OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 17 MARCH 1982

My Lords,

By actions brought in the First Civil Chamber of the Tribunale Civile di Roma, four Italian undertakings seek an order requiring the Italian Ministry of Foreign Trade to release certain bank guarantees that they had provided in accordance with Article 1 of Law No 1126 of 20 July 1952 (Gazzetta Ufficiale No 206 of 5 September 1952) and a Ministerial Decree made thereunder. The terms and effects of that legislation are set out in my opinion in Case 95/81 *Commission* v *Italy* to which I refer without repeating.

The plaintiff undertakings in the first two actions had imported goods to Italy from States not belonging to the European Communities, namely Cyprus and Argentina, whereas the other two plaintiff undertakings had imported to Italy goods in free circulation in the Netherlands and in the Federal Republic of Germany. In each case the imported goods were agricultural produce (locust beans, maize, coffee and cotton meal). In each case, the plaintiff had contracted to make an advance payment to the vendor in United States dollars. Each had, therefore, obtained a bank guarantee, for a sum equal to 5 % of the value in lire of the advance payment, in favour of the Ufficio Italiano dei Cambi, as the Italian legislation required. In each case, the goods covered by the guarantee arrived on Italian territory within the period specified under Italian legislation which period was, at the material time, set at 30 days from the date of the advance payment (see the Ministerial Decree of 7 August 1978, Gazzetta Ufficiale No 220 of 8 August 1978). In each case, however, there was a delay in clearing the goods (or substituted goods, in one case) through customs, with the result that each undertaking was unable to submit its declaration, for all or part of the goods in question, until after the expiry of the statutory period. Accordingly, the Italian Ministry of Foreign Trade appropriated a proportion of each undertaking's guarantee corresponding to the quantity of goods in respect of which the declaration of importation had been made more than 30 days after the advance payment.

The plaintiff undertakings contended that the Ministry had acted unlawfully in appropriating the guarantees since on its proper construction the Italian legislation authorized the forfeiture of a guarantee only if more than 30 days had intervened between the making of the advance payment and the arrival of goods on Italian territory, irrespective of the date when the goods were cleared through customs. In the alternative, they contended that if the statutory period was to be measured from the date of advance payment to the date of the clearance of the goods through the Italian customs, the Italian provision

contravened certain provisions in the Italian Constitution and in Community law.

Such were the circumstances in which the Tribunale referred to this Court two questions for preliminary rulings under Article 177 of the EEC Treaty. By the first it asks (in effect) whether the application of the Italian legislation in issue constitutes a measure having equivalent effects to a quantitative restriction on trade between Member States or a charge having equivalent effect to customs duties on that trade, contrary to Articles 9, 10, 13 and 3 to 36 of the EEC Treaty or entails discrimination contrary to Article 7 of that Treaty, or a breach of the obligation under Article 106 thereof to authorize, in the currency of the Member State in which the creditor resides, any payments connected with the movement of goods, or a breach of that part of Regulation No 120/67 of 13 June 1967 on the common organization of the market in cereals (Official Journal, Special Edition 1967, p. 33) which states that there shall be applied to the intra-Community trade in cereals the prohibition of customs duties, quantitative restrictions and equivalent charges and measures. By the second question, it asks (in effect) whether the application of the Italian legislation constitutes a measure having equivalent effects to a quantitative restriction on imports to the Community from third States, or a charge equivalent to customs duties on that trade, contrary to Articles 9, 10, 13 and 30 to 36 of the EEC Treaty together with Articles 13, 15 and 18 of Regulation No 120/67 or amounts to an unlawful increase in the rates of levies laid down in that regulation or entails discrimination contrary to Article 7 of the EEC Treaty.

The Italian Government rightly objects to the form in which these questions are framed, observing that in references for preliminary rulings under Article 177 of the Treaty this Court has no jurisdiction to determine the compatibility of national measures with provisions in the Treaties or acts of Community institutions but only to rule upon the validity or interpretation of those Community provisions in the abstract. It is, however, well established that in such a case this Court may extract from the wording of the reference submitted to it by a national court or tribunal the questions arising as a preliminary matter concerning the interpretation of the Treaty or acts of the institutions. This was done, for example, in Case 20/64, *Albatros* v *Sopéco* (1965) ECR 29 at p. 34, and in a series of subsequent decisions referred to in my opinion in Case 244/80 *Foglia* v *Novello*, 9 July 1981. The questions arising in the present case may indeed be restated in abstract terms. In essence, the Court is asked whether, on their proper construction, the provisions of Community law mentioned by the national court prohibit Member States from requiring importers of goods firstly, from other Member States, or secondly from third States, who make advance payment in a foreign currency for those goods, to provide guarantees that are liable to be forfeited if the importation is not effected within a specified period after the making of the advance payment.

I deal first with the position covered by the first question, namely whether there is such a prohibition in the event of trade between Member States as in two of the instant cases.

The plaintiff undertakings were careful to state that their objection under Community law to the contested Italian measures arose only if the Italian legislation, on its proper construction, provided for the forfeiture of the guarantee if the goods had not been cleared through customs within 30 days of the making of the advance payment. If, on the other hand, the statutory period was measured from the date of payment to the date of the arrival of the imported goods on national soil, it was not, in the view of those undertakings, open to objection from the point of view of Community law. The Italian Government contends that the statutory period must be taken to extend to the date of the clearance of goods through the customs, for if the guarantee were released as soon as the goods arrived on Italian territory traders would be free to divert them to another State, so evading the monetary restrictions on importations. If there is an ambiguity in Italian legislation, arising from the use of the word "importazione" (or "importation") in Law No 1126 of 20 July 1952, it is not for this Court to resolve the matter, even though it may offer an interpretation of Community law such as will enable an Italian court to construe national law accordingly. I do not consider it right, however, to confine the question, as the four undertakings would have it, to cases in which national law provides for the forfeiture of the guarantees of traders whose goods, purchased abroad, were detained for a crucial period by the customs authorities at the port of arrival. The national court has not framed its questions so narrowly; and it is perfectly possible to envisage cases in which a trader is exposed to the risk of losing his deposit by reason of a delay, exceeding 30 days, between the making of the advance payment and the arrival of the goods at the port. In both cases the delay may, or may not, be attributable to factors beyond the trader's control.

In my opinion in Case 95/81 *Commission* v *Italy* I expressed the view that the application of Law No 1126 of 20 July 1952 (as amended) and certain acts adopted thereunder, amounted to a measure having an effect equivalent to quantitative restrictions on trade between Member States, to the extent that they were applied to genuine commercial transactions (that is, imports in the ordinary course of trade) since that law and those acts were liable to expose traders to the risk of forfeiting sums lodged or provided by way of guarantee and to cause traders to incur additional costs, in the form of bank charges or the loss of interests on deposits. I took the view that there was no measure having equivalent effects to a quantitative restriction where the impact of a national law or practice was felt only by those whose dealing in goods was the mere vehicle for currency speculation, for in that case the "trade in goods" was not trade of the kind envisaged by Article 30

of the EEC Treaty. The same is true of Article 9 of the Treaty.

The facts of that case differ from those of the present in only one material particular: in Case 95/81 the Ministerial Decree in force at the relevant time stipulated a period of four months, following the date of the making of an advance payment, in which a trader might import the goods so as to retain his guarantee. In the four instant cases the period was of 30 days. There is no reason why the answer given in Case 95/81 should be modified, in favour of a national measure, when the time-limit specified in such a measure is shorter; rather the contrary. Accordingly, I would answer on the lines set out in my opinion in Case 95/81, that part of the Tribunale's first question which deals with the interpretation of the provisions in the EEC Treaty governing the elimination of measures having equivalent effects to quantitative restrictions.

My answer to that aspect of the Tribunale's first question disposes, in effect, of the Tribunale's enquiries about the compatibility of the contested legislation with the Community rules governing charges having an effect equivalent to customs duties. While I repeat my view that a single legislative act or situation may give rise to separate problems falling to be considered under two or more provisions of Community law, "those provisions may be of a different kind and this implies that their respective fields of application must be distinguished" (Case 74/76 *Ianelli* v *Meroni* (1977) ECR 557 at page 574; see also Case 91/78 *Hansen* v *Hauptzollamt Flensburg* (1979) 935 at page 953). The suggestion that provisions of the kind mentioned in the present case might constitute an equivalent charge arises from the tendency of such provisions to obstruct imports by adding to traders' costs. I take the view that those provisions are properly characterized as measures equivalent in effect to quantitative restrictions, rather than charges having an effect equivalent to customs duties since the cost which they are liable to impose on importers is not properly characterized as a "duty imposed unilaterally either at the time of importation or subsequently", as the Court put it in Joined Cases 2 and 3/62 *Commission* v *Luxembourg and Belgium* "the Gingerbread cases", (1962) ECR 425 at page 432. See F. Woolridge and R. Plender "Charges having an effect equivalent to customs duties" (1978) E. L. Rev. 101 at pp. 105-115.

Different considerations apply to the Tribunale's question about Article 106 of the EEC Treaty, since the objection taken to the Italian measures, on the basis of that article, is not that they are so framed or applied as to expose importers to risks or costs which constitute obstacles to trade, but rather that such measures are intrinsically inconsistent with a specific obligation, created by Article 106:

"to authorize, in the currency of the Member State in which the creditor or the beneficiary resides, any payments connected with the free movement of goods, services or capital, and any transfers of capital and earnings to the extent that the movement of goods,

services, capital and persons between Member States has been liberalized pursuant to this Treaty."

This Court characterized the object of Article 106 in broad terms in Case 7/78 *R* v *Thompson* (1978) ECR 2247 at page 2274, paragraph 24, stating that:

"The aim of this provision is to ensure that the necessary monetary transfers may be made both for the liberalization of movements of capital and for the free movement of goods, services and persons."

In Case 203/80 *Casati*, 11 November 1981 at para. 20, the Court repeated, in substance, that statement. In neither of these cases, however, was the Court directly confronted with the problem arising in the present case, namely, the use of a currency which could not, upon any construction, be regarded as that of the Member State in which the creditor or beneficiary resides. For this reason, I do not think that either of these cases decides the proposition that Article 106 entails an obligation to remove restrictions on payments in currencies other than those of Member States.

It does not seem to me possible to ignore the opening words — the obligation is "to authorize" and "in the currency of the Member State in which the creditor or the beneficiary resides". I am not satisfied that there was a breach of the obligation "to authorize payments" by the provision that a deposit or bank guarantee may be required. Even if there was, there was no failure to authorize such a payment in a relevant currency. For the importance of this limitation see C.-D. Ehlermann in Groeben-Boeckh-Thiesing, *EWG-Vertrag Kommentar*, 1974, Band I, p. 1383. The only currency of the contracts was US dollars and that is not in my view covered by Article 106 (1).

Equally I do not think that the remaining paragraphs of Article 106 are applicable. Paragraph 2 of Article 106 is not to be read in isolation. Paragraph 1 provides in broad terms for the removal of restrictions on payments where the movement of goods has been liberalized pursuant to the Treaty. Paragraph 2 creates an exception for those cases where movements of goods are limited only by restrictions on payments connected therewith where the basic transaction is not subject to restrictions. Restrictions on "payments connected" therewith do not have to be abolished immediately but progressively by applying the chapter relating to the abolition of quantitative restrictions (e.g. Articles 32 and 33 (7) on quotas). See Ehlermann, op. cit. at p. 1386; also J. Megret *et al*, *Le droit de la Communauté économique européenne*, Volume 6, Tome 1, p. 18.

Since Article 106 (1) does not, in my view, apply in present case for the reasons I have given, the exception in Article 106 (2) is equally inapplicable. I have in any event doubts as to whether Article 106 (2) is not to be seen as dealing only with cases where trade in goods had been liberalized (save as to restrictions on payment) at the date the

Treaties entered into force and as to whether the restrictions on payments prohibited by Article 30 are covered by the obligation in Article 106 (2) but in the circumstances since in my view Article 30 applies and Article 106 does not for other reasons, it is not useful to elaborate these doubts.

In the light of the foregoing comments, the Tribunale's second question which deals with imports from third countries may be answered relatively briefly. By Article 18 (2) of Council Regulation No 120/67:

"Save as otherwise provided in this regulation or where derogation therefrom is decided by the Council ... the following shall be prohibited:

— the levying of any customs duty or charge having equivalent effect;

— the application of any quantitative restriction or measure having equivalent effect..."

It has not been contended that the principal provision contained in that article is subject to any derogation, relevant to the present case, decided by the Council or contained elsewhere in the regulation. Moreover, as this Court observed in Case 34/73 *Variola* v *Amministrazione Italiana delle Finanze* (1973) ECR 981 at page 989:

"There is no consideration which could justify different interpretations of the concept of 'charge having equivalent effect' as it appears in Article 9 et seq. of the Treaty, on the one hand, and ... Article 18 ... of Regulation No 120/67, on the other".

That comment appears to be equally applicable to the expression "measure having equivalent effect" as it appears in the Treaty and the regulation.

Accordingly, my comments on the characterization of national provisions as measures having equivalent effect to quantitative restrictions, apply to measures affecting imports to the Community from third States of cereals falling within Regulation No 120/67 no less than to measures affecting imports from other Member States. Equally the characterization of such provisions as measures equivalent in effect to quantitative restrictions (rather than as equivalent charges) implies that they are not to be treated as disguised increases in the rates of levy laid down by Regulation No 120/67. Finally, an examination of Article 7 of the EEC Treaty adds, in my view, nothing of significance, since it has not been contended that the national provisions giving rise to the question entail discrimination on grounds of nationality between importers nor any element of discrimination on grounds of the origin of imports, save such as is inherent in any measure equivalent in effect to a quantitative restriction.

I am therefore of the opinion that the questions posed by the national court should be answered as follows:

1. The prohibition of measures having an equivalent effect to quantitative restrictions on trade between Member States of the European Economic Community, contained in Article 30 of the EEC Treaty, embraces a

national measure requiring importers of goods from such States who make advance payments for such goods to provide guarantees liable to be forfeited when the goods are not imported within a specified period of the date of the making of the advance payment, to the extent that such measures apply to genuine imports of goods in the ordinary course of trade as opposed to speculative transactions in currencies conducted in such a manner that trade in goods is the mere vehicle for such speculation. The prohibition of charges having equivalent effects to customs duties, in Articles 9, 10 and 13 of the EEC Treaty does not embrace such a measure; nor do the terms of Article 106 of the EEC Treaty.

2. By virtue of Article 18 of Council Regulation No 120/67 the prohibition of measures having an equivalent effect to quantitative restrictions applies to imports of products covered by that regulation into Member States of the Community from third States as it applies in the case of trade between Member States.