

JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
9 April 1997^{*}

In Case T-47/95,

Terres Rouges Consultant SA, a company incorporated under French law,
established in Paris,

Cobana Import SARL, a company incorporated under French law, established in
Rungis, France,

SIPEF NV, a company incorporated under Belgian law, established in Antwerp,
Belgium,

represented by Michel Aurillac, of the Paris Bar, with an address for service in
Luxembourg at the Chambers of Charles Duro, 4 Boulevard Royal,

applicants,

v

Commission of the European Communities, represented by Theofanis
Christoforou, Yves Renouf and Gérard Berscheid, of its Legal Service, acting as
Agents, with an address for service in Luxembourg at the office of Carlos Gómez
de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

^{*} Language of the case: French.

supported by

Council of the European Union, represented by Arthur Brautigam and Jürgen Huber, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

Kingdom of Spain, represented by Rosario Silva de Lapuerta, Abogado del Estado, a member of the Legal Department for matters before the Court of Justice, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

and

French Republic, represented by Catherine de Salins, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédéric Pascal, Central Administrative Attaché, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

interveners,

APPLICATION for annulment of Commission Regulation (EC) No 3224/94 of 21 December 1994 laying down transitional measures for the implementation of the Framework Agreement on Bananas concluded as part of the Uruguay Round of multilateral trade negotiations (OJ 1994 L 337, p. 72),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: K. Lenaerts, President, P. Lindh, J. Azizi, J. D. Cooke and M. Jaeger,
Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on
4 December 1996,

gives the following

Judgment

Legislation and factual context

1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (OJ 1993 L 47, p. 1; 'Regulation No 404/93'), as last amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105), established a common organization of the market in bananas.

2 Article 15 of Regulation No 404/93 draws a distinction in particular between:

- traditional imports of bananas from ACP States up to the quantitative limits set in the annex thereto ('traditional ACP bananas');

- non-traditional imports from ACP States exceeding the quantities set for traditional ACP bananas ('non-traditional ACP bananas');
- imports from non-ACP third countries, meaning quantities from other third countries ('third-country bananas').

3 Under Article 18 of Regulation No 404/93, a tariff quota of two million tonnes was to be opened each year for third-country bananas and non-traditional ACP bananas. Within the framework of that quota, it fixed a customs duty for third-country bananas, but made non-traditional ACP bananas subject to a zero duty. It also fixed customs duties for the two categories of bananas outside the quota. Traditional ACP bananas, which were not set against that quota, were granted full exemption from duty.

4 Following adoption by the Council of Regulation No 404/93, a number of Latin American banana-producing countries, namely Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, asked for a panel to be set up under Article XXIII(1) and (2) of the General Agreement on Tariffs and Trade ('GATT'). The setting up of such a panel constituted a stage in the GATT dispute-settlement procedure. The panel's terms of reference were to consider the matter referred to the Contracting Parties, and to make findings for the purpose of assisting the Contracting Parties to make recommendations or give a ruling on the matter raised.

5 The panel found that some aspects of the arrangements laid down by Regulation No 404/93 were incompatible with GATT, in particular the specific duties levied on imports of bananas, the preferential duties granted by the Community in respect of bananas originating in ACP countries and the award of import licences for imports within the tariff quota. It recommended that the Contracting Parties ask the Community to bring those aspects into line with its obligations under GATT. The panel's report was not adopted by the Contracting Parties.

6 In order to find a satisfactory permanent solution to the dispute between the Latin American countries and the Community, the latter gave notice in October 1993 of its intention to unbind, on the basis of Article XXVIII of GATT, the customs duty on bananas referred to in its schedule of concessions lodged with GATT and to enter into negotiations with the parties primarily concerned within the meaning of that article.

7 The Commission commenced negotiations relating to that unbinding, which in March 1994 led to a framework agreement on bananas ('the Framework Agreement') with the Latin American countries concerned, other than Guatemala.

8 The Framework Agreement provided in particular for a reduction from ECU 100 to ECU 75 per tonne in the duty payable on third-country bananas within the tariff quota.

9 It also divided up that quota into specific quotas allocated as follows:

Country	Share of the tariff quota
Costa Rica	23.4%
Colombia	21.0%
Nicaragua	3.0%
Venezuela	2.0%
Dominican Republic and other ACP countries concerning non-traditional quantities	90 000 tonnes
Other countries	46.32% (1994) 46.51% (1995)

10 In view of the Framework Agreement, the parties thereto undertook not to seek adoption of the panel's report.

11 Commission Regulation (EC) No 3224/94 of 21 December 1994 laying down transitional measures for the implementation of the Framework Agreement on Bananas concluded as part of the Uruguay Round of multilateral trade negotiations (OJ 1994 L 337, p. 72; 'Regulation No 3224/94' or the 'contested regulation') laid down transitional measures applying the arrangements for importing bananas into the Community pending adoption of definitive measures.

12 It also divided up the 90 000 tonnes of non-traditional ACP bananas as follows:

Country	Quantity in tonnes
Dominican Republic	55 000
Belize	15 000
Côte d'Ivoire	7 500
Cameroon	7 500
Others	5 000

13 Regulation No 3224/94 was adopted, in particular, on the basis of Article 20 of Regulation No 404/93, which authorizes the Commission to adopt detailed rules for implementing Title IV (Trade with third countries).

14 The three applicant companies are responsible for importing and marketing 70% of Côte d'Ivoire's banana production.

Procedure

- 15 By application lodged at the Court Registry on 20 February 1995, the applicants brought an action for annulment of Regulation No 3224/94.
- 16 On 22 March 1995, the Council lodged an application for leave to intervene in support of the form of order sought by the Commission.
- 17 By a document lodged on 28 April 1995, the Commission raised an objection of inadmissibility.
- 18 On 9 June 1995, the applicants lodged their observations on that objection.
- 19 On 20 July 1995, the Kingdom of Spain lodged an application for leave to intervene in support of the form of order sought by the Commission.
- 20 On 27 July 1995, the French Republic lodged an application for leave to intervene in support of the form of order sought by the Commission.
- 21 By order of the Court of First Instance (Fourth Chamber) of 26 October 1995, the objection of inadmissibility was joined to the substance of the case. By orders made on the same day by the President of the Fourth Chamber, the Council, the Kingdom of Spain and the French Republic were granted leave to intervene in support of the form of order sought by the Commission.

- 22 Following a request by the Kingdom of Spain, the Court decided on 5 December 1995, in accordance with Article 51(2) of the Rules of Procedure, to refer the case to the Fourth Chamber, Extended Composition, composed of five judges.
- 23 Upon hearing the Report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry, but requested the Commission to reply in writing to certain questions and to produce a copy of the minutes of the Management Committee meeting which had taken place on 20 December 1994. The Commission lodged its answers to the questions and the document requested on 26 November 1996.
- 24 The parties other than the Council presented oral argument and answered oral questions put by the Court at the hearing on 4 December 1996.

Forms of order sought

- 25 The applicants claim that the Court should:

— annul Regulation No 3224/94;

— order the Commission to pay the costs.

- 26 The Commission claims that the Court should:
- dismiss the action as inadmissible or, in the alternative, as unfounded;
 - order the applicants to pay the costs.
- 27 The Council claims that the Court should dismiss the action as inadmissible or, in the alternative, as unfounded.
- 28 The Kingdom of Spain claims that the Court should declare the action inadmissible or, in the alternative, unfounded.
- 29 The French Republic claims that the Court should dismiss the action as inadmissible.

Pleas and arguments of the parties

- 30 The applicants put forward four pleas in support of their claim for annulment, based, respectively, on infringement of essential procedural requirements, infringement of Regulation No 404/93, inapplicability of the Framework Agreement and infringement of the Fourth ACP-EEC Convention signed at Lomé on 15 December 1989.
- 31 The Commission contends that the action is inadmissible and, in the alternative, that the four pleas in support of annulment are unfounded.

Admissibility

Arguments of the parties

- 32 The Commission, supported by Spain, France and the Council, claims that the action for annulment is inadmissible on the ground that Regulation No 3224/94 is not of direct and individual concern to the applicants within the meaning of the fourth paragraph of Article 173 of the EC Treaty.
- 33 The applicants submit, first, that they import 70% of Côte d'Ivoire's production and that one of them, Terres Rouges Consultant, imports bananas from that country only.
- 34 They point out that, pursuant to Article 15 of Regulation No 404/93 and the annex thereto, Côte d'Ivoire may export 155 000 tonnes of traditional ACP bananas annually to the Community. That amount is lower than current potential production and Côte d'Ivoire is capable of placing approximately 50 000 additional tonnes of bananas on the Community market.
- 35 Under Regulation No 404/93 Côte d'Ivoire was entitled to a share in the tariff quota of two million tonnes, as confirmed in the following terms by a letter of 12 July 1993 from the Vice-President of the Commission to Côte d'Ivoire's Minister of Agriculture:

'Moreover, I am convinced that the exemption from customs duty which applies, in the context of the annual quota of two million tonnes, to imports of ACP bananas exceeding the traditional quantities will enable Côte d'Ivoire to sell its entire production on the Community market'.

- 36 Following adoption of Regulation No 3224/94, however, the tariff quota entitlement for non-traditional ACP bananas from Côte d'Ivoire was reduced to 7 500 tonnes each year, retroactively from 1 October 1994. Regulation No 3224/94 thus altered fundamentally the entitlement laid down by Regulation No 404/93.
- 37 The applicants are accordingly directly concerned by the substantial reduction in tariff quota entitlement for non-traditional ACP bananas from Côte d'Ivoire.
- 38 They are also individually concerned because they account for 70% of imports from Côte d'Ivoire. Although in 1994 they had been able to import approximately 35 000 tonnes of non-traditional ACP bananas into the Community, namely 70% of the 50 000 additional tonnes, they can henceforth import only 5 250 tonnes each year, that is to say 70% of the 7 500 tonnes allocated to Côte d'Ivoire.

Findings of the Court

- 39 As the Court of Justice and the Court of First Instance have consistently held, the fourth paragraph of Article 173 of the Treaty gives individuals the right to challenge any decision which, although in the form of a regulation, is of direct and individual concern to them. The particular purpose of that provision is to prevent the Community institutions from being able, simply by choosing to use the form of a regulation, to preclude an individual from bringing an action against a decision which concerns him directly and individually and thus to make it clear that the nature of a measure cannot be changed by the form chosen (see Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta v Commission* [1980] ECR 1949, paragraph 7, and Case T-298/94 *Roquette Frères v Council* [1996] ECR II-1531, paragraph 35).

40 The test for distinguishing between a regulation and a decision is whether or not the measure in question has general application. It is therefore necessary to analyse the nature of the contested measure and in particular the legal effects which it is intended to produce or actually produces (see Case 26/86 *Deutz and Geldermann v Council* [1987] ECR 941, paragraph 7, and *Roquette Frères v Council*, cited above, paragraph 36).

41 In this case the contested regulation does not have any features which would enable it to be classed as a decision taken in the form of a regulation. It is drafted in general and abstract terms and is applicable in all the Member States, without any regard being had to the situation of individual producers. It is designed to amend the arrangements for the import of bananas laid down by Regulation No 404/93 in order to adapt them to the changes introduced by the Framework Agreement entered into with the Latin American countries concerned.

42 It follows that the contested regulation applies to situations which have been determined objectively and has legal effects with respect to a category of persons viewed in a general and abstract manner.

43 As regards the question whether the applicants are individually concerned by the contested regulation, it is settled law that, in certain circumstances, even a legislative measure applying to the traders concerned in general may concern some of them individually (judgments in Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, paragraph 13, and Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraph 19, and order of 11 January 1995 in Case T-116/94 *Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e Procuratori v Council* [1995] ECR II-1, paragraph 26). In such circumstances, a Community measure could be of a legislative nature and, at the same time, in the nature of a decision *vis-à-vis* some of the traders concerned (Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] ECR II-2941, paragraph 50).

- 44 However, the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them (Case 123/77 *UNICME v Council* [1978] ECR 845, paragraph 16).
- 45 In that regard, the legislative provisions relevant to this dispute should be borne in mind. Article 19 of Regulation No 404/93 provides that the tariff quota is to be opened as to 66.5% for the category of operators who marketed third-country and/or non-traditional ACP bananas (category A); as to 30% for the category of operators who marketed Community and/or traditional ACP bananas (category B); and as to 3.5% for the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C). Supplementary criteria to be met by operators are to be laid down in accordance with the procedure provided for in Article 27 of the regulation. Operators who satisfy those conditions and who are granted import licences by the competent authorities of the relevant Member State may import third-country or non-traditional ACP bananas within the tariff quota, whatever category of importer they fall within.
- 46 In addition, the Court of Justice has held that the purpose of Articles 18 and 19 of Regulation No 404/93 is to establish arrangements for trade in bananas with third countries and a mechanism for the allocation of the tariff quota between categories of traders defined according to objective criteria. Those provisions accordingly apply to situations which have been determined objectively and have legal effects as regards categories of persons viewed in a general and abstract manner. It follows that the contested measure is of concern to the applicants only in their objective capacity as traders engaged in the marketing of bananas from third countries in the same way as any other trader in an identical position (order of 21 June 1993 in Case C-276/93 *Chiquita Banana Company and Others v Council* [1993] ECR I-3345, paragraphs 10, 11 and 12).

47 Regulation No 3224/94 admittedly restricted the quantity of non-traditional ACP bananas that Côte d'Ivoire could export within the tariff quota. However, under Regulation No 404/93 (see paragraph 45 of this judgment), all importers in categories A, B and C are entitled to import bananas from Côte d'Ivoire. Regulation No 3224/94 thus affects every importer wishing to import bananas from Côte d'Ivoire and the fact that the applicants currently import a large proportion of Côte d'Ivoire's bananas does not amount to circumstances differentiating them from other importers.

48 The applicants' argument that Regulation No 3224/94 fundamentally altered the rights conferred by Regulation No 404/93 must be rejected.

49 It is based on the premiss that, before Regulation No 3224/94 was adopted, Côte d'Ivoire could have placed approximately 50 000 tonnes of non-traditional ACP bananas on the Community market in addition to the 155 000 tonnes of traditional ACP bananas allocated to it by Regulation No 404/93 (see paragraphs 34 to 38 of this judgment).

50 First, Regulation No 3224/94 does not in any way preclude the applicants from importing into the Community traditional ACP bananas from Côte d'Ivoire. They can still import 70%, or even more, of the 155 000 tonnes of traditional ACP bananas allocated to that country.

51 Secondly, as the Commission stated at the hearing and the applicants did not dispute, the total amount of traditional ACP and non-traditional ACP bananas exported from Côte d'Ivoire in 1993 and 1994 after the new arrangements had

been established by Regulation No 404/93 did not exceed 160 000 tonnes per year. Those exports did not therefore exceed the quantity of 162 500 tonnes constituted by the reserve of 155 000 tonnes of traditional ACP bananas and the share of 7 500 tonnes of non-traditional ACP bananas reserved for Côte d'Ivoire by Regulation No 3224/94. The truth is that the figure of 50 000 tonnes quoted by the applicants is only an estimate of the potential production of Côte d'Ivoire's plantations and does not refer to current exports. Contrary to the applicants' submissions, therefore, their position has not in actual fact been affected by the adoption of Regulation No 3224/94.

- 52 Furthermore, the Vice-President of the Commission, in his letter of 12 July 1993 cited by the applicants (see paragraph 35 of this judgment), did not consider that the figure of 200 000 tonnes represented the amount of Côte d'Ivoire's current production. On the contrary, he stated: '... I was fully informed of the investment carried out in your country which is to take banana production above 200 000 tonnes per year and I can assure you that that information was also brought to the attention of the Council. Moreover, it was that information which enabled the Council to set a traditional quantity for Côte d'Ivoire which exceeds by far the quantity which would result from an interpretation of provisions of the Lomé Convention.'

- 53 He also explained how the tariff quota reserved for Côte d'Ivoire had been calculated. 'Secondly, it is clear that the Council also had to take account of the need to maintain a balance between the various sources of supply onto the Community

market, without which the success of the entire matter would have been jeopardized. Accordingly, I consider that the traditional quantity set for your country represents a fair compromise, particularly as that quantity exceeds even the level of the best performance achieved in the past on the entire Community market.'

54 Thirdly, the applicants' assertion that Côte d'Ivoire should be able to place an additional quantity of 50 000 tonnes of non-traditional ACP bananas on the Community market under the terms of Regulation No 404/93 is incorrect. Article 18 of that regulation provided for the opening of an annual tariff quota of two million tonnes for third-country bananas and non-traditional ACP bananas in general and did not set aside for Côte d'Ivoire any specific part of that quota.

55 It follows from the foregoing that Regulation No 3224/94 does not refer to or affect specifically the applicants' circumstances and concerns them only in their objective capacity as importers of third-country bananas. Their legal position is not affected by reason of circumstances in which they are differentiated from the other traders in the same position.

56 Accordingly, Regulation No 3224/94 is not of individual concern to the applicants.

57 Although it is not strictly necessary to address the question whether the applicants are directly concerned by that regulation, it should be added that it affects their legal position only in an indirect manner. Article 17 of Regulation No 404/93 requires every importer wishing to import third-country bananas to obtain an import licence. Under Articles 17 and 19, it is for the Member States to determine the number of import licences to be issued to each importer and to issue those licences.

- 58 In those circumstances, only the decisions of the Member States granting or refusing such licences are capable of concerning the applicants directly. The fact that a certain quantity of bananas is allocated to Côte d'Ivoire by Regulation No 3224/94 is not capable of affecting the applicants' legal position directly since they remain free to import bananas from any third country or ACP country within the tariff quota provided that they have obtained the necessary import licences.
- 59 Nor have the applicants established that in appropriate circumstances it would be impossible for them to challenge the validity of Regulation No 3224/94 before a national court, for example in an action brought against a refusal by the competent national authorities to issue them with import licences for non-traditional ACP bananas from Côte d'Ivoire, and to request the national court to seek a preliminary ruling in that regard from the Court of Justice pursuant to Article 177 of the Treaty.
- 60 It follows from all of the above that the application must be dismissed as inadmissible.

Costs

- 61 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful in their claims and the Commission has applied for costs, they must be ordered to pay the costs. However, in accordance with Article 87(4) of the Rules of Procedure, the Member States and the Council, as interveners, are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

- 1. Dismisses the action as inadmissible;**
- 2. Orders the applicants to bear jointly and severally the costs incurred by the defendant;**
- 3. Orders the interveners to bear their own costs.**

Lenaerts

Lindh

Azizi

Cooke

Jaeger

Delivered in open court in Luxembourg on 9 April 1997.

H. Jung

K. Lenaerts

Registrar

President