JUDGMENT OF THE COURT (Third Chamber)

29 April 2010 *

In Case C-102/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Firenze (Italy), made by decision of 20 February 2009, received at the Court on 13 March 2009, in the proceedings

Camar Srl

v

Presidenza del Consiglio dei Ministri,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, J. Malenovský, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

* Language of the case: Italian.

Advocate General: E. Sharpston,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 11 February 2010,

after considering the observations submitted on behalf of:

— Camar Srl, by W. Viscardini and G. Donà, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— the European Commission, by L. Prete and A. Bordes, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 14 of the Convention of Association between the European Economic Community and the African States and Madagascar associated with the Community, signed at Yaoundé on 20 July 1963 (JO 1964 93, p. 1431) ('the First Yaoundé Convention'), and Article 1 of Protocol No 5 on bananas annexed to the Fourth ACP-EEC Convention, signed at Lomé on 15 December 1989 (OJ 1991 L 229, p. 3) ('the Fourth Lomé Convention').

2 The reference was made in an action for damages brought by Camar Srl ('Camar') against the Presidenza del Consiglio dei Ministri (Office of the Prime Minister) on account of the damage which that company claims to have suffered as a result of an alleged infringement of Community law on the part of the Cortre suprema di Cassazione (Court of Cassation).

Legal context

The international conventions

3 Article 1 of the First Yaoundé Convention, which forms part of Title 1 thereof, entitled 'Trade', provides as follows:

'In order to promote an increase in trade between Associate States and Member States, to strengthen their economic relations and the economic independence of the Associate States and thus contribute to the development of international trade, the High Contracting Parties have agreed on the following provisions governing their trade with each other.'

4 Article 14 of the First Yaoundé Convention is worded as follows:

'Without prejudice to the special provisions laid down in this Convention, in particular the provisions in Article 3, each Contracting Party shall refrain from any internal fiscal measure or practice that directly or indirectly leads to discrimination between its own products and like products originating in the territory of the other Contracting Parties.'

5 The First Yaoundé Convention was replaced by the Convention of Association between the European Economic Community and the African States and Madagascar associated with the Community, signed at Yaoundé on 29 July 1969 (OJ

English Special Edition 1970(II), p. 7) ('the Second Yaoundè Convention'). Article 5 of that convention provides, in terms which are almost identical to Article 14 of the First Yaoundé Convention, as follows:

'Without prejudice to the special provisions laid down in this Convention, each party shall refrain from any internal fiscal measure or practice that directly or indirectly leads to discrimination between its own products and like products originating in the territory of the other Contracting Parties.'

6 The ACP-EEC Convention signed at Lomé on 28 February 1975 (OJ 1976 L 25, p. 2) ('the First Lomé Convention') replaced the Second Yaoundé Convention. Paragraph 1 of Protocol No 6 on bananas, annexed to the First Lomé Convention, provides as follows:

'1. As regards its exports of bananas to the Community, no [African, Caribbean or Pacific (ACP)] State will be placed, as regards access to markets and advantages on the market, in a less favourable situation than in the past or at present.'

7 Formulated in virtually the same terms, Article 1 of Protocol No 5 on bananas, annexed to the Fourth Lomé Convention, provides as follows:

'As regards its exports of bananas to the markets of the Community, no ACP State will 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.'

8 Article 1 of Protocol No 4 on bananas, annexed to the Second ACP-EEC Convention, signed at Lomé on 31 October 1979 (OJ 1980 L 347, p. 140), and to the Third ACP-EEC Convention, signed at Lomé on 8 December 1984 (OJ 1986 L 86, p. 3), is also worded in virtually the same terms.

9 In accordance with Article 2(1)(f) of Decision No 2/90 of the ACP-EEC Council of Ministers of 27 February 1990 on transitional measures to be applied from 1 March 1990 (OJ 1990 L 84, p. 2) and Article 1 and the second paragraph of Article 2 of Council Regulation (EEC) No 714/90 of 5 March 1990 concerning the application of Decision No 2/90 (OJ 1990 L 84, p. 1), Protocol No 5 on bananas annexed to the Fourth Lomé Convention was to apply with effect from 1 March 1990.

National legislation

10 Law No 986/1964 of 9 October 1964 (GURI No 264 of 27 October 1964) introduced a domestic tax on the consumption of fresh bananas. That law was repealed by Law No 428/1990 of 29 December 1990 (GURI No 10 of 12 January 1991). Over the years, the amount of that tax gradually increased and, by the time it was abolished, had reached the rate of ITL 525 per kilogram. At that time there was no tax on the consumption of fruit traditionally produced in Italy.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Camar challenged, in two sets of proceedings, the tax claimed from it under Law No 986/1964 in connection with imports of bananas originating in Somalia. Those proceedings concluded with two judgments of the Corte suprema di cassazione.

12 In its subsequent action before the Tribunale di Firenze (District Court, Florence), Camar submitted that the Corte suprema di cassazione disregarded Community law, in particular the obligation under Article 234 EC, by dismissing the actions brought before it without referring certain questions to the Court of Justice for a preliminary ruling.

13 It is apparent from the information provided by Camar at the hearing that the importations with which the main proceedings are concerned took place after 1 March 1990. At that time, there was very little, if any, production of bananas in Italy.

14 The Tribunale di Firenze states that it is necessary to examine whether Law No 986/1964 is compatible with the obligations arising under the international conventions referred to at paragraphs 3 to 8 above as a preliminary issue for the purpose of assessing the merits of Camar's action for damages. It considers that that examination raises complex questions of law which have yet to be fully settled by the Court's case-law in this field.

15 Against that background, the Tribunale di Firenze stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Did Article 14 of the First Yaoundé Convention preclude the introduction by a Member State of an internal tax on bananas originating in Somalia, which was not in practice applied to domestically produced bananas (the production of which was totally non-existent or insignificant) and was not applicable to any other type of domestically produced fruit?

If the answer to Question 1 is yes:

(2) Did the Protocol on Bananas annexed to the Lomé Convention then in force preclude collection of a tax that was incompatible with Article 14 of the First Yaoundé Convention in respect of imports into Italy of Somali bananas effected in 1990, having regard to the combined provisions of that protocol and of the analogous protocols annexed to the earlier Lomé Conventions, and also Article 5 of the Second Yaoundé Convention?

If the answer to Question 2 is no:

(3) Must it be concluded that the Protocols on Bananas annexed to the Lomé Conventions precluded increases of a tax such as the Italian consumption tax on bananas originating in Somalia after 1 April 1976, regardless of the specific effect of such increases on the export of such bananas?'

The questions

Questions 1and 2

16 By its first question, the Tribunale di Firenze seeks to ascertain, in essence, whether Article 14 of the First Yaoundé Convention precluded the introduction of a tax such as that imposed in Law No 986/1964, so that, even after the Yaoundé Conventions

ceased to be applicable, a Member State could not levy a tax in respect of imports of bananas originating in an Associate State under that law.

17 In order to answer that question, it is necessary to consider, first, whether, at the time when it was introduced, Article 14 of the First Yaoundé Convention precluded a Member State from levying under a law such as Law No 986/1964 a tax on the consumption of bananas originating in Somalia. For that purpose, it is necessary to analyse the scope of Article 14, without there being any need to determine whether that provision has direct effect. As is apparent from the wording of Question 1, the Tribunale di Firenze is uncertain as to the scope of Article 14, regardless of whether it may have direct effect.

18 Article 14 of the First Yaoundé Convention provides that each contracting party is to refrain from any internal fiscal measure or practice that directly or indirectly leads to discrimination between its own products and like products originating in the territory of the other contracting parties.

19 It is apparent from the order for reference that, at the time of the facts in the main proceedings, the production of bananas in Italy was negligible or non-existent and must therefore be disregarded. The criterion of similarity on which, according to its wording, the prohibition in Article 14 of the First Yaoundé Convention is based must be assessed in relation to table fruit typically produced in the Member State concerned (see, by analogy, Case 184/85 *Commission* v *Italy* [1987] ECR 2013, paragraph 8).

20 In that connection, it should be recalled that the Court has had to rule on whether bananas and other table fruits produced in Italy were similar in disputes relating to the interpretation of the first paragraph of Article 95 of the EEC Treaty (subsequently the first paragraph of Article 95 of the EC Treaty and now the first paragraph of Article 90 EC). It held that those two categories of products were not similar for the purposes of

the first paragraph of Article 95 EEC, since they have different characteristics and do not satisfy the same consumer needs (see *Commission* v *Italy*, paragraphs 9 and 10, and Case 193/85 *Cooperative Co-Frutta* [1987] ECR 2085, paragraphs 17 and 18).

21 The Court held that the organoleptic characteristics and the water content of those categories of product differ and that the banana is regarded, at least on the Italian market, as a foodstuff which is particularly nutritious, of a high energy content and well suited for infants (see *Commission* v *Italy*, paragraph 10).

22 Camar does not call into question that assessment of the facts. On the other hand, it has put forward arguments weighing in favour of a broader interpretation of Article 14 of the First Yaoundé Convention than that which must be applied, according to the judgments cited above, to the first paragraph of Article 90 EC.

23 Camar considers that Article 14 of the First Yaoundé Convention must be interpreted as prohibiting not only discriminatory taxation of like products but also, bringing together the provisions in the first and second paragraphs of Article 90 EC, any form of indirect fiscal protectionism benefiting national products which are in competition with imported products. It argues that any interpretation of Article 14 which is based on the premiss that imported products have the same characteristics as national products would deprive that provision of any practical effect, since the products from African countries covered by the First Yaoundé Convention are all tropical products whose characteristics differ from those of products from the Member States.

24 However, it should be noted that no support is to be found in the wording of Article 14 of the First Yaoundé Convention for the interpretation proposed by Camar. That provision simply imposes a prohibition on discriminatory taxation of like products,

using terms resembling those in the first paragraph of Article 90 EC. According to the case-law on that provision, it is accepted that the like products to which that prohibition applies are products with similar characteristics which satisfy the same consumer needs (see, to that effect, *Commission* v *Italy*, paragraphs 9 and 10).

25 It follows that, if the Community and the African States and Madagascar associated with the Community had intended to address the problem of the internal taxation of unlike products which are in competition with each other, instead of adopting a provision which was similar only to the first paragraph of Article 90 EC, they would have adopted a provision which was also modelled on the second paragraph of Article 90 EC (see, by analogy, Case C-469/93 *Chiquita Italia* [1995] ECR I-4533, paragraph 43).

26 It is clear, therefore, that the interpretation of Article 14 of the First Yaoundé Convention proposed by Camar is irreconcilable with the wording of that article.

27 It remains to be considered whether it is necessary, in order to satisfy the objective of the First Yaoundé Convention, to interpret Article 14, in spite of the terse wording of that provision, as also being directed at internal fiscal measures similar to those prohibited by the second paragraph of Article 90 EC.

28 It should be noted, first of all, that it is unnecessary, contrary to Camar's submissions, to interpret Article 14 of the First Yaoundé Convention in a manner that is broader than its wording strictly permits, in order to ensure that it is fully effective.

29 First, the words 'like products' must be interpreted not as meaning that the products must be identical but simply as excluding products with different characteristics

which do not satisfy the same consumer needs, as pointed out at paragraph 20 above. It follows that even characteristically tropical products cannot, in general, be regarded as dissimilar by comparison with products originating in the Member States.

30 Second, according to its wording, Article 14 of the First Yaoundé Convention relates to products originating in the territories of the contracting parties in general and is not confined to tropical products.

31 Secondly, in a wider context, any interpretation of Article 14 of the First Yaoundé Convention according to which the scope of that provision extends to a prohibition of internal fiscal measures, such as those referred to in the second paragraph of Article 90 EC, cannot be accepted. Those two provisions have different underlying objectives, so that they cannot be treated as equivalent through their interpretation.

32 According to the Court's case-law, the purpose of Article 90 EC is to guarantee the free movement of goods between the Member States in normal conditions of competition, prohibiting any form of protection which may result from the application to goods originating in other Member States of internal taxes of a discriminatory nature and to guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products (see, to that effect, *Commission* v *Italy*, paragraph 7)

33 Similarly, the interpretation of that provision must take account of the objectives of the Treaty as laid down in Articles 2 EC, 3 EC and 14 EC, which include, in the first place, the establishment of an internal market in which the free movement of goods, persons, services and capital is guaranteed (see, to that effect, Case 299/86 *Drexl* [1988] ECR 1213, paragraph 24).

34 Clearly, those objectives underlying Article 90 EC are absent from the First Yaoundé Convention. According to Article 1 of the convention, which, like Article 14, forms part of Title I, entitled 'Trade', the objective of the convention is to promote an increase in trade between the Associate States and the Member States, to strengthen their economic relations and the economic independence of the Associate States and thus contribute to the development of international trade.

35 The conclusion that, in order to satisfy the objective of the First Yaoundé Convention, it is unnecessary to interpret Article 14 in a manner that is broader than its wording strictly permits, so as to confer on that provision a scope that is comparable to that of the second paragraph of Article 90 EC, is also supported by the Court's interpretation of provisions that are virtually identical to Article 14 in disputes relating to agreements aimed at establishing a system of free trade. The Court has held that those provisions imposed on the contracting parties a rule against discrimination in matters of taxation, which is dependent only on a finding that the products affected by a particular system of taxation are of like nature (see Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 26, and Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR I-4263, paragraph 31).

36 Moreover, the Court has expressly held that the scope of a provision in a free trade agreement similar to Article 14 of the First Yaoundé Convention does not extend beyond the prohibition of discriminatory taxation of like products. As regards the first paragraph of Article 21 of the agreement between the European Economic Community and the Portuguese Republic signed in Brussels on 22 July 1972, concluded and approved on behalf of the Community by Council Regulation (EEC) No 2844/72 of 19 December 1972 (OJ English Special Edition 1972(I), p. 166), the Court decided, at paragraph 42 of *Kupferberg,* that there is no discrimination within the meaning of Article 21 where a Member State does not apply to products originating in the non-Member country concerned a tax reduction provided for certain classes of producers or kinds of products if there is no like product on the market of the Member State concerned which has in fact benefited from such reduction.

37 Accordingly, it must be concluded that the prohibition laid down in Article 14 of the First Yaoundé Convention is confined, in accordance with its wording, to discriminatory taxation of like products and does not therefore relate to unlike products which are in competition with each other.

38 In the light of the foregoing, the answer to Question 1 is that Article 14 of the First Yaoundé Convention did not preclude a tax on bananas originating in Somalia such as that introduced by Law No 986/1964.

39 Given the answer to Question 1, it is unnecessary to answer Question 2.

Question 3

40 By its third question, the Tribunale di Firenze seeks to ascertain, in essence, whether, in order for the national court to apply the standstill clause in the protocols on bananas annexed to the Lomé Conventions, it is necessary to examine the specific effects of increases of a tax such as that introduced by Law No 986/1964 in order to determine whether such increases are compatible with that clause.

41 Since the Tribunale di Firenze has failed to specify the Lomé Convention to which it intends to refer, it is necessary to determine, first, which of the four Lomé Conventions must be taken into account in the light of the circumstances in the main proceedings. It is apparent from the information provided by Camar at the hearing that

the imports which gave rise to the levying of the tax at issue in this case took place after 1 March 1990. Since Protocol No 5 on bananas annexed to the Fourth Lomé Convention was applicable from 1 March 1990, in accordance with Article 2(1)(f) of Decision No 2/90 and Article 1 and the second paragraph of Article 2 of Regulation No 714/90, reference must be made to that convention.

42 Article 1 of that protocol takes the form of a standstill clause. In other words, that provision aims to ensure that bananas from ACP States have access to their traditional markets upon conditions and according to rules which are no less favourable than those which existed when it entered into force. However, that guarantee of access benefits bananas from ACP States only up to the quantities imported when that provision entered into force (*Chiquita Italia*, paragraph 59).

43 The first three Lomé Conventions all contained a standstill clause worded in terms similar to those in Article 1 of Protocol No 5 on bananas annexed to the Fourth Lomé Convention (*Chiquita Italia*, paragraph 62). Since the First Lomé Convention entered into force on 1 April 1976, that date is the reference point for the application of the standstill clause (see, to that effect, *Chiquita Italia*, paragraph 63).

44 It is therefore for the referring court to establish whether the imports at issue in the main proceedings involved quantities of bananas of the order of those imported when the First Lomé Convention entered into force on 1 April 1976.

45 More specifically, with regard to the referring court's question concerning the examination to be carried out to determine whether increases of a tax such as that at

issue in the main proceedings are compatible with the standstill clause in Article 1 of Protocol No 5 on bananas annexed to the Fourth Lomé Convention, such increases lead to increases in the price of the bananas concerned and, accordingly, make it more difficult to sell them on the market in question (*Chiquita Italia*, paragraph 60). Accordingly, in order to examine such an increase from the perspective of the standstill clause, it is not normally necessary to examine the specific effects of the increase on imports.

46 However, in the case presented in the parties' arguments in which such increases are aimed solely at bringing a tax such as that introduced by Law No 986/1964 in line with inflation, the purpose of that standstill clause is to prevent banana exports being placed in a situation less favourable than before as regards access to their traditional markets and the advantages they enjoy on those markets (see, to that effect, *Chiquita Italia*, paragraph 63) so that the clause relates to the actual situation in those markets.

47 Accordingly, in so far as increases of a tax such as that at issue in the main proceedings are confined to adjusting the tax to take account of inflation in order to maintain the actual taxation of the goods at a consistent level, such increases are not contrary to Article 1 of Protocol No 5 on bananas annexed to the Fourth Lomé Convention.

48 In the light of the foregoing, the answer to Question 3 is that the national court is not required to examine the specific effects of increases of a tax on imports of bananas originating in Somalia, such as the tax introduced by the legislation at issue in the main proceedings, by comparison with the situation before 1 April 1976, in order to determine whether such increases are compatible with the standstill clause in Article 1 of Protocol No 5 on bananas annexed to the Fourth Lomé Convention. However,

increases of such a tax which simply adjust it to take account of inflation are not incompatible with that clause.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 14 of the Convention of Association between the European Economic Community and the African States and Madagascar associated with the Community, signed at Yaoundé on 20 July 1963, did not preclude a tax on bananas originating in Somalia such as that introduced by Law No 986/1964 of 9 October 1964.**

2. **The national court is not required to examine the specific effects of increases of a tax on imports of bananas originating in Somalia, such as the tax introduced by the legislation at issue in the main proceedings, by comparison with the situation before 1 April 1976, in order to determine whether such**

increases are compatible with the standstill clause in Article 1 of Protocol No 5 on bananas annexed to the Fourth Lomé Convention. However, increases of such a tax which simply adjust it to take account of inflation are not incompatible with that clause.

[Signatures]