JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
12 July 2001 *

In Case T-3/99,

Banatrading GmbH, established in Hamburg (Germany), represented by G. Meier, lawyer,

applicant,

v

Council of the European Union, represented by S. Marquardt and J.P. Hix, acting as Agents,

defendant,

supported by

French Republic, represented by K. Rispal-Bellanger, C. Vasak, S. Seam and F. Million, acting as Agents, with an address for service in Luxembourg,

* Language of the case: German.

and by

Commission of the European Communities, represented by K.-D. Borchardt, acting as Agent, with an address for service in Luxembourg,

interveners,

APPLICATION for compensation for the loss which the applicant has suffered as a result of the Council introducing, under Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1), provisions which are alleged to conflict with Article I.1 and Article XIII of the General Agreement on Tariffs and Trade (GATT),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 3 October 2000,

gives the following

Judgment

Legal Background

1 Title IV of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) replaced the various national systems with a common system of trade with third countries.

2 Article 15 thereof, which became Article 15a following the adoption of 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), drew a distinction between *inter alia*:

— 'traditional imports from [African, Caribbean and Pacific] States', representing the quantities of bananas exported by each ACP State which has traditionally exported bananas to the Community, as set out in the Annex to Regulation No 404/93 ('traditional ACP bananas');

— 'non-traditional imports from ACP States', representing the quantities of bananas exported by the ACP States in excess of the quantities set for traditional ACP bananas ('non-traditional ACP bananas');

— 'imports from non-ACP third countries', representing the quantities exported by other third countries ('third-country bananas').

3 The quantities of traditional ACP bananas for each of the States concerned were fixed in the Annex to Regulation No 404/93 and amounted, in total, to 857 700 tonnes (net weight). In accordance with the Fourth Lomé Convention those quantities were deemed to represent the highest figures for pre-1991 exports from each of those States to the Community.

4 Article 18(1) of Regulation No 404/93, as amended by Regulation (EC) No 3290/94, provided that a tariff quota of 2.1 million tonnes (net weight) for 1994 and 2.2 million tonnes (net weight) for subsequent years was to be opened for imports of third-country bananas and non-traditional ACP bananas. Within that quota, imports of third-country bananas were to be subject to duty of ECU 75 per tonne and imports of non-traditional ACP bananas to zero duty. Non-traditional ACP bananas imported in excess of that quota were subject to the duty prescribed by the Common Customs Tariff, reduced by ECU 100.

5 Traditional ACP bananas were granted full exemption from duty.

6 Article 19(1) of Regulation No 404/93 subdivided the tariff quota as follows: 66.5% to the category of operators who had marketed third-country and/or non-

traditional ACP bananas (category A), 30% to the category of operators who had marketed Community and/or traditional ACP bananas (category B) and 3.5% to the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C).

7 The first sentence of Article 19(2) of Regulation No 404/93 was worded as follows:

'On the basis of separate calculations for each of the categories of operators referred to in paragraph 1... each operator shall obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available.'

8 On 10 June 1993 the Commission adopted Regulation (EEC) No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6).

9 Those import arrangements were the subject of a dispute settlement procedure within the framework of the World Trade Organisation (WTO) following complaints from some third countries.

10 That procedure gave rise to reports from the WTO Panel of 22 May 1997 and a report from the WTO Standing Appellate Body of 9 September 1997, which was adopted by the WTO Dispute Settlement Body by decision of 25 September

1997. In that decision the Dispute Settlement Body declared certain aspects of the arrangements governing banana imports into the Community incompatible with the rules of the WTO.

11 Following that decision, the Council adopted Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation (EEC) No 404/93 (OJ 1998 L 210, p. 28). In particular, Regulation No 1637/98 replaced the Annex to Regulation No 404/93 with a new Annex, again setting the total quantity of traditional ACP bananas at 857 700 tonnes but without subdividing that quantity between the ACP States concerned.

12 Following a request lodged by one of the complainant third countries, the WTO panel considered whether Regulation No 1637/98 was compatible with WTO rules and produced a report on 12 April 1999. In that report the panel stated in effect that the Community was not in a position to authorise certain ACP States which are traditional suppliers to exceed their highest figures for pre-1991 individual exports within the total quantity of 857 700 tonnes allocated to those States as a whole.

Facts and procedure

13 The applicant is an undertaking which, since 1 January 1995, has imported bananas originating in Ecuador for sale in Germany. It was a Category C operator. It claims that it had to acquire import licences from other operators and pay import dues in order to be able to market the bananas concerned.

14 The applicant brought this action for damages by application lodged at the Registry of the Court of First Instance on 4 January 1999. It relied in particular

on breach of certain provisions of the General Agreement on Tariffs and Trade 1994 (GATT), which is found in Annex 1A to the Agreement establishing the World Trade Organisation ('the WTO Agreement'), approved by Council Decision 94/800/EC (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

15 By order of 10 September 1999, the President of the Fifth Chamber of the Court of First Instance granted the Commission and the French Republic leave to intervene in support of the form of order sought by the Council in this case. The pleadings of the interveners were lodged on 18 October and 2 November 1999 respectively.

16 In its judgment of 23 November 1999 in Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, the Court of Justice held at paragraph 47:

'[H]aving regard to their nature and structure, [the memoranda and agreements in Annexes 1 to 4 to the WTO Agreement] are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.'

17 By letter of 16 December 1999, the parties were requested to submit their observations on the possible consequences of that judgment. The Commission, the applicant, the French Republic and the Council submitted their observations on 6, 10, 18 and 19 January 2000 respectively.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, to ask the applicant to reply to questions. In particular, the applicant was asked to make clear whether it was abandoning its arguments relating to the alleged direct effect of the 1994 GATT rules and to provide certain explanations orally at the hearing. On 2 August 2000, the applicant provided answers to the questions to which it had been requested to reply in writing.

19 The parties presented oral argument and replied to the Court's questions at the hearing in open court on 3 October 2000.

Forms of order sought

20 The applicant claims that the Court should:

— as regards its principal claim:

— order the Council to compensate it for the loss which it has suffered since 21 January 1996 through having to obtain import licences from Category A, B or C operators in order to market bananas originating in Ecuador in Germany;

— order the Council to compensate it for the loss which it has suffered since 21 January 1996 through having to pay import duties in respect of the bananas originating in Ecuador and marketed by it in Germany;

— order the Council to compensate it for loss which it has suffered since 21 January 1996 as a result of not having been able to deposit in an interest-bearing account the sums that it spent on the purchase of import licences and the payment of import duties;

— order interest to be paid on any compensation at a rate of 4% as from the commencement of proceedings;

— order the Council to pay the costs;

— in the alternative, order the Council to compensate it for the abovementioned loss suffered since 8 September 1997;

— in the further alternative, order the Council to compensate it for the abovementioned loss suffered since 25 September 1997.

21 In its reply the applicant stated that it discontinued the fourth head of its principal claim.

22 As regards both the alternative and further alternative heads of claim, the applicant stated at the hearing that the dates referred to therein are to be replaced by 1 January 1999.

23 The Council contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

24 In its rejoinder, it also contends that the Court should, in any event, order the applicant to pay the costs relating to the fourth head of its principal claim.

25 The Commission and the French Republic submit that the Court should dismiss the action.

Admissibility of the amendments to the alternative and further alternative heads of claim

Arguments of the parties

26 The applicant explained at the hearing that the substitution in the alternative and further alternative heads of claim of 1 January 1999 in place of 8 and 25 September 1997 respectively was dictated by the judgment in *Portugal* v *Council*, cited above. It seeks to rely, more specifically, on the exception to the absence of direct effect for the 1994 GATT rules which it claims that judgment introduced (see paragraph 38 below).

27 The Council countered by saying that that amendment should be held inadmissible.

Findings of the Court

28 Under Article 44(1) of the Rules of Procedure of the Court of First Instance an applicant is required to state in his application the subject-matter of the proceedings and the forms of order sought. Although Article 48(2) of those rules authorises, in certain circumstances, new pleas in law to be introduced in the course of proceedings, the provision cannot in any circumstances be interpreted as authorising the applicant to bring new claims before the Court and thereby to modify the subject-matter of the proceedings (judgments of the Court of Justice in Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3, and of the Court of First Instance in Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraph 43).

29 The applicant is not entitled to require the substitution in the alternative and further alternative heads of claim of 1 January 1999 in place of 8 and 25 September 1997 respectively. Such an amendment, in so far as it arises solely because there is a new plea in law which is itself inadmissible (see paragraphs 46 to 50 below), would result in a new claim being brought before the Court and thereby in the modification of the subject-matter of the proceedings.

Substance

30 It is settled case-law that the Community can incur non-contractual liability under the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) only if a number of conditions, relating to the unlawfulness of the alleged conduct of the Community institutions, the existence of damage and the presence of a causal link between that conduct and the alleged damage, are met (see Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraph 42, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 54).

31 The applicant claims that the Council's conduct was unlawful inasmuch as it acted in breach of (i) certain provisions of GATT 1994 and (ii) the first paragraph of Article 234 of the EC Treaty (now, after amendment, the first paragraph of Article 307 EC).

32 It explains in that regard that the quantities of traditional ACP bananas set out in the Annex to Regulation No 404/93 are presumed to represent the highest figures for pre-1991 exports to the Community from ACP States as traditional suppliers. It states that the Annex refers to a total of 857 700 tonnes, whereas, in the light of statistics from the European Communities Statistical Office (Eurostat), the figure

should have been only 622 000 tonnes. It is apparent from the findings made by the WTO Standing Appellate Body in its report of 9 September 1997 and by the Dispute Settlement Body in its decision of 25 September 1997 that the difference between those two figures, namely 235 700 tonnes, is incompatible with Article I.1 and Article XIII of GATT 1994. The preferential tariff treatment thereby granted by the Community to the ACP States which are traditional suppliers should, by virtue of the most-favoured-nation clause in Article I.1 of GATT 1994, have been extended to each of the other producing countries party to that agreement up to a maximum of that last figure. That would have enabled the applicant to import into Germany free of customs duties the bananas originating in Ecuador. However, in its reply the applicant argues that the Community should have extended the preferential tariff arrangements to that country up to a maximum not of 235 700 tonnes but of the surplus amounts of which Belize, Cameroon and the Ivory Coast had unlawfully had the benefit. At the hearing the applicant developed a third argument alleging that the arrangements should have applied to bananas originating in any of the producing countries which are party to GATT, other than the twelve ACP States which are traditional suppliers, up to a maximum of 857 700 tonnes. Its points concerning the quantities exceeding the highest figures for pre-1991 exports from those States are therefore now pleaded only in the alternative.

The alleged breach of certain provisions of GATT 1994

Arguments of the parties

33 The applicant submits that Article I.1 and Article XIII of GATT 1994 have direct effect within the Community legal order.

34 First, those provisions are clear, precise and unconditional.

35 Second, there are significant differences between the WTO Agreement and its annexes and GATT 1947. Unlike GATT 1947, the former constitute a proper legal system with its own judicial arrangements. The new WTO law is not amenable to debate but includes strict prohibitions which may be restricted or temporarily lifted only by WTO measures and not by unilateral measures taken by a member country.

36 Lastly, the parties to the WTO Agreement have not precluded it from being directly applicable. Unilateral declarations to the contrary by the Community or the United States of America have no legal effect in international law.

37 As to the possible consequences of the judgment in *Portugal* v *Council* (see paragraph 16 above), the applicant admitted in response to the Court's question that the Court of Justice had held that the WTO rules did not have any 'general direct effect' in the Community legal order. In its letter of 2 August 2000 (see paragraph 18 above) and at the hearing the applicant specifically stated that it was therefore abandoning the arguments it had put forward in that regard.

38 At the hearing, it submitted that in that judgment, the Court of Justice had stated that it was none the less for the Community courts to review the legality of the Community measure in question in the light of the WTO rules where the following three cumulative conditions were satisfied: first, the WTO has found that there has been a breach of those rules; second, the Community has undertaken to implement the recommendations and subsequent decisions of the Dispute Settlement Body in accordance with Article 21(3) of the Understanding on the Rules and Procedures governing the Settlement of Disputes in Annex 2 to

the WTO Agreement; third, the Community has not taken the measures necessary to comply with the recommendations and decisions within the prescribed time-limit. The applicant claims that in the present case those three conditions were met on 1 January 1999, the date on which Regulation No 1637/98 first applied.

39 The Council contends that the WTO rules, including Article I.1 and Article XIII of GATT 1994, do not have direct effect within the Community legal order and cannot therefore be relied on by individuals in legal proceedings.

40 It points out that the Court held that the 1947 GATT rules did not have direct effect, since the agreement was based on the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements, a particular feature being the great flexibility of its provisions (Case C-280/93 *Germany* v *Council* [1994] ECR I-4973). The Council submits that that case-law also applies to the WTO Agreement and its annexes since they share the same features as the 1947 GATT rules.

41 In response to the Court of First Instance's question about the possible consequences of *Portugal* v *Council*, the Council asserts that the judgment bears out its argument. It is clear from the judgment that the WTO Agreement and its annexes do not constitute a criterion by reference to which the legality of the Community's secondary legislation is to be assessed.

42 The Commission and the French Republic essentially concur with the Council's arguments.

Findings of the Court

43 It is settled Community case-law that, having regard to their nature and structure, the WTO Agreement and its annexes are not in principle among the rules in the light of which the Court is to review the legality of measures of the Community institutions (see *Portugal* v *Council*, cited above, paragraph 47; and Joined Cases C-300/98 and C-392/98 *Dior* [2000] ECR I-11307, paragraph 43). Those texts are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law (see *Dior*, cited above, paragraph 44).

44 Furthermore, the applicant expressly abandoned the arguments on which it had relied to support its contention that Article I.1 and Article XIII of GATT 1994 have direct effect (see paragraphs 17, 18 and 37 above).

45 In those circumstances, this action cannot be founded on an alleged breach of those articles.

46 The applicant's argument that it is for the Community courts to review the legality of Community measures in the light of the WTO rules where three cumulative conditions are fulfilled (see paragraph 38 above) was raised for the first time at the hearing.

47 Pursuant to Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

48 In the present case, no new matters have come to light in the course of the procedure which would permit that argument to be advanced out of time. Thus, even in the applicant's view, the three conditions in question were fulfilled on the date on which Regulation No 1637/98 first applied, namely 1 January 1999. Since that regulation was adopted on 20 July 1998 and published in the *Official Journal of the European Communities* on 28 July 1998, it cannot be accepted that the argument at issue is based on a matter which has come to light in the course of the procedure.

49 In so far as the argument is to be understood as being based on paragraph 49 of the judgment in *Portugal* v *Council*, in which the Court of Justice held that 'it is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to specific provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules', it is appropriate to point out that those two exceptions form the subject-matter of settled case-law (see Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paragraphs 19 to 22; Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31; and *Germany* v *Council* (cited above), paragraph 111). It is clear from the case-law that a judgment which merely confirms law which ought to have been known to the applicant when it brought an action cannot be regarded as a new matter allowing a fresh plea to be raised (Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17; and Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 57). Therefore, the applicant cannot usefully rely on the judgment in *Portugal* v *Council* as a new matter of law or fact for the purposes of Article 48(2) of the Rules of Procedure. Although that judgment relates to GATT 1994, whilst the settled case-law referred to above involved GATT 1947, the fact remains that, as the question as to whether GATT 1994 had direct effect was the subject of much debate at the material time, the applicant could have safeguarded against a finding that there was no direct effect by pleading the argument in point in its application.

50 It is clear from the foregoing that the argument must be rejected as inadmissible.

The alleged breach of the first paragraph of Article 234 of the EC Treaty

Arguments of the parties

51 The applicant submits that the first paragraph of Article 234 of the EC Treaty establishes that international agreements concluded before the date on which the EC Treaty entered into force prevail over incompatible provisions of Community law. That principle enables provisions of Regulation No 404/93 which are contrary to Article I.1 and Article XIII of GATT to be disapplied. Should the Community institutions none the less apply those provisions, they would be required to pay compensation in respect of any loss suffered by individuals as a result.

52 According to the applicant, the conditions for applying the first paragraph of Article 234 of the Treaty are fulfilled in the present case.

53 First, it is clear from the judgment of the Court of Justice in Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023 that, in order for an international agreement to prevail over subordinate Community legislation by virtue of the first paragraph of Article 234 of the Treaty, it is sufficient for the agreement to predate the EC Treaty. Ecuador, although it was not a contracting party to GATT 1947 and did not accede to the WTO Agreement until 21 January 1996, has none the less been entitled to rely on Article 234 since the latter date for the purposes of ensuring that the GATT rules are complied with.

54 Second, Article I.1 and Article XIII of GATT are provisions which existed prior to the EC Treaty. GATT 1994 merely replicates the substantive law in GATT 1947. The amendments made in the context of the WTO concerned only the 'mechanism' of GATT, which had become obsolete. Furthermore, the parties to

GATT 1994 never decided to abrogate GATT 1947 as of 31 December 1995 but merely made provisional arrangements concerning the transitional application of the procedural rules in GATT 1947.

55 Third, the applicant points out that the obligations arising under GATT 1947 were transferred to the Community by virtue of its competence in matters relating to the common commercial policy.

56 When asked by the Court, by way of measures of organisation of procedure (see paragraph 18 above), to give a clear explanation at the hearing of its arguments based on the first paragraph of Article 234 of the Treaty, the applicant maintained that the Council had, in adopting the provisions in Title IV of Regulation No 404/93, failed to have regard to the rule in that provision concerning the scope of the powers of the Community, on the one hand, and of the Member States on the other. It asserted *inter alia* that Article 18(1) of the regulation was contrary to the provisions of GATT 1947, by which the Federal Republic of Germany had been bound since 1952.

57 The Council submits that the effect of the first paragraph of Article 234 of the Treaty cannot be to give Article I.1 and Article XIII of GATT precedence over the provisions of Regulation No 404/93.

58 It explains that, according to settled case-law, the sole purpose of the first paragraph of Article 234 of the Treaty is to make clear, in accordance with the principles of international law, that application of the EC Treaty does not affect the commitment of the Member State concerned to respect the rights of third countries under an earlier agreement and to comply with its corresponding obligations (Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8; and Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, paragraph 60). The provision thus deals with a situation in which there is a conflict between (i) an obligation incumbent upon a Member State under an earlier agreement and (ii) its obligation to apply Community legislation. However, there is no such conflict in the present case.

59 The Council contends, first, that GATT 1947 was no longer in force at the time of the imports at issue and that the commitments arising under GATT 1994 were entered into after the Treaty came into force. As is clear from Article II.4 of the WTO Agreement, GATT 1994 creates new, legally distinct obligations. It had been agreed that GATT 1947 should be abrogated and replaced by a new agreement, GATT 1994, in order to prevent parties to GATT 1947 not wishing to accede to the WTO Agreement and its annexes from none the less being able to have the benefit thereof by relying on the most-favoured-nation clause in GATT 1947. The Council also points out that Ecuador only acceded to the WTO Agreement on 21 January 1996.

60 Second, the Council submits that GATT 1994 imposes obligations not on Member States but solely on the Community, since the Community alone was competent under Article 113 of the EC Treaty (now, after amendment, Article 133 EC) to enter into the agreement. It adds that the Community had had exclusive competence for GATT 1947 since 1 July 1968, the date on which the Common Customs Tariff came into force.

61 Furthermore, the Council contends that it cannot be inferred from the Court of Justice's findings in the judgment in *T. Port*, cited above, that the first paragraph of Article 234 of the Treaty applies in cases relating to the import of bananas originating in a third country which was a member of GATT 1994 at the time of the imports in question, since that international agreement was not concluded by the Member States: nor was it concluded before the entry into force of the EC Treaty.

62 Lastly, it contends that the first paragraph of Article 234 of the Treaty does not establish that the WTO rules are directly applicable.

63 The Commission argues that Article 234 of the Treaty does not establish that public international law obligations prevail overCommunity law, but rather the

reverse. It points out that the second paragraph of that article provides that the Member States concerned are to take all appropriate steps to eliminate the incompatibilities established, which may include repudiating the public international law obligation at issue.

64 Nor, according to the Commission, may any general rule be inferred from Article 234 so far as the settlement of any conflict between public international law and Community law is concerned. The first paragraph of the article cannot therefore serve as a basis for a declaration, in the context of an action for damages, that the Community has acted in breach of certain higher rules of law under the WTO Agreement and its annexes, which are intended to safeguard individuals.

65 It adds that, in any event, the conditions for the first paragraph of Article 234 of the Treaty to apply are not fulfilled in the present case.

66 The French Republic submits that Article 234 of the Treaty cannot apply in the present case and draws attention more specifically to the fact that GATT 1947 was no longer in force at the time of the imports at issue.

Findings of the Court

67 As a preliminary point, the Court observes that (as the Council and the Commission rightly pointed out at the hearing) it is not clear from the applicant's arguments whether it is relying on the alleged breach of the first paragraph of Article 234 of the Treaty as a direct and independent ground for its action or whether it is invoking that provision merely in an attempt to establish that individuals may rely on breach of the provisions of GATT 1994 in legal proceedings.

68 Irrespective of which of the two possibilities the applicant has in mind, it cannot usefully rely on the first paragraph of Article 234 of the Treaty, since the conditions for that provision to apply are not fulfilled in this instance.

69 Under that provision as it was worded at the time when the action was commenced, 'the rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

70 According to settled case-law (see, *inter alia*, *T. Port*, cited above, paragraph 60), the purpose of the first paragraph of Article 234 of the Treaty is to make clear, in accordance with the principles of international law, that application of the EC Treaty does not affect the commitment of the Member State concerned to respect the rights of third countries under an earlier agreement and to comply with its corresponding obligations. Consequently, in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is necessary to consider whether that agreement imposes on the Member State concerned obligations whose performance may still be required by third countries which are parties to it.

71 Thus, for a Community provision to be deprived of effect as a result of an international agreement, two conditions must be fulfilled: the agreement must have been concluded before the entry into force of the EC Treaty and the third country concerned must derive from it rights which it can require the Member State concerned to respect (*T. Port*, paragraph 61).

72 First, however, it is apparent from the documents before the Court that the banana imports that form the subject-matter of the present proceedings took place between 1996 and 1998, that is, when GATT 1994 had already entered into

force and replaced GATT 1947. Furthermore, Ecuador was not a party to GATT 1947 and only became a member of the WTO, and thus of GATT 1994, on 21 January 1996. Since GATT 1994 was concluded after the entry into force of the Treaty, the first condition referred to above is not fulfilled.

73 It is noteworthy that in its pleadings the applicant does not dispute that at the time of the disputed imports it was GATT 1994 which applied. In the reports and decisions of the various WTO bodies to which the applicant refers in support of its action, those bodies express their view as to the compatibility of the Community legislation in point with Article I.1 and Article XIII of GATT 1994. However, the applicant's argument amounts to saying that GATT 1994 cannot be construed as an agreement which postdates the EC Treaty because it replicates the substantive law of GATT 1947, which predates conclusion of that Treaty. That argument cannot be accepted.

74 Article II.4 of the WTO Agreement specifically provides that 'the General Agreement on Tariffs and Trade 1994 as specified in Annex 1A... is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947,... as subsequently rectified, amended or modified...'.

75 GATT 1947 was abrogated on 31 December 1995 in accordance with the Decision of 8 September 1994 adopted by the Preparatory Committee for the WTO and the Contracting Parties to GATT 1947 concerning the transitional co-existence of GATT 1947 and the WTO Agreement.

76 Second, the obligations arising from GATT 1994 fall not on the Member States but on the Community, which had exclusive competence, pursuant to Article 113

of the EC Treaty, to conclude that agreement (Opinion 1/94 [1994] ECR I-5267, paragraph 34). At point 16 of his Opinion in *T. Port*, cited above (at p. I-1026), Advocate General Elmer thus stated that 'claims arising from GATT 1994 can only be addressed to the Community and not to the various Member States'.

77 In the light of the foregoing, the conclusions drawn by the applicant from *T. Port* (see paragraph 53 above) cannot be accepted.

78 In the event that the applicant is basing its case directly on the alleged breach of the first paragraph of Article 234 of the Treaty, it is also appropriate to point out that that provision is not intended to confer rights on individuals. In its judgment in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42, the Court held that the right to compensation requires *inter alia* that the rule of law infringed be intended to confer rights on individuals.

79 For the same reason, the argument propounded by the applicant for the first time at the hearing (see paragraph 56 above), in so far as it complains that the Council has failed to have regard to a rule in the first paragraph of Article 234 of the Treaty concerning the scope of the respective powers of the Community and the Member States, must, whether or not it is admissible (see paragraph 47 above), be rejected.

80 Finally, in the event that the reference to the first paragraph of Article 234 of the Treaty is to be understood as a submission by the applicant that that provision allows individuals to rely in legal proceedings on breach of the provisions of GATT 1994, the Court can only observe that such an argument is wholly

inconsistent with the applicant's express acknowledgement that those provisions do not have direct effect in the Community legal order and is unfounded in view of the case-law to the effect that the WTO Agreement and its annexes do not, as a general rule, come within the body of rules by reference to which the legality of acts of the Community institutions will be reviewed by the Court (see paragraph 43 above).

81 It is clear from the foregoing that the condition relating to the unlawfulness of the alleged conduct of the Community institution concerned is not fulfilled in the present case. The action must therefore be dismissed in its entirety as unfounded and it is not necessary to consider the conditions relating to the existence of damage and a causal link.

Costs

82 Under Article 87(2) of the Rules of Procedure, the unsuccessful party will be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it will be ordered to pay the costs, as applied for by the Council.

83 Under Article 87(4), Member States and institutions which intervened in the proceedings are to bear their own costs. The Commission and the French Republic must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to pay the costs;**

3. **Orders the Commission and the French Republic to bear their own costs.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 12 July 2001.

H. Jung
Registrar

P. Lindh
President