OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 2 December 2004 (1)

Case C-342/03

Kingdom of Spain

v

Council of the European Union

1. In the present case Spain seeks the annulment of Council Regulation (EC) No 975/2003 of 5 June 2003 opening and providing for the administration of a tariff quota for imports of canned tuna covered by CN codes 1604 14 11, 1604 14 18 and 1604 20 70. (2)

The contested regulation and its background

2. In November 2001 the Community, Thailand and the Philippines agreed to hold consultations to examine to what extent Thai and Philippine legitimate interests were being unduly impaired by the preferential tariff treatment for canned tuna originating in the African, Caribbean and Pacific Group of States ('the ACP States').

3. At that time the Community granted canned tuna originating in the ACP States total exemption from customs duty whereas canned tuna originating in Thailand and the Philippines was subject to customs duty at the rate of 24%.

4. Following the failure to achieve a mutually acceptable solution, the Community, Thailand and the Philippines agreed to refer the matter to mediation within the World Trade Organisation ('WTO').

5. On 20 December 2002 the mediator recommended that the Community open a tariff quota of 25 000 tons of canned tuna originating in Thailand and the Philippines for 2003 subject to customs duty at 12%.

6. That was effected by Regulation No 975/2003 ('the Regulation' or 'the contested Regulation'), which was based on Article 133 EC.

7. The tariff quota was divided into four parts: 52% of the annual volume for imports originating in Thailand, 36% for imports originating in the Philippines, 11% for imports originating in Indonesia

and 1% for imports originating in other third countries.

8. Spain puts forward eight pleas in support of its application for annulment.

Infringement of the principle of Community preference

9. Spain asserts that the Regulation infringes the principle of Community preference, which is one of the principles of the Treaty (3) and underlies the Common Customs Tariff, (4) because such measures may be adopted only if Community production is insufficient.

10. I do not accept that argument. The Court has explicitly stated that the principle of Community preference is not a legal requirement infringement of which would result in the invalidity of the measure concerned. (5)

Distortion of competition

11. Spain repeats that measures such as the Regulation may be adopted only if Community production is insufficient to supply the Community market; where that is not the case, the measure will distort the conditions of competition on the market.

12. It is clear however that any reduction in the customs duty imposed on goods imported from third countries is liable to have some effect on competition between those goods and equivalent Community products to the disadvantage of the latter. Spain's argument, taken to its logical conclusion, would mean that the Community could never reduce duties on imported goods. That clearly cannot be the case; in any event, it would be contrary to Article 131 EC which states that, by establishing a customs union between themselves, Member States aim to contribute to inter aliathe lowering of customs barriers in international trade. As the Commission, which has intervened in the action in support of the Council, submits, a more rigorous analysis leads to the view that it is customs duties which themselves distort competition whereas their elimination re-establishes market equilibrium.

Infringement of procedure

13. Spain states that it is settled case-law that the rights guaranteed by the Community legal order in administrative procedures include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case. (6) It submits that the Regulation is not based on any study showing that it is necessary and was accordingly adopted in breach of administrative procedures.

14. It is clear however that the Regulation is the fruit not of an administrative procedure but of a legislative procedure. Article 230 EC states that the Court of Justice has jurisdiction in actions for annulment brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application or misuse of powers. The essential procedural requirements whose infringement may result in annulment of a Community legislative act do not include the requirement to undertake an impact assessment, which is in effect what Spain is alleging.

15. In any event, however, as is clearly indicated by its preamble, (7) the Regulation was adopted

against the background of a WTO mediation procedure and in particular to implement the recommendations of the mediator. The mediator's opinion, which is expressly referred to in the preamble and which has been produced to the Court by Spain, shows that he conducted a scrupulously close examination of the canned tuna markets concerned, taking account in particular of data concerning Community production and consumption and the capacity of the Community market to absorb more imports. The rates and tonnage of the tariff quota set by the Regulation broadly reflect the figures arrived at by the mediator in the light of that examination. It is accordingly not the case that the Regulation was adopted without consideration of its possible impact.

Infringement of Article 12 of the Cotonou Agreement

16. Spain submits that there has been an infringement of Article 12 of the Cotonou Agreement. (8)

17. The Cotonou Agreement seeks to promote and expedite the economic, cultural and social development of the ACP States with a view to contributing to peace and security and to promoting a stable and democratic political environment.

18. The first paragraph of Article 12 provides:

'… where the Community intends, in the exercise of its powers, to take a measure which might affect the interests of the ACP States, as far as this Agreement's objectives are concerned, it shall inform in good time the said States of its intentions. Towards this end, the Commission shall communicate simultaneously to the Secretariat of the ACP States its proposal for such measures.'

19. Spain asserts that, although a meeting with tuna exporters from the ACP States was held in Brussels on 28 January 2003, it took place before the Commission presented the proposal for the Regulation on 27 March 2003; (9) Article 12 of the Cotonou Agreement was accordingly not respected.

20. According to the Council, the Community kept the ACP States regularly informed about the development of the matter in question. Apart from the meeting of 28 January 2003, the issue was raised on several occasions, including meetings with the ACP States on 6 May 2002, 1 March 2003 and 25 March 2003. The Council has provided copies of minutes of those meetings which substantiate its assertions. Spain objects that those meetings also took place before presentation of the proposal for the Regulation; however, as the Council points out, it might be thought that notifying a proposal once it has been adopted would be less useful than giving advance notice. Moreover Spain mentions in its reply a Cotonou Agreement meeting which took place in Brazzaville (Republic of Congo) from 31 March to 3 April 2003 at which a resolution was passed against the proposed solution to the dispute. From that very fact it may be inferred that there had been information and communication in the context of the Cotonou Agreement.

21. It appears therefore that there was no infringement of Article 12 of the Cotonou Agreement.

Infringement of preferential agreements

22. Spain's next plea concerns alleged infringements of preferential agreements concluded by the Community with (i) the ACP States and (ii) the States falling under – in Spain's terminology – the SGP (scheme of generalised preferences) drug scheme. That reference is to the 'special

arrangements to combat drug production and trafficking' which are part of the scheme of generalised preferences currently (and at the relevant time) set out in Council Regulation (EC) No 2501/2001. (10)

23. Spain submits that the agreements referred to give preferential treatment enabling canned tuna originating in the ACP and drug-schemeStates to enter the Community market. It asserts that the tariff quota imposed by the contested Regulation will undermine those preferential agreements since the quota will enable canned tuna from developed countries to compete with that originating in the ACP States and in those falling under the SGP drug scheme. Moreover those agreements subject canned tuna to stricter rules on origin than those laid down by the Regulation; to that extent the quotas imposed by the Regulation harm the States which have entered into preferential agreements with the Community.

24. I will consider separately the two limbs of Spain's plea.

25.

The ACP States

26. The agreement invoked by Spain concluded by the Community with the ACP States is the Cotonou Agreement. (11) That Agreement makes provision for the total elimination of customs duties (12) whereas the tariff quota opened by the Regulation is subject to duty at 12%. I do not therefore see how the Regulation could be considered to undermine the Cotonou Agreement.

27. Furthermore the tariff preferences provided for in the Cotonou Agreement are not subject to any quantitative limitation; the Regulation in contrast opens a quota of 25 000 tonnes, which according to the Commission (which has not been contradicted on this point by Spain) represents barely 10% of total imports from the combined ACP and SGPdrug-schemeStates.

28. In any event, the sole legal obligation on the Community flowing from the Cotonou Agreement with regard to imports is to exempt them from customs duty; there is no provision guaranteeing the beneficiary States either a margin of tariff preference or a minimum volume of imports in comparison with those from other States. Even therefore if the Regulation had the effects alleged by Spain, there would be no conflict with the earlier arrangements.

29.

The SGP drug-scheme States

30. Spain refers to a preferential agreement between the Community and the SGPdrug-schemeStates. In fact, as the Commission points out, the tariff preferences accorded by the Community to the beneficiary countries of the SGP drug scheme are not the subject of any agreement with those countries: rather they are unilateral preferences granted by the Community in the context of the 'special arrangements to combat drug production and trafficking' referred to above. (13)

31. Those arrangements include the suspension of Common Customs Tariff duties on 'products which, according to Annex IV, are included in the special arrangements to combat drug production and trafficking referred to in Title IV and which originate in a country that according to Column I of Annex I benefits from those arrangements'. (14) Those products however do not appear to include canned tuna. (15)

32. Even if the preferential arrangements accorded by the Community under the SGP drug scheme extended to canned tuna, I consider that, for the reasons given above in the context of the

first limb of Spain's plea concerning the Cotonou Agreement, the contested Regulation could not be said to undermine those arrangements.

Infringement of legitimate expectations

33. Spain submits that the Regulation infringes the principle of the protection of legitimate expectations. The expectations in question are apparently those of Community operators who consented to investments in the ACP and SGPdrug-schemeStates. Spain alleges that the Regulation will affect investments made in those States which will have negative repercussions on their economies since the investments, if they cease to be profitable, may disappear.

34. I confess to some difficulty in following that argument; to the extent that it suggests that Community traders may have a legitimate expectation that the economies of the ACP and SGPdrug-schemeStates will not decline it seems somewhat fanciful. In any event it is clear that legitimate expectations are not in general infringed by legislation adopted in accordance with the institutions' discretion.

35. The Court has indeed stated, as cited by Spain, that 'there is nothing to prevent a MemberState from claiming in an action for annulment that an act of the institutions frustrates the legitimate expectations of particular individuals'. (16) In the following paragraph of that judgment, however, the Court went on to say that since 'the Community institutions enjoy a margin of discretion in the choice of the means needed to achieve the common commercial policy, traders cannot claim to have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained'. (17)

36. In the present case I find it impossible to see how either the Cotonou Agreement or the SGP drug scheme (even if it were relevant) could engender any reasonable expectation that the Community would not open tariff quotas for canned tuna originating in Thailand and the Philippines.

Failure to state reasons

37. Spain submits that the Regulation infringes the requirement in Article 253 EC that regulations must state the reasons on which they are based: the first recital in the preamble to the Regulation simply refers to the opinion of the WTO mediator, which was not binding on the Community, and the Regulation does not deal with the problem globally since it does not examine the effect of the measures on the Community canning industry.

38. In fact the preamble to the Regulation read as a whole does a great deal more than simply refer to the mediator's opinion. The preamble in full reads as follows:

‘(1) In November 2001 the Community, Thailand and the Philippines agreed to hold consultations to examine to what extent the Thai and the Philippine legitimate interests were being unduly impaired as a result of the implementation of the preferential tariff treatment for canned tuna originating in ACP States. Following the failure to achieve a mutually acceptable solution, the Community, Thailand and the Philippines agreed to refer the matter to mediation. On 20 December 2002 the mediator presented its opinion whereby the Community should open a MFN-based tariff quota of 25 000 tons for 2003 at an in-quota tariff rate of 12% ad valorem.

(2) Given its desire to resolve this long-standing problem, the Community has decided to accept this proposal. Therefore, an additional tariff quota for a limited volume of canned tuna should be opened.

(3) It is appropriate to allocate country specific shares of the quota to those countries having a substantial interest in supplying canned tuna, on the basis of the quantities supplied by each of them under non-preferential conditions during a representative period of time. The remaining part of the quota should be available to all other countries.

(4) The best way of ensuring optimal use of the tariff quota is to allocate it in the chronological order of the dates on which declarations of release for free circulation are accepted.

(5) In order to ensure that the quota is administered efficiently, presentation of a certificate of origin should be required for imports of canned tuna from Thailand, the Philippines and Indonesia, the main suppliers and the main beneficiaries of the quota.

(6) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.’

39. Those recitals seem to me to constitute a perfectly adequate statement of reasons, fully complying with the requirement laid down by the Court that the preamble of a measure intended to have general application indicate the general situation which led to its adoption and the general objectives which it is intended to achieve. (18) It is true that, as Spain alleges, the preamble does not deal with the effect of the measures on the Community canning industry. However, since there is no requirement that it do so, that omission is not a ground for annulment.

Misuse of powers

40. Finally, Spain submits that the Regulation is vitiated by misuse of powers in that it allocated the quota to the beneficiary States arbitrarily by including not only Thailand and the Philippines but also Indonesia and by leaving the balance to third countries. Spain considers that the percentages fixed by the Regulation are contrary to the very notion of a quota and seem rather to be the result of political negotiation. It further alleges that the grant of those tariff preferences creates a dangerous precedent which will certainly give rise to numerous calls for similar treatment from States considering themselves harmed by the preferential agreements between the Community and the SGP drug-scheme countries; moreover the ACP and SGP drug-scheme countries may also feel that they have been discriminated against because of the differences in the rules on origin, and hence seise the WTO of the problem.

41. It is settled case-law that a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main

purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. (19) Spain has produced no such evidence. In my view therefore Spain's final plea must be rejected, without its being necessary to consider the Commission's explanations (which appear at first sight to be persuasive) as to why the allegations made by Spain in this context are misconceived.

Conclusion

42. I am therefore of the opinion that the Court should:

(1) dismiss the application;

(2) order the Kingdom of Spain to bear the costs, with the exception of the costs of the Commission, which as intervener must bear its own costs.

1 – Original language: English.

2 – OJ 2003 L 141, p. 1.

3 – Spain cites Case 5/67 *Beus* [1968] ECR 83, at p. 98.

4 – Case 232/86 *Nicolet Instrument* [1987] ECR 5025, paragraph 13 of the judgment.

5 – Case C-353/92 *Greece* v *Council* [1994] ECR I-3411, paragraph 50 of the judgment.

6 – Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14 of the judgment.

7 – The preamble is set out in full in paragraph 38 below.

8 – Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317, p. 3.

9 – COM(2003) 141 final.

10 – Regulation of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, OJ 2001 L 346, p. 1.

11 – See paragraph 17 and note 8 above.

12 – See Article 1 of Annex V to the Agreement.

13 – See paragraph 22.

14 – See Article 10(1) of Regulation No 2501/2001.

15 – See Article 4 of and the list in Annex IV to Regulation No 2501/2001.

16 – Case C-284/94 *Spain* v *Council* [1998] ECR I-7309, paragraph 42 of the judgment.

17 – Paragraph 43 of the judgment, citing numerous cases.

18 – Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 189 of the judgment.

19 – Case C-110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 137 of the judgment.