OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 18 June 1987 *

Mr President,
Members of the Court,

1. The Court of Justice is called upon to adjudicate on two actions which were brought by the Commission against the Hellenic Republic for failure to fulfil its obligations and were joined in view of the fact that they are interconnected. In the first action the Commission seeks a declaration that the Hellenic Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty by making the importation of bananas which originate in other Member States or which are in free circulation there subject to the grant of an import licence, and by systematically refusing to issue such a licence in practice, whilst in the second action the Commission seeks a declaration that the Hellenic Republic has failed to fulfil its obligations under the Lomé Convention by prohibiting the importation of bananas originating in ACP countries.

2. I would emphasize, first of all, that the Court's decision concerning the charge that Greece has failed to fulfil its obligations under Article 3 (1) of the Lomé Convention by prohibiting the importation of bananas from ACP countries (Case 241/85) depends on its decision concerning the legality of the measures adopted by Greece in connection with the importation of bananas which originate in other Member States or which are in free circulation there (Case 194/85), in view of the fact that Article 6 of the Lomé Convention does not permit the ACP countries to be accorded more favourable treatment than the Member States of the Community.

3. For that reason, I propose to deal in the first place with Case 194/85.

4. I — Before I begin, however, a preliminary point concerning the extension of the subject-matter of the dispute must be resolved.

5. In its applications the Commission relies essentially on Greece's failure to fulfil its obligations under Article 30 of the EEC Treaty and Article 3 (1) of the Lomé Convention. The charges formulated during the preliminary non-contentious procedure are based on the same grounds.

6. The procedure was set in motion and the application was lodged during the transitional period established by the Act concerning the conditions of accession of the Hellenic Republic to the European Communities ('the Act of Accession'). However, at the hearing, which was held just after the expiry of the transitional period on 31 December 1985, the Agent for the Commission sought to extend the application to the period subsequent to that date as well.

7. Notwithstanding the fact that the grounds on which the application is based are essentially the same now as they were before the end of the transitional period following Greece's accession, I consider that the Commission's claim is unjustified.

8. When charged with failing to fulfil its obligations, the Greek Government

* Translated from the Portuguese.

defended itself, during the preliminary non-contentious procedure and in its defence to the Commission's application, by relying — as it was entitled to — on Article 65 (2) of the Act of Accession, that is to say on the rules in force at the time.

9. If the procedure had ended before the expiry of the transitional period, no problem would arise and only the legal position during that period would be relevant. It would make no sense in those circumstances to ask the Court to assess a future situation in advance.

10. The fact that the procedure, which was set in motion whilst the transitional provisions of the Act of Accession were in force, was subsequently extended cannot influence the applicant's procedural position.

11. As there has been a change in the rules applicable to Greece, the defendant cannot now be required to adjust its defence in accordance with the new legal position, particularly since at the time when the change occurred the written procedure in the contentious proceedings had already come to an end (the rejoinder was submitted on 5 December 1985).

12. Nor would it make sense, on the other hand, to require the defendant — as the Commission seems to demand — to state its views as from the commencement of the proceedings on a future situation and to defend itself on the basis of a hypothetical set of rules, however foreseeable those rules might be.

13. The defendant must always have at its disposal in relation to each charge the full range of defences guaranteed to it in proceedings which run their full course.

14. If it were otherwise, that would constitute an improper extension of the subject-matter of the application, which is prohibited by Articles 38 (1) (c) and 42 of the Rules of Procedure and which the Court has invariably penalized in its decisions. [1]

15. The classic situation in which the subject-matter of the dispute is amended (and in which different, supposedly wrongful, conduct is alleged, whilst the rules applicable remain the same) has its symmetrical counterpart in this case, and the same legal effects must be associated with it.

16. The application must therefore be assessed in the light of the factual and legal situation prevailing at the time when it was lodged (taking into account the preliminary non-contentious procedure), since that is required by the rights of the defence.

17. In this case, that conclusion is not affected in any way by the fact that the Commission sent the Greek Government a second reasoned opinion.

18. A second opinion was issued because the approach taken by Greece in its defence, and in particular the explanations which it furnished in response to the first reasoned opinion when it had recourse to Article 65 (2) of the Act of Accession, obliged the Commission to amend its arguments accordingly.

19. That is why the second reasoned opinion focuses essentially on an argument

1 — See, for instance, the judgment of 25 September 1979 in Case 232/78 *Commission* v *France* [1979] ECR 2729; judgment of 9 December 1981 in Case 193/80 *Commission* v *Italy* [1981] ECR 3019; judgment of 8 February 1983 in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203; judgment of 22 March 1983 in Case 42/82 *Commission* v *France* [1983] ECR 1013; judgment of 27 March 1984 in Case 50/83 *Commission* v *Italy* [1984] ECR 1633; and judgment of 15 January 1986 in Case 121/84 *Commission* v *Italy* [1986] ECR 107.

which is clearly set in the context of Article 65 (2) of the Act of Accession.

20. The subject-matter of the application was thereby established and it cannot be either extended or amended.

21. **II** — I now turn to the issues raised in Case 194/85.

22. At issue here is an order of the Greek Minister for Trade, dated 24 December 1980 and periodically renewed, which makes the importation of bananas into Greece as from 1 January 1981 conditional on the issue of a licence. In addition, the Commission finds — and the Greek Government does not dispute — that applications for the issue of an import licence are systematically refused in practice.

23. According to the Commission, both the requirement of an import licence and the systematic refusal to issue such a licence are contrary to Article 30 of the EEC Treaty.

24. In its defence, however, the Greek Government refers, as we have seen, to the existence of a national market organization covering the production and marketing of bananas, which, given the absence of a common organization of the market in that sector, supposedly makes it possible, pursuant to Article 65 (2) of the Act of Accession, to derogate from the rules on the free movement of goods.

25. I would recall that Article 65 (2) is worded as follows:

'In respect of products not covered, on the date of accession, by a common organization of the market, the provisions of Title II concerning the progressive abolition of charges having equivalent effect to customs duties and of quantitative restrictions and measures having equivalent effect shall not apply to those charges, restrictions and measures if they form part of a national market organization on the date of accession.

This provision shall only apply until the common organization of the market for these products is implemented and not later than 31 December 1985 and to the extent strictly necessary to ensure the maintenance of the national organization.'

26. The Commission, for its part, challenges the argument put forward by the Greek Government on the ground that, if a national market organization were recognized to exist — which in its view is not the case — the absolute ban on the importation of bananas would be inconsistent with Community law since, as Article 65 (2) of the Act of Accession provides, quantitative restrictions and measures having equivalent effect are permitted only 'to the extent strictly necessary to ensure the maintenance of the national organization'.

27. Accordingly, two problems need to be resolved. In the first place, it is necessary to ascertain whether or not in Greece there is a national market organization for bananas, and secondly, if there is such an organization, it is necessary to analyse the relationship between the measures adopted and the maintenance of the national market organization in order to determine whether those measures are strictly necessary for the attainment of that objective.

1. *Is there a national market organization?*

28. In challenging the contention that in Greece the production and marketing of bananas are covered by a national market organization, the Commission takes as its basic premise the Court's definition, according to which a national organization is 'a totality of legal devices placing the regulation of the market in the products in question under the control of the public authority, with a view to ensuring, by means of an increase in productivity and of optimum utilization of the factors of production, in particular of manpower, a fair standard of living for producers, the stabilization of markets, the assurance of supplies and reasonable prices to the consumers'. [2]

29. According to the Commission, it cannot be denied that the Greek authorities adopted a series of measures designed to protect domestic production of bananas (which is restricted in practice to the island of Crete) and to regulate the marketing of such bananas.

30. In the Commission's view, however, those measures are not sufficient for the system in force in Greece to be regarded as a national market organization.

31. The Commission lays emphasis on the following facts: such bananas are small and of poor quality; even so, they are unobtainable for long periods; in the circumstances, the sale of those bananas lends itself to speculation and they are sold at very high prices; all that is the result of extremely high production costs in return for a small crop and of the Greek authorities' inability to control the marketing circuits.

32. Hence the measures enacted by the Greek authorities concerning the production and marketing of bananas are unlikely to achieve the objectives of a national market organization, namely the stabilization of the market, security of supplies at reasonable prices to the consumer, optimum utilization of the factors of production and so on.

33. According to the Commission, excessive sums are spent in order to maintain a costly and inadequate crop of poor quality for the benefit of a tiny number of growers and traders, to the detriment of the vast majority of consumers.

34. That view, of course, is not shared by the Greek Government, which claims that Greece has for some years had a genuine national market organization for bananas, characterized by a number of measures which constitute as many instruments for achieving the objectives laid down by the Court when it defined such organizations in the *Charmasson* judgment.

35. In that connection, the Greek Government refers to the following series of measures:

(a) the grant of different kinds of financial aid to banana growers, including credit facilities, direct subsidies and aid to raise the crop yield;

(b) the grant of other forms of production aid, including the carrying out of technical and economic studies and experimental research, and the compilation of statistical returns and records;

2 — Judgment of 10 December 1974 in Case 48/74 *Charmasson* [1974] ECR 1383, at pp. 1396 and 1397.

(c) the fixing of maximum prices for sales to the public, taking into account production and transport costs, a fair return guaranteed to traders and a reasonable level of prices for consumers;

(d) the determination of quality requirements and other standards which bananas placed on the market must satisfy;

(e) the improvement of marketing circuits and of the distribution network by the grant of licences to small retailers;

(f) the monitoring of external trade; making the importation of seed-producing plants subject to the grant of import authorizations and to plant-health inspections; since 1969 the ban on the importation of bananas has been replaced, exceptionally and for short periods, by authorization to import them in small quantities, which has been offset by the imposition of a countervailing duty; at present, as we know, the importation of bananas is subject to the grant of a licence, which is systematically refused.

36. Those measures are implemented by different bodies, including the Ministry of Agriculture, agricultural cooperatives and the Agricultural Bank of Greece.

37. According to the Greek Government, those measures as a whole contribute towards the stabilization of the market and the fixing of reasonable prices for the consumer. Furthermore, in conjunction with the consumption of other kinds of fruit, which are grown in large quantities in Greece, they ensure security of supplies and go some way towards meeting that country's demand for bananas, production of which amounts to between 4 000 and 5 000 tonnes per annum. Moreover, the fact that banana growing is restricted to the island of Crete is evidence of the optimum utilization of the factors of production since that is where climatic conditions are most suited to the cultivation of that crop.

38. The Greek Government does not claim that all those objectives are simultaneously achieved to the same degree. However, referring to the Court's judgments in *Balkan-Import-Export*[3] and *Beus*,[4] it argues that, as was the case with regard to the application of the common agricultural policy, the establishment of an appropriate scale of priorities for the objectives pursued enabled it to give precedence to developing the cultivation of bananas and to ensuring a fair standard of living for banana growers, without demanding excessive sacrifices on the part of consumers.

39. How is the situation to be assessed from that point of view?

40. To begin with, I would recall that, as the Court pointed out in *Charmasson*,[5] the objectives of a national market organization, for the purposes of Article 43 *et seq.* of the EEC Treaty, are analogous on a national level to those pursued by a 'common organization of the market', as they are set out in Article 39 of the EEC Treaty, to which Article 40 (2) refers. Moreover, the measures forming part of such an organization must contribute towards the attainment in general terms of the objectives of the EEC Treaty, as Article 38 (2) of the Treaty presupposes.

3 — Judgment of 24 October 1973 in Case 5/73 *Balkan-Import-Export* [1973] ECR 1091.

4 — Judgment of 13 March 1968 in Case 5/67 *Beus* v *Hauptzollamt München* [1968] ECR 125.

5 — *Charmasson, supra*, paragraph 24 of the decision.

41. In my view, it is legitimate to question whether the measures implemented by the Greek Government are the ones most suitable for achieving the general objectives of Article 39. In particular, it is unclear to what extent those measures can be regarded as contributing towards 'the rational development of agricultural production' and 'the optimum utilization of the factors of production'. The Greek Government itself acknowledges that, on the evidence, Greek bananas cannot compete — in terms of quality and yield — with bananas imported from other Member States and from non-member countries (and it has for that very reason applied measures prohibiting imports), with the result that, as became apparent at the hearing, it seems prepared to depart from the approach it has hitherto taken and studies are being carried out with a view to switching over to a different type of crop.

42. Moreover, the Greek Government does not defend the effectiveness of the system with conviction, and in particular the ability of the system to prevent speculation.

43. There is no doubt, however, that, in the light of the economic policy decisions previously taken by the Greek authorities, the measures at issue are consistent with the objectives they pursue.

44. Moreover, although it cannot be said that all — or even the majority — of the objectives of the common agricultural policy, as set out in Article 39 of the EEC Treaty, have been achieved, or are effectively being pursued, by the organization set up, it seems to me to fulfil the essential minimum requirements for recognition as a national market organization in the light of Article 65 (2) of the Act of Accession. Clearly, *Balkan-Import-Export* and *Beus* cannot be automatically applied as precedents since in those two judgments the Court formulated, with regard to the reconciliation of the objectives of the common agricultural policy and the possibility that one objective may in economic terms take precedence over another, a recommendation addressed to the Community institutions and not to the Member States. However, the thinking behind the Court's reasoning in those two judgments is wholly applicable to a case involving a national market organization covered by a Community Treaty and operated by a Member State.

45. Moreover, the measures adopted by Greece are on the whole consistent with Article 40 (3) of the EEC Treaty and some of them coincide with those which are expressly referred to in that provision.

46. I believe that to extend the Court's power of review to an analysis of whether the measures are appropriate to the objectives pursued would involve an assessment of reasonableness and effectiveness, which goes beyond the scope of a review of legality.

47. Furthermore, it is necessary to bear in mind the absence of a common organization of the market in this sector, which reflects the fact that less importance is attached to the requirements resulting from the need to achieve the objectives of the common agricultural policy in this area.

48. In any event, it is clear that the aim of Article 65 (2) of the Act of Accession was to strike a temporary compromise involving the attainment to a lesser degree of the objectives of the EEC Treaty in the field of

agricultural policy by allowing, during the transitional period, the retention of provisions which in normal circumstances would be incompatible with the application of Community rules.

49. No doubt the national market organization for bananas in Greece does not deserve the top prize for quality, but I am compelled to conclude that, in view of its characteristics, it qualifies as a national market organization for the purposes of Article 65 of the Act of Accession.

50. The fact that the latter provision is applicable means, therefore, that during the period laid down therein Greece may continue to impose in its external trade charges having equivalent effect to customs duties, quantitative restrictions and measures having equivalent effect, in so far as such charges, restrictions and measures form part of the national market organization in existence at the date of accession.

51. However, that possibility is not automatically applicable, as it depends on fulfilment of the condition laid down in the second subparagraph of Article 65 (2), which reads as follows: 'This provision shall only apply . . . to the extent strictly necessary to ensure the maintenance of the national organization'.

2. *Is the measure strictly necessary?*

52. Now it is necessary to ascertain whether the requirement of a licence to import bananas originating in other Member States or in free circulation there and, further still, the systematic refusal to issue such a licence, which amounts to a total ban on imports, can be treated as measures strictly necessary to ensure the maintenance of the national market organization for bananas in Greece.

53. That is the view taken by the Greek Government which considers that, if the importation of bananas were permitted during the transitional period provided for in Article 65 of the Act of Accession, it would not only disrupt production and lead to the financial ruin of thousands of banana growers but also compel the State to abandon its financial programmes and investments.

54. The Commission takes a different view. It considers that since the provision at issue constitutes an exception to the principle of the free movement of goods, it must be given a restrictive interpretation.

55. In its view, that is apparent from the Court's judgment of 29 March 1979 in Case 231/78,[6] all the more so, moreover, since the adverb 'strictly' used in Article 65 (2) was not used in the corresponding provision (Article 60 (2)) of the 1972 Act concerning the conditions of accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.

56. In my view, it is quite clear that the Commission is right. The provisions of the Act of Accession must be interpreted with reference to the foundations of, and the system established by the Community,[7] which are set out in Article 35 of the Act of Accession concerning the abolition, as from the date of accession, of quantitative

6 — *Commission* v *United Kingdom* [1979] ECR 1447, at p. 1460, paragraph 13 of the decision.

7 — *Commission* v *United Kingdom*, cited above, paragraph 12 of the decision.

restrictions and any measures having equivalent effect as between Greece and the other Member States of the Community.

57. Similarly, since Article 65 of the Act of Accession relates to trade in agricultural products, it must also be interpreted in the light of the Treaty provisions concerning the common agricultural policy, towards the attainment of which it must make every possible contribution. [7]

58. Furthermore, according to the consistent case-law of the Court concerning the transitional period laid down by the Treaty, the derogations from Article 30 of the EEC Treaty provided for in the Act of Accession are valid only during the said transitional period. Upon the expiry of that period, Article 30 is directly applicable even in respect of agricultural products (such as bananas) for which no common organization of the market has yet been established, and that is not precluded even by the operation of a national market organization. [8] That has been the position in Greece since 1 January 1986, as is clear from Articles 2 and 9 of the Act of Accession and is expressly laid down by the second subparagraph of Article 65 (2), whose wording was evidently designed to avoid the difficulties raised by the wording of the second subparagraph of Article 60 (2) of the 1972 Act of Accession. [9]

59. The aim of provisions such as those of Article 65 of the Act of Accession is to enable a State which accedes to the Community gradually to bring its production and marketing structures for an agricultural product protected by a national market organization into line with the requirements of the common market during the transitional period laid down.

60. The derogations permitted on the basis of those provisions must therefore be implemented in such a way as to facilitate the attainment of the objectives of the EEC Treaty and the application of all its rules. That would seem to follow from the combined provisions of Articles 2 and 9 of the Act of Accession and has already been stated by the Court in connection with the 1972 Act of Accession [10] and the transitional period laid down by the Treaty. [11]

61. However, it is clear in this case that the almost complete ban on the importation of bananas into Greece not only did not make it easier to apply the Community rules at the end of the transitional period, but instead constituted a virtually insurmountable barrier to the adaptation of the relevant national rules.

62. In those circumstances, the supply of bananas on the Greek market permits no more than a very low annual consumption per head of the population (0.44 to 0.55 kg per inhabitant compared with an average of 7 kg in the other Member States) and the situation has not improved with the passage of time.

63. To claim, as the Greek Government does, that the possibility of consuming other kinds of fruit justifies the adoption of the measure and raises total consumption to an acceptable average amounts to an attempt to legitimize a practice which has already been censured by the Court [12] in the context of

7 — *Commission* v *United Kingdom*, cited above, paragraph 12 of the decision.

8 — Judgment of 16 March 1977 in Case 68/76 *Commission* v *France* [1977] ECR 515, at p. 531. See also *Charmasson*, *supra*, paragraph 15 of the decision, and *Commission* v *United Kingdom*, *supra*, paragraph 15 of the decision.

9 — *Commission* v *United Kingdom*, *supra*, paragraphs 16 and 17 of the decision.

10 — *Commission* v *United Kingdom*, *supra*, paragraphs 10 and 11 of the decision.

11 — *Charmasson*, supra, paragraphs 16 and 17 of the decision.

12 — See judgment of 12 July 1983 in Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265.

the competitive relationship between products capable of satisfying the same needs of consumers.

64. Moreover, the Commission is justified in contending that the objectives pursued by the Greek Government can be achieved by other measures which are far less detrimental to freedom of trade within the Community. The liberalization of imports, accompanied by a system of controls or quotas, for instance, would be a flexible response to the twin need to protect domestic production and to adjust to the system of total liberalization applicable as from 1 January 1986. Moreover, a gradual easing of restrictions would make it possible to test the reaction of the market and to bring the measures adopted suitably into line with it.

65. Since, therefore, the first subparagraph of Article 65 (2) of the Act of Accession is inapplicable, the general rule in Article 35 on the prohibition of quantitative restrictions on imports and measures having equivalent effect is applicable.

66. Hence the rules that were in force in Greece even during the transitional period, which created a barrier to intra-Community trade, and their practical application, which led to a total ban on imports, are contrary to Article 35 of the Act of Accession and Article 30 of the EEC Treaty, as the Court has consistently held since its judgment in *Dassonville*. [13]

67. **III** — I now turn to the allegation in Case 241/85 that Greece has failed to fulfil its obligations under Article 3 (1) of the Lomé Convention in so far as it prohibits imports of bananas originating in ACP countries.

68. Article 3 (1) lays down a prohibition on the imposition of quantitative restrictions and measures having equivalent effect on the importation into the Community of products originating in ACP countries, whose scope is evidently the same as that of the prohibition in Article 30 of the EEC Treaty.

69. The Greek Government's defence is based on arguments of the same kind as those advanced in Case 194/85; thus it relies on Article 65 (2) of the Act of Accession as well as on Article 6 of the Lomé Convention, which does not permit the ACP countries to be treated more favourably than the Member States of the Community.

70. I have already reached the conclusion that the considerations relied upon by Greece in Case 194/85 are unfounded. It follows not only that its arguments in Case 241/85 are likewise unfounded, for exactly the same reasons, but also that its recourse to Article 6 of the Lomé Convention is meaningless.

71. **IV** — With the Court's consent I wish to refer, lastly, to the Greek Government's argument that the Greek Council of State has already stated its views on the system at issue and has concluded that the contested measures are lawful.

72. The case-law of the Court is quite clear on this point: in the case of Community

13 — Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, at p. 852, paragraph 5 of the decision.

rules which are directly applicable, the existence of remedies available through the national courts cannot prejudice the making of the application referred to in Article 169 of the EEC Treaty since the two procedures have different objectives and effects. [14]

73. It follows that the decision of the Greek Council of State is not relevant for the purpose of finding a solution in these proceedings which is in keeping with Community law and with the exercise by the Court of Justice of the powers conferred upon it by the Treaty.

74. V — In conclusion, I suggest that the Court declare that, by making the importation of bananas which originate in other Member States or which are in free circulation there subject to the grant of a licence and by systematically refusing to issue such a licence, the Hellenic Republic has failed to fulfil its obligations under Article 35 and the second subparagraph of Article 65 (2) of the Act of Accession in conjunction with Article 30 of the EEC Treaty, and that by applying the same system to imports originating in ACP countries it has also failed to fulfil its obligations under Article 3 (1) of the Lomé Convention.

75. The declaration that Greece has failed to fulfil its obligations relates only to the transitional period provided for in the Act of Accession, since the period thereafter, which commenced after the end of the written procedure, was referred to by the Commission only at the hearing.

76. Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. I do not believe that the circumstance which I have just mentioned, concerning the period following the end of the transitional period, constitutes a ground for not applying that general rule concerning the apportionment of the costs to this case.

14 — See, for instance, the judgment of 7 February 1970 in Case 31/69 *Commission* v *Italy* [1970] ECR 25.