OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 25 February 1999 *

1. By application for annulment under Article 173 of the EC Treaty, lodged at the Court Registry on 21 March 1996, the Portuguese Republic asks the Court to annul Annex V to Commission Regulation (EC) No 3053/95 of 20 December 1995 amending Annexes I, II, III, V, VI, VII, VIII, IX and XI of Council Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries (hereafter referred to as 'Regulation No 3053/95'). [1] The Portuguese Republic is thus challenging the instrument by which the Commission has exempted Indian cottage industry and folklore products from the quantitative restrictions placed on the import of such products pursuant to the aforesaid Council Regulation No 3030/93.

The relevant legal framework

2. Council Regulation (EEC) No 3030/93 of 12 October 1993 on common rules for imports of certain textile products from third countries (hereafter referred to as 'Regulation No 3030/93') [2] provides for a system of annual quantitative limits which is to apply to the products expressly listed in Annex I (Article 1). Pursuant to that regulation, the system of quantitative limits does not apply to handloom and folklore products. Accordingly, Article 3(1) provides that: 'the quantitative limits referred to in Annex V shall not apply to the cottage industry and folklore products specified in Annexes VI and VIa which are accompanied on importation by a certificate issued by the competent authorities of the country of origin in accordance with the provisions of Annexes VI and VIa and which fulfil the other conditions laid down therein'.

Paragraph 1 of Annex VI, to which Article 3 specifically refers, lists the products regarded as cottage industry and folklore products. Annex VIa provides for an exception to the import restrictions on cottage industry and folklore products, specifying, in particular, that 'exports of hand-made garments made in the cottage industry of India from fabric referred to in paragraph 1 of Annex VI ... are included in the quantitative limits established in Annex V'. The regulation, therefore, provides that cottage industry products origi-

* Original language: Italian.

1 — OJ 1995 L 323, p. 1.

2 — OJ 1993 L 275, p. 1.

nating in India are not among the products exempted from quantitative restrictions.

As regards the powers of the Commission, Article 19 of Regulation 3030/93 provides that: 'Amendments to the annexes to this regulation which may be necessary to take into account the conclusion, amendment or expiry of agreements, protocols or arrangements with third countries or amendments made to Community rules on statistics, customs arrangements or common rules for imports shall be adopted in accordance with the procedure laid down in Article 17'. That article provides for a textile 'committee' composed of representatives of the Member States and chaired by a Commission representative and lays down a series of rules of procedure under which the Commission may 'adopt the measures proposed' by the chairman of the textile committee where they are in conformity with the committee's opinion (Article 17(4), second subparagraph).

3. On 31 December 1994, in the context of the Uruguay Round negotiations, the Commission initialled a Memorandum of Understanding with the Republic of India 'on arrangements in the area of market access for textile products'. [3]

That memorandum provides that the Indian Government 'will bind its tariffs on the textiles and clothing items listed [in the attachment to the memorandum] at the rates and according to the timetable indicated therein' (paragraph 2 of the memorandum) and that, with effect from 1 January 1995, the European Community will remove all restrictions applicable to exports of handloom products and cottage industry products referred to in Article 5 of the EC — India Agreement (paragraph 5 of the memorandum). [4] The Community also agreed to give favourable consideration to requests 'which the Government of India might introduce for exceptional flexibilities, in addition to the flexibilities applicable under the bilateral textiles agreement' up to certain amounts specified in the Memorandum of Understanding. Lastly, the memorandum allows the Indian Government to invoke such exceptional flexibilities in the order of carry over, inter-category transfer and carry-forward, to the extent of the possibilities existing on the

3 — On the same day, the Commission also signed a Memorandum of Understanding with the Islamic Republic of Pakistan concerning the same textile market.

4 — Article 5 of the Agreement concluded between the Community and the Republic of India pursuant to the Council decision of 11 December 1986 concerning the provisional application of the Agreement between the European Economic Community and the Republic of India on trade in textile products (OJ 1988 L 267, p. 1) provides that, with reference to Article 12(3) of the Geneva Arrangement regarding international trade in textiles concluded by the Community by decision of the Council of 21 March 1974 (OJ 1974 L 118, p. 1), import quotas 'will not apply to handloom fabrics of the cottage industry, hand-made cottage industry products made of such handloom fabrics and traditional folklore handicraft textile products'.

basis of the utilisation of quotas (paragraph 6 of the memorandum). [5]

4. On 26 February 1996, the Council adopted the decision concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products. [6]

Facts and procedure

5. By the contested Regulation No 3053/95, the Commission amended Annex VI to Regulation No 3030/93 and repealed Annex VIa to that regulation (Article 1, fifth and sixth indents), thereby excluding Indian cottage industry and folklore products from the quotas applicable to textile products imported into the Community. The fourteenth recital to that regulation refers explicitly to the arrangement with the Republic of India, emphasising that that arrangement 'foresees the removal of quantitative restrictions on the importation of certain handloom and folklore products originating in the Republic of India'. Lastly, the second paragraph of Article 2, provides for the retroactive effect of the regulation which is to apply 'from 1 January 1995'.

6. On 21 March 1996, the Portuguese Republic lodged an application at the Court Registry challenging Regulation No 3053/95.

7. During the written procedure, on 19 July 1996 to be precise, the Commission withdrew the contested instrument: it adopted Regulation (EC) No 1410/96 concerning the partial withdrawal of Regulation (EC) No 3053/95 amending Annexes I, II, III, V, VI, VII, VIII, IX and XI to Council Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries (hereafter referred to as 'Regulation 1410/96'). [7] Article 1(1) of that regulation provides that 'Regulation (EC) No 3053/95 shall be repealed with retroactive effect from 1 January 1995 inasmuch as the fifth and sixth indents of Article 1 thereof amend and/or repeal Annexes VI and VIa to Regulation (EEC) No 3030/93'. Article 1(2) provides that: 'the partial withdrawal of Regulation (EC) No 3053/95 referred to in paragraph 1 shall not affect the rights that its adoption may have engendered among its intended beneficiaries in the period from 1 January 1995 and the date of entry into force of this regulation'.

In the first recital of the preamble to the withdrawal regulation, the Commission concedes that Regulation No 3053/95 was adopted at a time when 'by virtue of Article 19 of Regulation (EEC) No 3030/93, the Commission was not yet

5 — Flexibilities means the possibility of granting licences to import products in quantities exceeding the import quotas set for textile products under Regulation 3030/93.

6 — OJ L 153, p. 47.

7 — OJ 1996 L 181, p. 15.

entitled to do so, the Council not yet having decided to conclude or apply provisionally the market access arrangements negotiated... with India' and that 'Regulation (EC) No 3053/95 therefore contains a procedural defect that warrants at least its withdrawal or partial annulment'.

Admissibility

8. The Portuguese Republic claims that it still has a legal interest in bringing proceedings, notwithstanding the withdrawal of the contested instrument. In its view, the withdrawal of the regulation is not tantamount to its annulment and consequently does not diminish the interest in the action in question. In this case, in particular, the Portuguese Republic still has an interest in obtaining a declaration that the instrument is unlawful and in seeing certain conduct on the part of the Commission censured. Moreover, the applicant points out that such a declaration would allow the traders affected and the Portuguese Republic itself to claim compensation for any damage incurred. Lastly, the Portuguese Republic observes that, since the instrument of withdrawal preserves the effects of Regulation No 3053/95 up to the date of withdrawal, namely from 1 January 1995 to 21 July 1996, the contested regulation still produces its effects today.

9. The Commission, on the other hand, contends that, following the adoption of Regulation No 1410/96, there is no longer any case to answer. Contrary to what the Portuguese Republic maintains, the case-law of the Court shows that withdrawal is tantamount to annulment and that, with the withdrawal of the contested instrument, the applicant obtained 'the only result that its application could have secured for it' (Order of the Court in Case C-123/92 *Lezzi Pietro* v *Commission* [1993] ECR I-809). As regards possible claims for damages, the Commission points out that it expressly acknowledged the irregularity of the contested decision in the preamble to the withdrawal regulation. Lastly, as regards the comments concerning the effects of the regulation that had been withdrawn, the Commission observes that, since Regulation No 3053/95 removes the quantitative restrictions on Indian cottage industry and folklore products, it would be inconceivable at this stage to remove the effects already produced by that regulation. In any event, those effects are now definitive, since the products released into free circulation in the common market under Regulation 3053/95 can no longer be traced. In any case, the Commission concedes that, when the withdrawal regulation was adopted, not even the Commission itself could identify the practical effects of Regulation No 3053/95 that would be preserved under Regulation No 1410/96. In limiting the effects of withdrawal, the Commission had merely sought to prevent the emergence of any factors that might disrupt the market.

10. It is indisputable, as the Commission observes, that the withdrawal of the contested act usually removes the subject-matter of the dispute. As the Court of Justice itself stated in the order cited above, from the point of view of the applicant's

interest, amendment is in principle tantamount to an annulment of the instrument. Moreover, contrary to what the Portuguese Republic claims, the withdrawal of the instrument does not affect any rights which the injured parties may have to damages. In the present case, what is more, the Commission explicitly acknowledged that Regulation No 3053/95 was partially unlawful.

In the case we are considering, however, there are indications that Regulation No 1410/96, concerning the partial withdrawal of Regulation No 3053/95, has not removed the interest in an action for annulment of Regulation No 3053/95. These proceedings are distinctive in that the regulation withdrawing the contested instrument preserves all the effects produced by that instrument up to the date of its withdrawal, that is to say from 1 January 1995 to 21 July 1996. There can, therefore, be no doubt that the applicant also has an interest in the removal of those effects in order both to extinguish outright all the effects of the regulation and to establish the right to damages arising from that regulation during the period in question.

One may well wonder if it is not in fact the lawfulness of Regulation No 1410/96 that is at issue here since the Court will actually be ruling on the effects of the contested regulation which are preserved under Regulation No 1410/96. In essence, one could ask whether it is legitimate to give judgment on an instrument which must be deemed definitive since it has not been challenged. While that point is not entirely without merit, I do not believe that it can affect the appraisal of the Commission's plea of inadmissibility since it relates to the effects of the possible judgment annulling Regulation No 3053/95 and such a judgment cannot fail to affect the instrument withdrawing the contested regulation.

Substance

11. The Portuguese Republic claims that the contested regulation is unlawful on two grounds: lack of competence of the Commission and unlawfulness of the retroactive effect of the second paragraph of Article 2 of Regulation No 3053/95.

12. In support of its first claim, the Portuguese Republic argues that Article 19 of Regulation No 3030/93 authorises the Commission to amend that regulation only in the event of the conclusion of 'agreements, protocols or arrangements'. The power to conclude such international agreements, on the other hand, is vested in the Council pursuant to Article 228 of the Treaty. Since, in this case, the Council did not conclude the agreement with India

until February 1996, the Commission was not entitled to amend Regulation No 3030/93 in December 1995. The Commission was not even entitled to implement the Memorandum of Understanding on a provisional basis, since that power lies exclusively with the Council, the sole body having the power to conclude, even provisionally, international agreements within the meaning of Article 228 of the Treaty. In fact, the question of the agreement's provisional effect had been on the agenda for the meeting of the textile committee (set up under Article 17 of Regulation No 3030/93) on 13 December 1995, but the Commission adopted the contested regulation on 20 December 1995.

13. In that regard, the Commission maintains in its defence that, on the date the contested regulation was adopted, it already had the power to adopt the provisions in question for the partial withdrawal of Regulation 3030/93. It argues that, interpreted broadly, Article 19 of Regulation No 3030/93 confers on it the power to amend that regulation as necessary to take into account the Community's international obligations. In the cited 14th recital in the preamble to Regulation No 1410/96 concerning the partial withdrawal of the contested regulation, the Commission concedes however that, in December 1995, it was not entitled to adopt the measures implementing the 1994 Memorandum of Understanding. The Commission maintains that, even assuming that the applicant's objections were well-founded, there is no ground to annul the contested regulation since, first, the defect at issue is purely procedural and, second, the irregularity alleged by the Portuguese Republic was remedied by the Council Decision of 26 February 1996 finalising the agreement with the Republic of India referred to in the Memorandum of Understanding of December 1994.

14. Apart from the fact that the Commission has acknowledged that the objection concerning its powers to adopt the contested regulation is well-founded, it must be observed that Article 19 of Regulation 3030/93, concerning the delegation of powers at issue, provides that: 'Amendments to the annexes to this regulation which may be necessary to take into account the conclusion, amendment or expiry of agreements, protocols or arrangements with third countries or amendments made to Community rules on statistics, customs arrangements or common rules for imports shall be adopted in accordance with the procedure laid down in Article 17'. Article 17 lays down a series of rules of procedure allowing the Commission to 'adopt the measures proposed' by the chairman of the textile committee (a Commission representative) where such measures are in conformity with the committee's opinion (Article 17(4), second paragraph).

It seems clear to me that, taken together, Articles 17 and 19 of Regulation 3030/93 do not confer on the Commission the

power to amend the regulation before the international agreements are concluded. Any other interpretation would be tantamount to conferring on the Commission the power to implement, and thus to transpose into Community law, international agreements which have not yet been concluded, a power that would allow the Commission, which as a rule negotiates the international agreements in the commercial policy area, to give effect to such agreements before they had been concluded by the Council. Such a delegation of power, moreover, is not provided for in the text of the regulation and must, therefore, be ruled out. [8]

In view of the foregoing, I believe that Commission Regulation 3030/93 must be declared null and void, so far as concerns the provisions on the abolition of restrictions on Indian cottage industry and folklore products, on the grounds that it was adopted by a body lacking the competence to do so.

15. Having established the merits of the first plea in law, it is no longer necessary to consider the second.

8 — Regarding the scope of the powers delegated by the Council to the Commission under Regulation No 3030/93, please refer to my Opinion in case C-159/96 *Portugal* v. *Commission*, in particular points 50 to 60, and to the judgment in that same case, paragraphs 33 to 50 (not yet published in the ECR). In that judgment, the Court upheld the claim concerning the application of the second paragraph of Article 174 of the Treaty, relying — so it would appear — on a different interpretation of the facts.

On the application of the second paragraph of Article 174 of the Treaty

16. In the event that the Court upholds the applicant's claim, the Commission asks in the alternative that the effects of the contested regulation be preserved. According to the Commission, limiting the temporal effects of the judgment avoids jeopardising the import rights granted to traders in the sector under Annex V to the regulation and the expectations of those traders arising from the international commitments assumed by the Community.

17. I believe that that claim must be dismissed inasmuch as there no longer seem to be any possible rights or other subjective positions which are liable to be jeopardised by the outright annulment of the contested regulation. Such products as were already imported into the Community on the basis of the contested regulation are in free circulation within the Common Market and can no longer be traced. Such import rights as have not yet been exercised, if any, originate in an unlawful instrument the annulment of which does not produce effects warranting the application of the second paragraph of Article 174 of the Treaty. The risk of an import regime modification must be considered as inherent to the activity of economic operators who, just as they reap the benefits of such activities, must also assume the correspond-

ing physiological risks (following the well-known adage *ubi commoda ibi incommoda*). Limiting the effects of an annulment under the second paragraph of Article 174 of the Treaty would be tantamount to preventing the court from abolishing outright the effects of the unlawfulness of the contested instruments whenever such instruments were likely to affect the legal sphere of the traders.

Conclusion

18. In light of the foregoing considerations, I propose that the Court should

— annul Annex V of Regulation (EC) No 3053/95 of 20 December 1995 amending Annexes I, II, III, V, VI, VII, VIII, IX and XI of Council Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries;

— dismiss the Commission's claim that the effects of the contested regulation should be declared definitive within the meaning of the second paragraph of Article 174 of the EC Treaty;

— order the Commission to pay the costs.