OPINION OF ADVOCATE GENERAL ELMER

delivered on 26 June 1997 *

1. In this case the Tribunale di Salerno, Italy, has referred to the Court for a preliminary ruling various questions concerning the validity of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas [1] ('the basic regulation'), Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community [2] ('the implementing regulation') and Commission Regulation (EEC) No 1443/93 of 10 June 1993 on transitional measures for the application of the arrangements for importing bananas into the Community in 1993 [3] ('the transitional regulation'). The questions are raised with reference *inter alia* to the Fourth Lomé Convention of 15 December 1989 [4] ('the Lomé Convention') and Protocol 5 thereto ('Protocol 5').

Relevant Community provisions

2. Article 168 of the Lomé Convention provides as follows:

'1. Products originating in the ACP States [5] shall be imported into the Community free of customs duties and charges having equivalent effect.

2. (a) Products originating in the ACP States:

— listed in Annex II to the Treaty where they come under a common organization of the market within the meaning of Article 40 of the Treaty,

...

shall be imported into the Community, notwithstanding the general arrangements applied in respect of third countries, in accordance with the following provisions:

(i) those products shall be imported free of customs duties for which Community provisions in force at the time of import

* Original language: Danish.

1 — OJ 1993 L 47, p. 1.

2 — OJ 1993 L 142, p. 6.

3 — OJ 1993 L 142, p. 16.

4 — As approved by Decision 91/400/ECSC, EEC of the Council and the Commission of 25 February 1991 (OJ 1991 L 229, p. 1).

5 — Countries in Africa, the Caribbean and the Pacific which have acceded to the Lomé Convention.

do not provide, apart from customs duties, for the application of any measure relating to their import;

(ii) for products other than those referred to in point (i), the Community shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products.

...'

3. Protocol 5 lays down in Article 1, that '[i]n respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present'.

4. The Joint Declaration relating to Protocol 5, which forms Annex LXXIV to the Lomé Convention ('the Joint Declaration'), states:

'... Article 1 of Protocol 5 does not prevent the Community from establishing common rules for bananas, in full consultation with the ACP, as long as no ACP State, traditional supplier to the Community, is placed as regards access to, and advantages in, the Community, in a less favourable situation than in the past or at present.'

5. The first paragraph of Article 17 of the basic regulation lays down that any importation of bananas into the Community is to be subject to the submission of an import licence. The second sentence of the second paragraph of Article 17 lays down that the issue of such licences is to be subject to the provision of security for compliance with the import commitment, under the conditions laid down by the regulation during the period of validity of the licence. [6]

6. Article 18(1) of the basic regulation lays down a tariff quota of 2.1 million tonnes for 1994 and 2.2 million tonnes for 1995 for third-country bananas and non-traditional ACP bananas [7] and provides that within the framework of the tariff quota imports of third-country bananas are to be subject to a levy of ECU 75 and imports of non-traditional ACP bananas are to be subject to a zero duty; apart from the quota, imports of third-country bananas and non-traditional

6 — Derogations may be granted under the committee procedure laid down in Article 27 of the basic regulation. That did not, however, occur in this case.

7 — By non-traditional ACP bananas is meant quantities of bananas from ACP countries imported into the Community which exceed the quantity defined in the annex to the basic regulation. For Somalia a traditional quantity of 60 000 tonnes was set.

ACP bananas are to be subject to a levy of ECU 850 and ECU 750 per tonne respectively.

7. The implementing regulation lays down in Title II concerning traditional ACP bananas *inter alia* as follows:

'*Article 14*

...

2. Import licence applications shall be lodged with the competent authorities of any Member State during the first week of the last month of each quarter.

...

Article 17

1. The competent national authority shall issue the licences not later than the 21st day of the last month of each quarter. Where that day is not a working day, the licences shall be issued on the first following working day at the latest.

2. The term of validity of import licences shall expire on the seventh day of the fourth month following the month of issue.

...'

Facts of the case and the questions referred for a preliminary ruling

8. Somalfruit SpA is a Somali company which exports bananas. Camar SpA is an Italian company which imports bananas. On 20 September 1994 Camar applied to the Italian Ministry of Foreign Trade for a licence to import a cargo of 533 tonnes of bananas from Somalia, which were scheduled to arrive in Italy during the last quarter of 1994. The bananas were to be deducted from the quota of traditional ACP bananas reserved for Somalia.

9. The application was refused by the Ministry of Foreign Trade, in accordance with a negative opinion from the Commission, on the ground that the application had not been made in the first week of the last month of the relevant quarter (Article 14(2) of the implementing regulation).

10. Somalfruit and Camar thereupon applied for an emergency order to the Tribunale di Salerno, which concluded that the imports were of non-traditional ACP bananas outside the tariff quota of 2.1 million tonnes, so that the rejection of the application for an import licence was lawful. In the circumstances the Tribunale di Salerno ordered the local customs office to clear the consignment and release the bananas for free circulation against payment of ECU 750 per tonne or of security guaranteeing payment of the equivalent amount.

11. Camar and Somalfruit brought an action against the Italian Ministry of Finance and Ministry of Foreign Trade challenging the legality of the rejection of the application for an import licence and claiming compensation. By an order of 12 October 1995, the Tribunale di Salerno decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Should that part of [the basic regulation] which limits the right to import Somali bananas — the so-called right of access, as recognized by [the Lomé Convention], Protocol 5 thereto and [the Joint Declaration] — be considered valid, in particular inasmuch as it:

(a) establishes different import arrangements for traditional bananas, non-traditional bananas and bananas in excess of the quota set for that purpose and thus imposes quantitative restrictions;

(b) imposes the requirement to obtain an import document and to lodge a security for that purpose — a document which is not purely for statistical purposes and is subject to conditions that are onerous and difficult to satisfy;

(c) imposes a customs duty of ECU 750 per tonne for bananas in excess of the tariff quota?

2. Should those parts of [the implementing regulation] and [the transitional regulation], as amended and supplemented by later regulations, which limit, reduce or restrict unnecessarily and in a disproportionate manner in relation to the objective pursued the right of access of Somali bananas, as guaranteed by the Convention referred to in Question 1 and by [the basic regulation], be considered valid, in particular inasmuch as they:

(a) set the final date for the submission of applications for import licences up to three months and three weeks before the transaction and limit the period for

submitting applications to one [full] week on only four occasions a year;

(b) provide, in the event of non-compliance with the deadline, for forfeiture, in all cases, of the right to import for an entire quarter, without laying down specific rules or derogations for situations of *force majeure*, unforeseeable circumstances and similar situations;

(c) make the issue of the licence subject to the prior deposit of a security?'

Relationship to the Lomé Convention

12. By its first question and the first limb of the second question, the national court essentially seeks to ascertain whether the basic regulation and the implementing regulation are invalid because they conflict with the Lomé Convention.

13. The French Government, the Council and the Commission pointed out that Somalia has not ratified the Lomé Convention and that Camar and Somalfruit cannot therefore challenge the validity of Community law by reference to that Convention.

14. Camar and Somalfruit acknowledge that Somalia has not ratified the Lomé Convention, but claim that the Convention nevertheless binds the Community in relation to products from Somalia, since Community law treats Somalia as an ACP State. Even if the extension of the Lomé Convention to Somalia is accepted as being unilateral, the Community is obliged to comply with the Convention. Camar and Somalfruit further stated that the Lomé Convention is valid for Somalia on a customary law basis.

15. Somalia has not ratified the Lomé Convention. The precondition for the Community's commitment under the Lomé Convention *inter alia* to give favourable treatment to certain products from Somalia must, I consider, be assumed to have been that Somalia should ratify the Convention and thereby undertake the obligations which are the corollary of and the consideration for the rights thereunder. That precondition did not, however, materialize.

16. The Court was informed that on 28 June 1996 the ACP-EU Council of Ministers

adopted the following conclusions concerning Somalia:

'The ACP-EU Council of Ministers

1. confirms the political accession of Somalia to the Lomé Convention, despite the fact that Somalia has not been able to ratify the Convention for reasons beyond its control;

...'.

That statement is, in my view, a declaration of a political character and can scarcely be regarded as binding the Community in law in relation to Somalia in such a way that that country can rely on the rules of the Lomé Convention vis-à-vis the Community.

17. The common market organization for bananas does, however, treat Somalia as an ACP country in accordance with that political declaration and allocates to it a quota for traditional ACP bananas. The argument that the Community must thereby assume obligations with regard to Somalia in accordance with the Lomé Convention is not in my view tenable. The fact that the Community unilaterally, *de facto* and politically, treats Somalia favourably cannot imply that it has any obligation towards Somalia since that is purely unilateral favourable treatment on the part of the Community.

18. Nor, in my view, has any evidence come to light to support the claim that by way of customary law Somalia has become a party to the Convention. That would presuppose that Somalia, for its part, by conduct satisfying the strict requirements attaching to custom in international law, had undertaken to meet the obligations arising under the Convention which are the corollary to and consideration for obtaining rights thereunder. According to the evidence there is no basis, however, for such an assumption.

19. In my opinion the question of the validity of the Community market organization for bananas with reference to the Lomé Convention cannot, accordingly, be raised in a case concerning bananas from Somalia. That limb of the questions concerning the compatibility of Community law with the Lomé Convention is therefore hypothetical in relation to the case before the national court.

20. As a result of the hypothetical nature of that limb of the questions, consideration might be given to the question whether the Court should decline to reply thereto on the ground that its lacks jurisdiction to do so. In that connection it must, however, be remembered that the preliminary-ruling procedure is based on cooperation between the Court of Justice and the national courts and is aimed at producing a reply which will be useful in deciding the case before the national court. I consider it most appropriate for the Court to give the national court a reply stating clearly that the Lomé Convention has no relevance for the present case.

21. In the light of the foregoing I would propose that the Court reply to the first question and to the first limb of the second question, concerning the compatibility of the implementing regulation with the Lomé Convention, to the effect that in a case concerning the charging of duty on bananas imported from a country which has not ratified the Fourth Lomé Convention no question arises as to whether the basic regulation and the implementing regulation are invalid as contrary to the provisions of the Convention.

Relationship to the basic regulation

22. By the second limb of the second question, the national court wishes to ascertain whether the implementing regulation or the transitional regulation are invalid as contrary to the basic regulation.

23. I would point out that the transitional regulation lays down transitional measures for the application of the arrangements for importing bananas into the Community in 1993. The transitional regulation is therefore irrelevant as far as the case before the national court is concerned, which concerns imports of bananas in the last quarter of 1994. In so far as it concerns that regulation, the question is therefore hypothetical as regards the case before the national court and should not, therefore, be answered.

24. Camar and Somalfruit stated that Article 14(2) of the implementing regulation should be interpreted to the effect that failing to meet the deadline should not prevent operators from seeking a licence for the import of bananas from an ACP country provided the quota of traditional ACP bananas for the country in question has not been exhausted. An interpretation to the contrary effect would conflict with the principle of proportionality, Article 17 of the basic regulation and Article 16(3) of the implementing regulation, according to which non-traditional ACP bananas are bananas imported after import licences have been issued for all the traditional import quantities. In the case

before the national court, licences had not been issued for all the traditional import quantities from Somalia.

25. The French and Italian Governments and the Council stated that the implementing regulation does not conflict with the basic regulation.

26. Under Article 14(2) of the implementing regulation, import licence applications for traditional ACP bananas are to be lodged during the first week of the last month of each quarter. Within two days following the closing date, the national authorities are to notify the Commission of the quantities covered by licence applications, and the Commission is to determine forthwith the quantities for which licences may be issued (Article 16(1)). If applications for import licences for bananas from an ACP country relate to a quantity larger than the traditional quantity for that country, the Commission is to set a single percentage to be applied to all licence applications concerning bananas from that country to reduce the quantities allocated. Where import licences are issued for all the traditional quantities from the same country of origin, the Commission is to notify the Member States and operators that any further imports from that country during the year in question are to be considered non-traditional. The licences are to be issued not later than the 21st day of the same month (Article 17(1) of the implementing regulation) and their term of validity is to expire on the seventh day of the fourth month following the month of issue (Article 17(2)).

27. The deadline for the submission of applications for import licences is thus three weeks before the quarter to be covered by the import licence applied for. The first two weeks are used for the calculation and drawing-up of the licences which accordingly are available one week before the beginning of the quarter in which they are to be used.

28. A time-limit for the submission of applications for import licences is necessary for several reasons. First, the Commission must carry out a number of calculations, including the setting of a single percentage to reduce the quantities allocated where applications for a particular ACP country relate to an overall quantity that exceeds the country's traditional quantities. Those calculations can only be made if an overview can be obtained, by way of a time-limit, as to the size of the quantities in respect of which import licences have been applied for. Secondly, a time-limit enables the administrative procedures to be concluded and licences issued before the beginning of the quarter to which the licences relate.

29. Traditional quantities that have not been used up in the first, second or third quarter are transferred to the following quarter(s) in

the same year. Traditional quantities that have not been used up in the fourth quarter cannot, however, under the implementing regulation, be transferred to the next year, and are therefore forfeited. That is, however, a consequence of the fact that under the system of the basic regulation there is an annual traditional quantity. In order to divide that annual traditional quantity between competing applicants a time-limit is quite simply necessary. The fact that in the implementing regulation the Commission chose to operate quarterly time-limits is no ground for criticism in my view. That makes it easier to administer the quantities in a flexible way rather than if the allocation was carried out once a year, and conversely it would be significantly more of an administrative burden if a quota had to be allocated every day, every week or every month.

30. Nor, in my view, can the rules on time-limits in the implementing regulation be interpreted to the effect that the time-limit for applications is waived in cases where the traditional quantity has not been used up by the applications that have been submitted in time. First, there is nothing in the text of the implementing regulation to suggest anything of the sort. Secondly, such an interpretation would on the one hand make it necessary to set a further time-limit for the submission of applications for a share of the traditional quantity of bananas from the country in question that has not been used up by import licences allocated on the basis of the applications submitted in time, *inter alia* for the purpose of setting a single percentage to reduce the quantities allocated where applications are made for larger quantities than are available as unused quantities. Accordingly in all circumstances it is necessary to have a time-limit.

31. If operators wish to take advantage of the duty exemption under the market organization for traditional ACP bananas from Somalia, it must be a minimum requirement that they submit their application in time. The fact that the implementing regulation does not mention any exemption from the time-limit for the submission of applications cannot, therefore, in my view mean that the implementing regulation is invalid.

32. Contrary to what was stated in the questions submitted by the national court, it is not the implementing regulation but rather the basic regulation which lays down in Article 17(2) that the issue of licences is to be subject to the provision of security. The question does not therefore arise as to whether the implementing regulation is contrary to the basic regulation on that point.

33. I would accordingly propose that the Court answer the second question to the effect that consideration of the implementing regulation in the light of the order for reference and the information otherwise produced in the case has revealed no factor of such a kind as to cast doubt on that regulation's validity.

Conclusion

34. In the light of the foregoing, I would propose that the Court answer the questions referred to it by the Tribunale di Salerno as follows:

(1) In a case concerning the charging of duty on bananas imported from a country which has not ratified the Fourth Lomé Convention of 15 December 1989 no question arises as to whether Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas and Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community are invalid as contrary to that Convention.

(2) Consideration of Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community in the light of the order for reference and the information otherwise produced in the case has revealed no factor of such a kind as to cast doubt on that regulation's validity.