which is known as the lamina. Thirty or more years ago the stem used to be discarded after threshing, but modern technology permits the whole of the tobacco leaf, both stem and lamina, to be used in the manufacture of cigarettes. However, the stem and the lamina have different physical characteristics which make different treatment necessary at the manufacturing stage. After suitable treatment, the stems are added to the lamina to produce the mix required for the particular type of cigarettes being manufactured. In view of the differences of treatment in the primary manufacturing stage it is more convenient for stem and lamina to be separated in the pre-shipment stage.

3. The national court points out that the differences in the treatment of the stem and lamina at this primary stage are essentially three:

(a) the preliminary stage of primary processing is to add back moisture which was removed before the tobacco was packed for transport; this is necessary to make the leaf workable in the primary processing machines; stem and lamina have different requirements in this respect;

(b) the stem has to be flattened so that it can be handled in the cutting machines; this involves rolling it; lamina does not have to undergo this process;

(c) to produce particle sizes in the final mix which will be approximately the same for stem as for lamina the rolled stem is more finely cut than the lamina; for lamina the cutting machines make some 25 to 36 cuts per inch while for stem there are some 120 to 160 cuts per inch.

* Language of the Case: English.

4. In April 1985, Imperial Tobacco Ltd (hereinafter referred to as 'Imperial Tobacco') imported into the United Kingdom a quantity of Virginia-type flue-cured tobacco leaf-stems from outside the Community. The term 'flue-cured' indicates that the tobacco has been cured in artificial atmospheric conditions by an operation which combines a regulated temperature and ventilation, and the term 'Virginia' designates a particular type of tobacco. Stems account for a little more than 20% by weight of Virginia-type tobacco. In completing the customs entry form, Imperial Tobacco declared that the goods were to be regarded as falling under subheading 24.01 A of the Common Customs Tariff. HM Customs and Excise, on the other hand, relying upon Commission Regulation No 3517/84 of 13 December 1984 on the classification of goods falling within subheading 24.01 B of the Common Customs Tariff, treated it as entered under 24.01 B.

5. The principal effect of classifying Virginia-type flue-cured tobacco leaf-stems under subheading 24.01 A is that they enjoy a tariff preference under the generalized tariff preference system, which is not the case for products under subheading 24.01 B. Imperial Tobacco then commenced proceedings before the Divisional Court of the Queen's Bench Division for a declaration that that classification by HM Customs and Excise was incorrect. Subsequently, by an order of 2 June 1986 which was received at the Court Registry on 6 June 1986, the Divisional Court stayed the proceedings and asked the Court to give a preliminary ruling on the following questions:

'(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?'

B — *Legislative background*

6. Tobacco is covered by chapter 24 of the Common Customs Tariff which, in the version in force on 1 January 1985 (Council Regulation No 3400/84 of 27 November 1984, (Official Journal 1984, L 320, p. 1)), is worded as follows:

24.01 Unmanufactured tobacco; tobacco refuse:

A. Flue-cured Virginia-type and light air-cured Burley-type tobacco (including Burley hybrids); light air-cured Maryland-type and fire-cured tobacco (a)

B. Other

24.02 Manufactured tobaccos; tobacco extracts and essences:

A. Cigarettes

B. Cigars

C. Smoking tobacco

D. Chewing tobacco and snuff

E. Other, including agglomerated tobacco in the form of sheets or strip

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(a) Entry under this subheading is subject to conditions to be determined by the competent authorities.

That wording remains unchanged in the subsequent versions of the Common Customs Tariff.

7. With respect to heading No 24.01, the Explanatory Notes to the Customs

Cooperation Council Nomenclature introduced by the Brussels Convention of 15 December 1950 on the classification of goods in customs tariffs are worded as follows:

'This heading covers:

(1) Unmanufactured tobacco in the form of whole plants or leaves in the natural state or as cured or fermented leaves, whole or stripped, trimmed or untrimmed, broken or cut (including pieces cut to shape, but not tobacco ready for smoking).

(2) Tobacco refuse, e.g., waste resulting from the manipulation of tobacco leaves, or from the manufacture of tobacco products (stalks, midribs, trimmings, dust, etc.).'

8. In order to ensure the uniform application of the Common Customs Tariff nomenclature, on 20 December 1979 the Commission, having regard to note (a) to the abovementioned chapter of the Common Customs Tariff and on the basis of Article 4 of Regulation No 97/69 of the Council (see below), published Regulation No 3035/79 (Official Journal 1979, L 341, p. 26) on the conditions for entry in subheading 24.01 A of the Common Customs Tariff. Under Article 1 of that regulation, 'the entry under subheading 24.01 A of the Common Customs Tariff ... shall be subject to presentation of a certificate of authenticity meeting the requirements specified in this regulation'. The product involved in these proceedings is accompanied by such a certificate.

9. Pursuant to Regulation No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (Official Journal, English Special Edition 1969 (I), p. 12), as amended by Council Regulation No 2055/84 of 16 July 1984 (Official Journal 1984, L 191, p. 1), the Commission is empowered to adopt provisions 'to specify the content of the headings or subheadings of the Common Customs Tariff without, however, amending the text thereof' (second recital in the preamble thereto), in accordance with a specified procedure and after obtaining the opinion of the Committee on Common Customs Tariff Nomenclature. In the third recital it is also stated that the Community provisions which may be adopted 'relate to a particularly technical field and close cooperation is required between the Member States and the Commission'. That committee, its composition and powers are governed by Articles 1 and 2 of the regulation. Article 3 thereof lays down the procedure to be followed for the adoption by the Commission of provisions specifying the content of the Common Customs Tariff headings or subheadings and Article 4 provides that:

'Where [the] Common Customs Tariff makes the inclusion of goods under a particular heading or subheading subject to special conditions, those conditions may be fixed according to the procedure laid down in Article 3.'

10. Pursuant to the abovementioned regulation, the Commission adopted Regulation No 3517/84 of 13 December 1984 (Official Journal 1984, L 328, p. 9) on the classification of goods falling within subheading 24.01 B of the Common Customs Tariff (hereinafter referred to as 'the contested regulation'). It is stated in the first recital in the preamble to that regulation that '... to ensure that the Common Customs Tariff nomenclature is applied uniformly, measures must be taken concerning the classification of leave-stalks, stems, ribs and trimmings of tobacco leaves' and in the third recital that '... the products in question have the

characteristics of tobacco refuse falling within heading No 24.01 and must therefore be classified in this heading; whereas, within this heading, subheading 24.01 B should be chosen . . . '. Article 1 of the contested regulation provides:

'Leave-stalks, stems, ribs and trimmings of tobacco leaves shall be classified in the Common Customs Tariff within subheading:

24.01 Unmanufactured tobacco; tobacco refuse:

B. Other.'

11. The leaf-stem is the widest part of the stem, which attaches the leaf to the central stalk of the plant. The term 'ribs' is basically synonymous with 'stems' (the stem is the main rib) and the trimmings are the very smallest fragments of lamina which result from the threshing process. All these materials are at present used in the manufacture of cigarettes.

12. Under the system of generalized preferences unilaterally accorded by the Community within the framework of the United Nations Conference on Trade and Development (Unctad), a tariff quota is opened each year for Virginia-type flue-cured tobacco. For 1985, that tariff quota is governed by Council Regulation No 3564/84 of 18 December 1984 (Official Journal 1984, L 338, p. 183) and for 1986 by Council Regulation No 3601/85 of 17 December 1985 (Official Journal 1985, L 352, p. 192), both applying generalized tariff preferences in respect of certain agricultural products originating in developing countries. The fourth recital in the preamble to the first of those regulations and the fifth recital in the second state that that system consists of: '. . . a reduction in customs duties within the limits of a Community ceiling or tariff quotas for tobacco . . . '. The detailed arrangments for the opening of that tariff quota for unmanufactured Virginia-type flue-cured tobaccos are contained in Articles 8 to 12 of both regulations.

II — Written procedure

1. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 4 September 1986 by the Belgian Government, represented by A. Van de Velde, Adviser to the Customs and Excise Administration, acting as Agent; on 4 September 1986 by the United Kingdom, represented by H. R. L. Purse, Assistant Treasury Solicitor, acting as Agent; on 8 September 1986 by the Commission of the European Communities, represented by Peter Oliver, a member of its Legal Department, acting as Agent; and on 10 September 1986 by Imperial Tobacco Ltd, represented by R. S. Whiting, acting as Agent.

2. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

3. By Decision of 8 April 1987 the Court assigned the case to the Fourth Chamber pursuant to Article 95 (1) and (2) of its Rules of Procedure.

Written observations submitted to the Court

A — *The first question*

4. In substance, there is no divergence between the views of the parties as to the fact that the result of the contested regulation is to classify Virginia-type flue-cured tobacco stems in subheading 24.01 B.

5. *Imperial Tobacco,* on the basis of that interpretation, maintains that the regulation is contrary to the Common Customs Tariff and must either be interepreted so as not to conflict with the Common Customs Tariff or else should be held invalid. It maintains

that the provisions of Chapter 24 of the Common Customs Tariff clearly place Virginia-type flue-cured tobacco stems in subheading 24.01 A, since they make no distinction between the various parts of the leaf. It further observes that the effect of the contested regulation is to deprive tobacco stem of the preference to which it was entitled if it originated in one of the developing countries to which the generalized system of preferences applies.

6. The United Kingdom states that in essence the first question seeks to ascertain whether the wording of Article 1 of the contested regulation, viewed in the context of its purpose and effect, is such as to require the classification of Virginia-type flue-cured tobacco stem, covered by a certificate of authenticity which establishes that it is of Virginia type, within subheading 24.01 B or whether it was designed to cover stem of tobacco other than that specifically mentioned in subheading 24.01 A.

7. Until 1 January 1985, the date of entry into force of the contested regulation, it was the United Kingdom practice to admit under subheading 24.01 A all unmanufactured tobacco goods (including stem) of flue-cured Virginia type, provided that they were covered by a certificate of authenticity. Only stem not covered by such a certificate came under subheading 24.01 B.

8. On the assumption that the contested regulation does not amend Chapter 24 of the Common Customs Tariff but simply clarifies it for the purposes of uniform application of the tariff, it is the opinion of the United Kingdom that no scope exists for classification of tobacco stem, even if it is of the properly authenticated Virginia flue-cured type, under any subheading other than subheading 24.01 B of the tariff, by reason of the clear recitals in the preamble to the regulation and of the wording of Article 1 itself. The regulation requires *all* tobacco stems to be classified under subheading 24.01 B.

9. The United Kingdom also states that in the absence of specific provisions of Community law, the Customs Cooperation Council's Explanatory Notes, even though they have no binding legal force, are an authoritative source for interpreting the headings of the Common Customs Tariff. In this case, those notes corroborate the above interpretation of the contested regulation.

10. The United Kingdom suggests that the first question should be answered as follows:

'The purpose, wording and effect of Commission Regulation (EEC) No 3517/84 is such that it may only properly be interpreted so 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'.

11. The *Belgian Government* considers it to be established that the contested regulation classifies tobacco leaf-stems in subheading 24.01 B.

12. The *Commission* maintains that the only purpose of the contested regulation is to place tobacco leaf-stems under subheading 24.01 B, even if they come from leaves of a type falling within subheading 24.01 A. Even before the adoption of the regulation, it was clear that both the lamina and the leaf-stem of types of tobacco not falling within subheading 24.01 A fell within subheading 24.01 B. It would therefore have been pointless to adopt a regulation whose sole purpose was to provide that stems of such types of tobacco fell under subheading 24.01 B.

13. The Commission therefore proposes that the first question should be answered as follows:

'According to Commission Regulation (EEC) No 3517/84, tobacco stem is to be classified under subheading 24.01 B of the Common Customs Tariff even when it is covered by a certificate of authenticity which establishes that it is of *flue-cured Virginia type*'.

B — *The second question*

14. According to the order for reference, the validity of the contested regulation is challenged by Imperial Tobacco on the ground that it is contrary to the clear provisions of the Common Customs Tariff and that the Commission has therefore exceeded its powers.

15. *Imperial Tobacco* maintains that the Common Customs Tariff clearly places Virginia-type flue-cured tobacco in subheading 24.01 A, without making any distinction between stem and lamina, and that the Commission is not entitled to classify such tobacco in any other subheading. By virtue of Regulation No 97/69 of the Council, the Commission's powers in the matter are subject to the Common Customs Tariff itself and are thus merely interpretative. According to the opinion of Mr Advocate General Mayras in Case 37/75 *Bagusat KG* v *Hauptzollamt Berlin-Packhof* [1975] ECR 1339 the Commission may adopt regulations to specify the content of headings or subheadings of the Common Customs Tariff provided that in doing so it merely specifies or clarifies the provisions of the tariff without modifying them or distorting their scope, which is determined by the Council alone.

16. Imperial Tobacco relies upon the following arguments in support of its view that the contested regulation is contrary to the provisions of the Common Customs Tariff:

(a) the terms of heading No 24.01 refer to tobacco in general and make no distinction between different parts of the leaf. If it had been intended to permit so important a distinction, it would have been expressed;

(b) subheadings 24.01 A and B appear plainly to be intended to make distinctions between different types of tobacco and not different parts of the leaf. Subheading 24.01 B entitled simply 'Other' necessarily also means 'other types' of tobacco;

(c) a distinction between different parts of the tobacco leaf does not conform to trading practice or reality. The stem and lamina of Virginia-type tobaccos are separated only for practical purposes in the country of production. They are purchased together or in related quantities and both are fully used in the manufacture of the same types of cigarettes;

(d) if it were within the powers of the Commission to distinguish between different parts of the tobacco leaf and to place some parts in subheading 24.01 B, there could be no reason why the Commission should not be entitled to place the lamina in 24.01 B, which would be absurd and unreal;

(e) The distinction being imposed by the contested regulation can be shown to be based on an out-of-date understanding of tobacco manufacturing technology. In the Customs Cooperation Council Nomenclature Explanatory Notes, stems are under the heading 'tobacco refuse', covering, for example, waste resulting from the manipulation of

tobacco leaves or from the manufacture of tobacco products, because at that time they were discarded after threshing, which is no longer the case today. It is clearly apparent from previous decisions of the Court that the Explanatory Notes provide guidance to the interpretation of the Common Customs Tariff, but must give way to any contrary provisions of Community law, in this case the Common Customs Tariff itself. It appears that the Commission has paid undue regard to the literal wording of the Explanatory Notes without appreciating that they cannot supersede the plain language of the Common Customs Tariff or that they are out of date. The Commission has apparently wished to put all 'waste' into the category of 'Other' but has not appreciated that the stems are not waste;

(f) the contested regulation is defective because it is not supported by correct reasoning. The preamble to the regulation does no more than state that the stems have the characteristics of tobacco refuse, which is clearly incorrect. The Commission's powers do not extend to basing a decision on a manifest error of fact, even though, as the Court has held, it has a wide discretion in defining the subject-matter of tariff headings;

(g) stem which is identifiable as of the types of tobacco mentioned in subheading 24.01 A and which has the required certificate of authenticity cannot be classified under subheading 24.01 B;

(h) the contested regulation infringes the Rules for the interpretation of the Nomenclature of Common Customs Tariff. According to general rule 3 (a), the most specific description is to be preferred to headings providing a more general description and that applies equally, under general rule 5, to the determination of the appropriate subheading. Subheading 24.01 B is a generic heading of a residual nature and as such its scope is less specific than that of subheading 24.01 A.

17. Imperial Tobacco suggests that the Court should reply to the questions submitted to it by ruling that stems of flue-cured Virginia-type tobacco are placed by the Common Customs Tariff in subheading 24.01 A and that the contested regulation should be declared void as being contrary to the provisions of the Common Customs Tariff.

18. The *United Kingdom* has submitted observations only on the first question. The question whether it is proper to regard stem of the flue-cured Virginia type, properly authenticated, as 'tobacco refuse' in the light of modern technological advance is a matter which is material only to the question of the validity of the contested regulation, and it is content for that issue to be decided by the Court.

19. The *Belgian Government* refers in the first place to the origin of the provisions, observing that subheading A of heading No 24.01 of the Common Customs Tariff is the result of a concession granted by the EEC to the United States of America under the General Agreement on Tariffs and Trade (GATT). A preferential tariff is granted to a number of developing countries for the same goods.

20. The Customs Cooperation Council Nomenclature (CCCN) provides for subheadings in order to make it possible to correlate headings with the Standard International Trade Classification (SITC) of the United Nations. Four subheadings of the CCCN (24.01 A to D) and four headings of the SITC (121.11, 121.19, 121.21 and 121.29) concern 'tobacco', whilst one subheading (24.01 E) and one heading (121.30) also concern 'tobacco refuse'.

21. In the mean time, the Customs Cooperation Council has adopted a revised nomenclature, the 'Harmonized Commodity Description and Coding System' (HS), which provides, in respect of products under heading No 24.01, the three following subheadings (with the corresponding SITC subheadings):

	HS	*SITC*
24.01-10	tobacco, not stripped	121.11-121.19
24.01-20	tobacco wholly or partly stripped	121.21-121.29
24.01-30	tobacco refuse	121.30

In the notes on 'tobacco refuse' in the CCC Nomenclature and the harmonized system, reference is also made to leaf midribs and leaf stalks. In the negotiations concerning the Nomenclature and the Explanatory Notes, no party made any reservation on this point.

22. Accordingly, tobacco leaf midribs are to be regarded as tobacco refuse within the meaning of:

(i) heading 121.30 of the SITC;

(ii) heading No 24.01 and subheading 24.01-30 of the CCC Nomenclature;

(iii) subheading 24.01-30 of the harmonized system;

(iv) subheading 24.01 B of the Common Customs Tariff.

23. The contested regulation does not change the scope of Common Customs Tariff heading No 24.01, but is merely confirmative.

24. The *Commission* refers to the history of the contested regulation. It observes that when it came to the notice of the Commission that the United Kingdom authorities treated Virginia-type flue-cured tobacco leaf-stems as falling under subheading 24.01 A and that they therefore attributed them to the tariff quota for that subheading, the Commission, having always been firmly of the opinion that such stems fell under subheading 24.01 B, considered that the most appropriate course was for it to adopt a regulation to that effect according to the procedure laid down in Council Regulations Nos 97/69 and 2055/84. A draft regulation was duly submitted to the Nomenclature Committee and when the vote was taken only the United Kingdom delegation voted against it. The Danish and Irish delegations abstained, and all the other delegations voted for it. The Commission then adopted the draft, which then became Regulation No 3517/84 whose validity is contested.

25. The Commission considers that, by adopting the contested regulation, it kept well within the bounds of the discretion conferred upon it. According to the decisions of the Court on Regulation No 97/69, the Council 'conferred on the Commission, acting in cooperation with the customs experts of the Member States, a wide discretion as to the choice between two or more tariff headings in which a given product might be classified' (Case 158/78 *Biegi* v *Hauptzollamt Bochum* [1979] ECR 1103).

26. In the Commission's opinion there is no doubt that the 'refuse' falls under subheading 24.01 B. That is shown by the fact that subheading 24.01 A refers expressly to certain types of 'tobaccos'.

27. The Commission points out that the value of the stem is only about one-fifth of that of the lamina. As regards the meaning of the term 'refuse', the Commission considers that tobacco stems have always been regarded as refuse. That conclusion

follows clearly from the Customs Cooperation Council Explanatory Notes according to which heading No 24.01 includes '(1) unmanufactured tobacco . . . ; [and] (2) tobacco refuse, such as . . . stalks, midribs, trimmings . . . '. Whilst conceding that tobacco stems can now be used in the manufacture of cigarettes, the Commission maintains that they must still be classified as refuse. In the context of the Common Customs Tariff, the term 'refuse' does not refer only to goods having no value whatever, since no account will be taken of them in any case. Mr Advocate General Warner has said (with respect to Chapter 23 of the Common Customs Tariff) that '. . . there could be little purpose in classifying for customs purposes that which is fit only to be thrown away. So, in this context, "residues" and "wastes" are relative terms: what is one industry's "residue" or "waste" is another's raw material' (Joined Cases 69 and 70/76 *Dittmeyer* v *Hauptzollamt Hamburg-Waltershof* [1977] ECR 231). In the Commission's opinion, that view is confirmed by the interpretation given by the Court to the term 'animal . . . waste not intended for human consumption' (Case 90/83 *Paterson* v *Weddel* [1984] ECR 1567). The Court concluded that that term covered '. . . inedible parts [which] have far less value and importance than edible products . . . '. The Commission maintains that, in the present case, the term 'tobacco refuse' must be taken to refer to any product which, after removal from the tobacco leaf, has far less value and importance than the lamina. By adopting the contested regulation, the Commission therefore kept within the bounds of the discretionary power conferred upon it by the Council.

28. In the opinion of the Commission, subheading 24.01 A covers only those tobaccos which are listed under that subheading, provided that they are accompanied by a certificate of authenticity issued by the State of production. Subheading 24.01 B covers tobaccos of the types listed in subheading 24.01 A which are not accompanied by such a certificate, tobaccos of the types not mentioned under subheading 24.01 A and tobacco refuse of all types. That is confirmed by the Nimexe, which includes under subheading 24.01 B various types of tobacco (24.01-61 to 24.01-78) and also tobacco refuse (24.01-80). None of the Nimexe codes falling within subheading 24.01 A covers tobacco refuse.

29. Finally, the Commission states that the contested regulation in no way altered the pre-existing situation either as regards the Common Customs Tariff or as regards the system of generalized preferences. It is clear from the annual regulations on the system of generalized preferences, together with the Nimexe, that even before the adoption of the contested regulation Virginia-type flue-cured tobacco leaf-stems did not benefit from the preferences laid down for tobacco falling under subheading 24.01 A. Moreover, both the system of generalized preferences and the Nimexe refer only to two types of unmanufactured flue-cured Virginia tobacco, namely 24.01-02 — *'not stripped'* — and 24.01-09 — 'wholly or partly *stripped'*. The term *'stripped'* is perfectly clear.

30. The Commission proposes that the second question should be answered as follows:

'Examination of the regulation has not disclosed any factor such as to affect its validity'.

C. Kakouris
Judge-Rapporteur