OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 12 December 1989 *

Mr President,
Members of the Court,

1. The national court seeks from this Court an interpretation of the rule for classifying broken rice for the purpose of applying import levies.

The problem arises when consignments of rice are imported which comprise fragmented grains for the most part and, to a lesser extent, whole grains.

I refer the Court to the Report for the Hearing for the background to the case, but would point out that, pursuant to Article 2 of Regulation (EEC) No 2729/75 of the Council, [1] the levy applicable to such mixtures of rice and broken rice is the levy for the component predominating by weight where that component 'represents at least 90% of the weight of the mixture'; where neither of the two components accounts for 90% of the total weight, the higher levy will apply, namely the levy for rice. The rule just cited is intended to reduce drastically any possibility that importers might import, under the description of broken rice (and thus enjoying the lower import levy), consignments in which the proportion of broken grains is only slightly greater than that of whole grains, the latter in any event accounting for a significant percentage. The rule at issue is, therefore, as pointed out at an earlier stage in the proceedings, an 'anti-avoidance rule', in so far as it is intended to limit the risk of the levy on rice being avoided where substantial quantities of that product are imported in consignments which also contain slightly larger quantities of broken rice.

2. The regulation in question gives no guidance as to the meaning of the term 'broken rice'. For that purpose recourse must be had to the definition contained in Annex A to Council Regulation (EEC) No 1418/76 on the common organization of the market in rice. [2] Points 2 and 3 of that annex give the following definitions:

'2. (a) Round-grain rice: rice, the grains of which are of a length not exceeding 5.2 mm and of a length/width ratio of less than 2;

(b) Long-grain rice: rice, the grains of which are of a length exceeding 5.2 mm;

(c) Measurement of the grains: grain measurements are taken on wholly milled rice by the following method:

(i) take a representative sample from the consignment,

* Original language: Italian.

1 — Regulation (EEC) No 2729/75 of the Council of 29 October 1975 (OJ 1975, L 281, p. 18)

2 — Council Regulation (EEC) No 1418/76 of 21 June 1976 (OJ 1976, L 166, p. 1).

(ii) sieve the sample so as to retain only whole grains,

(iii) carry out two measurements consisting of 100 grains each and find the average,

(iv) express the result in millimetres, rounded off to one decimal place.

3. Broken rice: grain fragments the length of which does not exceed three-quarters of the average length of the whole grain.'

In the light of those provisions, therefore, the rice must be classified having regard to the dimensions of the grains, which are to be measured in a representative sample of grains from the imported consignment. The broken grains are to be classified according to two terms of comparison: the length of the grain fragments in the consignment and the 'average length of the whole grain'.

It seems clear to me that the length of the fragments is to be determined by direct measurement of a representative sample from the consignment. All that remains to be established, therefore, is the method of arriving at the other relevant term, namely the average length of the whole grain.

In that connection, it must be noted that, as the broken rice is selected by a sieving process based on the length of the grains, whole grains may frequently also be found in consignments since, not being fully developed, they are smaller than fully developed grains of the variety to which the broken grains belong. It follows that where the average length of the whole grains is determined by measuring the length of the whole grains present in the consignment of broken rice and where, for the purposes of such measurement, account is also taken of whole grains which are not fully developed and are therefore smaller, the average figure arrived at may well be rather low. In such circumstances, therefore, the length of a large proportion of the grain fragments will exceed three-quarters of the average length of the whole grains. Application of the provisions of Regulation No 2729/75, cited earlier, will result in the consignment in question being classified as rice and not as broken rice — and the higher levy will be imposed.

3. It is specifically with that problem that the questions submitted by the national court are concerned. Essentially, the Court is asked to state whether the average length of a whole grain is to be determined by measuring the whole grains present in the consignment, including the whole grains which are less than fully developed, or whether, on the other hand, the average length is to be arrived at by reference to other criteria such as, in particular, the standard dimensions of the various varieties of rice included in the definitions relied on in international trade.

In the Commission's view, recourse to external points of reference, either directly or indirectly, is out of the question. The Commission emphasized two points in particular. First, in its view there is no doubt that the average length of the whole grain is to be determined by direct measurement of the length of the whole grains present in the consignment; in particular, the fact that point 3 of Annex A to Regulation No

1418/76 does not provide for recourse to external criteria — such as the standard dimensions of the various qualities of rice according to international trade practice — excludes that option entirely; in other words, the direct system of measurement laid down, for rice, in point 2 of that annex is, by implication, to be used for classifying broken rice as well. In the second place, the Commission considers that, when direct measurement is thus carried out, the national authorities are required also to take account of whole grains which are not fully developed, despite the fact that they will necessarily be smaller than those that have grown fully.

4. Before I analyse the Commission's thesis, I think it is appropriate to bear in mind that the provisions of the Community nomenclature must be interpreted in such a way as to ensure certainty and uniformity of application. These are general and overriding requirements which are based on the principle, reiterated by the Court,[3] according to which the classification of goods is essentially to take account of the objective characteristics of the product.

Those requirements also apply to the interpretation of a rule relating not to the customs nomenclature but to agricultural nomenclature.[4] In the latter area, there is another reason for them to apply: the need to specify the products — and therefore the actual area — to which the agricultural rules apply, so as to ensure that they operate properly in relation to the prescribed objectives. That applies also to import levies. The instrument of levies is, of course, applied in response to the need to cover the difference between the Community price and the world price for certain products. Since those prices may vary in relation to various products and qualities, it is necessary to lay down rules for the classification of goods to ensure that the appropriate levy is applied in each case. It is also clear that, where classification rules are not applied correctly, the levy system operates in a distorted manner as a result. For example, if the higher levy prescribed for rice is applied to a consignment which in fact displays the objective characteristics of broken rice, that consignment will be subjected to an unjustified burden since the levy will exceed the difference between the internal price and the external price for that product, with the risk that competition may well be distorted.

5. That having been said, it seems to me that it must be emphasized in the first place that Regulation No 1418/76 does not require the national authorities to determine the average length of the whole grains exclusively by direct measurement of the grains in the consignment. Point 3 of Annex A of that regulation makes no provision, positive or negative, in that regard. Accordingly, it does not seem to me that there is any reason to exclude outright the possibility of reference to external criteria as well. It will be for the national authorities, within the discretion accorded to them by the regulation, to adopt the

3 — See *inter alia* judgment of 25 May 1989 in Case 40/88 *Weber* [1989] ECR 1395.

4 — With respect to the need for uniform interpretation, at least as a general rule, of customs and agricultural nomenclature, see the judgments of 5 July 1978 in Case 5/78 *Milchfutter* [1978] ECR 1597, and of 28 March 1979 in Case 158/78 *Biegi* [1979] ECR 1103.

system which will guarantee the most objective classification,

Furthermore, it would even seem that, in certain cases at least, recourse to standard dimensions is essential. It will be necessary to rely on external criteria in cases where, for example, no whole grain can be found in the consignment in question. Again, as was correctly pointed out, it may be necessary to refer, indirectly, to standard dimensions in order to decide whether or not it is appropriate to exclude from the measurement operation grains which display characteristics which do not match those of the variety under examination — such a course may be necessary to avoid the risk of fraud in cases where particularly long grains of a variety different from that of the broken grains have been deliberately added for the sole purpose of arriving at a higher average length than that appropriate to the variety in question, thus procuring the application of the lower levy.

6. However, even if it is conceded that — in appropriate cases, of course — priority must be accorded to direct measurement to determine the average length of the whole grains, I do not think that it is necessary in every case — as the Commission contends — to include in that operation the whole grains which are not fully developed. Those grains, which clearly depart from the norm and are contained in the consignment merely by accident, cannot, specifically for that reason, be used as a proper point of reference for the application of the classification rule and, consequently, for the rule as to the rate of levy.

In other words, I consider that the measuring operation in question must be carried out on a sample which has been selected to ensure that it is representative of the variety to which the broken fragments belong. Any other course can only lead to a result which does not reflect the objective characteristics of the goods in question. Another result is that the levy system is undermined since, in accordance with the Commission's thesis, it follows that, in all probability, a higher rate will be imposed without justification. Moreover, since the classification is then seen to rely on a wholly accidental factor (the presence of a greater or lesser number of abnormal grains), the result will be wholly unforeseeable and traders will be deprived of any certainty. Finally, for the same reasons, it would seem correct to conclude that the criterion advocated by the Commission might lead, as a result of wholly fortuitous circumstances, to goods being placed in a category whose objective characteristics they do not display.

In short, it seems to me that whole underdeveloped grains should not be taken into account in measuring the average length of whole grains within the meaning of point 3 of Annex A to Regulation No 1418/76 if it is wished to ensure that goods are classified in a manner which reflects the general requirements of objectivity, certainty and uniformity.

In addition, the fact that the need to work on the basis only of a representative sample of the imported variety is consistent with the scheme of the regulation is confirmed by the fact that point 2 of the annex in question expressly provides, in relation to rice

comprising whole grains, that the measurement of the grains is to be carried out on a 'representative sample from the consignment'.

7. It will also be noted that the Commission has not effectively denied that the application of the criterion suggested by it may give rise to the difficulties outlined earlier. However, it stated that the broken rice in question, in so far as it is used in the Netherlands market for food purposes, may in some degree compete with rice properly so called. Therefore, even if the imposition of a higher levy does not appear justified in the light of the objective characteristics of the product, which is still to be regarded as broken rice, that levy must none the less be regarded as appropriate in so far as it ensures that, in certain markets, rice, particularly of Community origin, is not exposed to competition from imported broken rice.

In the first place, I would point out that the marketing of broken rice for food purposes is perfectly lawful, both under Community law and under the laws of the Member States. I would also point out that the Commission did not consider it possible, or appropriate, to adjust the rates of levy by increasing the rate applicable to broken rice of superior quality which is more likely than other qualities to compete with rice made up of whole grains.

In those circumstances, the application of the levy applicable to rice to a product which in fact displays the objective characteristics of broken rice amounts to no more and no less than an obstacle to the marketing of the latter product. I see no justification for such an obstacle since broken rice is marketed in accordance with the Community rules and satisfies a demand which exists in certain areas of the market. But even if that fact is disregarded, I consider in any event that it is inappropriate for such a result to be sought, indirectly, by the distorted application of the relevant classification rule.

8. In the light of the foregoing observations, I think that the national court's first two questions may be answered as follows:

'(1) Pursuant to point 3 of Annex A to Regulation No 1418/76, the national authorities are not required to determine the "average length of the whole grain" by direct measurement of the dimensions of the whole grains occurring in the consignment of imported broken rice. They may also have recourse to external criteria, in particular the standard dimensions recognized in international trade practice, where they consider it necessary to do so to ensure that the classification of the goods is consonant with their objective characteristics.

(2) However, in those cases where the "average length of the whole grain" is to be determined by measuring the dimensions of the whole grains occurring in the consignment of imported broken rice, the national authorities are required to carry out that operation on a sample which has been selected so as to render it representative of the variety of rice to which the broken grains belong. For that purpose, whole grains whose dimensions are not in conformity with those of the variety in question are to be excluded from the measuring operation, in particular grains which have not achieved full growth. In selecting the representative sample to be measured, the national authorities may adopt as a criterion the standard dimensions of the various varieties of rice recognized in international commercial practice.'

9. In view of the foregoing answer, it is unnecessary to consider the third question submitted by the national court.