JUDGMENT OF THE COURT (Sixth Chamber)
12 December 1995 *

In Case C-469/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale di Trieste (Italy) for a preliminary ruling in the proceedings pending before that court between

Amministrazione delle Finanze dello Stato

and

Chiquita Italia SpA,

on the interpretation of the General Agreement on Tariffs and Trade and the ACP-EEC Conventions signed at Lomé concluded between the African, Caribbean and Pacific States and the European Economic Community,

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. Hirsch, F. A. Schockweiler, P. J. G. Kapteyn and J. L. Murray (Rapporteur), Judges,

* Language of the case: Italian.

Advocate General: C. O. Lenz,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Chiquita Italia SpA, by Luigi R. Bianchi, Enzo Volli, Paolo Volli and Guido Greco, of the Milan Bar,

— the Italian Government, by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, assisted by Sergio Laporta, Avvocato dello Stato,

— the French Government, by Nicolas Eybalin, Secretary for Foreign Affairs in the Directorate of Legal Affairs of the Ministry of Foreign Affairs, and by Catherine de Salins, Sous-Directeur in that Directorate, acting as Agents,

— the Commission of the European Communities, by Eugenio de March, Legal Adviser, and Theofanis Christoforou, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Chiquita Italia SpA, represented by Guido Greco, the Italian Government, represented by Maria Gabriella Mangia, Avvocato

dello Stato, and the Commission, represented by Antonio Aresu, of its Legal Service, acting as Agent, at the hearing on 12 January 1995,

after hearing the Opinion of the Advocate General at the sitting on 16 February 1995,

gives the following

Judgment

1 By order of 10 November 1993, received at the Court on 16 December 1993, the Tribunale di Trieste (District Court, Trieste) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of the General Agreement on Tariffs and Trade ('GATT') and the ACP-EEC Conventions signed at Lomé between the African, Caribbean and Pacific States and the European Economic Community ('the ACP-EEC Conventions').

2 Those questions were raised in proceedings between the Amministrazione delle Finanze dello Stato and Chiquita Italia SpA ('Chiquita Italia').

3 Italian Law No 986/64 of 9 October 1964 ('the Italian Law') introduced, with effect from 1 January 1965, a tax on fresh bananas which was increased several times.

4 In Case 193/85 *Co-Frutta* v *Amministrazione delle Finanze dello Stato* [1987] ECR 2085 the Court held that the second paragraph of Article 95 of the EEC Treaty precluded the charging of a consumption tax on certain imported fruit where it might protect domestic fruit production. It also held that Article 95 covered all products coming from Member States, including products originating in non-member countries which were in free circulation in the Member States.

5 Likewise, in its judgment in Case 184/85 *Commission* v *Italy* [1987] ECR 2013, paragraph 15, the Court declared that, by imposing and maintaining in force a tax on the consumption of fresh bananas which was applicable to bananas originating in other Member States, the Italian Republic had failed to fulfil its obligations under the second paragraph of Article 95 of the Treaty.

6 The Court considered that, on the one hand, the tax constituted internal taxation on the ground that it was part of a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products. It also held that the tax constituted a protectionist measure for the purposes of the second paragraph of Article 95, since it might protect domestic fruit production.

7 On the basis of those judgments, on 2 April and 25 May 1990 Chiquita Italia brought two actions before the Pretore di Trieste (Magistrate, Trieste) seeking an order that the Italian administration allow Chiquita to bring into Italy consignments of bananas from Columbia, Honduras and Saint Lucia, without paying the consumer tax laid down by the Italian Law, on the ground that the tax was contrary to Community law.

8 The Pretore di Trieste granted those applications.

9 On 18 September 1990 the Ministry of Finance brought two actions before the Tribunale di Trieste for a declaration that the tax at issue was lawful and that it had been correctly levied. It claimed that the levying of the tax ought to be regarded as unlawful only with regard to bananas originating in other Member States or those in free circulation, but not with regard to bananas coming directly from non-member countries.

10 On 29 December 1990 Law No 428/90 (Supplement to the GURI of 12 January 1991) abolished the Italian consumption tax on bananas. However, according to the order for reference, that Law did not have retroactive effect.

11 While the proceedings before the Tribunale di Trieste were in progress, the Court of Justice delivered its judgment in Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90 *Simba and Others* [1992] ECR I-3713, which also concerned the import of bananas into Italy directly from non-member countries.

12 In that judgment the Court confirmed that the consumption tax at issue constituted internal taxation within the meaning of Article 95 of the Treaty. It then observed (at paragraph 14) that Article 95 was applicable only to products imported from other Member States and that it did not apply to products imported directly from non-member countries.

13 However, the Court held (at paragraph 19) that, while the Treaty did not itself include provisions which prohibited possible discrimination in the application of internal taxes to products imported directly from non-member countries, account had to be taken of the international agreements in force between the Community and the non-member countries from which the consignments of bananas originated, which might contain such clauses liable to affect the outcome of the main proceedings.

14 The Court also noted (at paragraph 20) that under Article 139(2) of the Third ACP-EEC Convention the Community and its Member States had undertaken, under the General Trade Arrangements, not to use protectionist measures against products imported from ACP States.

15 The Court then (at paragraph 21) pointed to the protectionist nature of a duty such as the national consumption tax with regard to the home-produced table fruit of the Member State in question.

16 However, it stated (at paragraph 22) that it was a matter for the national courts, after seeking, if necessary, a preliminary ruling from the Court on the interpretation of the provisions of the international agreements, to determine whether those provisions were of a nature effectively to prohibit a Member State from levying a duty such as the national consumption tax on consignments of fresh bananas imported directly from the non-member countries concerned.

17 Finally, the Court stated (at paragraph 28) that, where national courts considered a national law introducing a duty such as the national consumption tax to be incompatible with the provisions of Community law contained in agreements conferring rights on individuals, the individuals concerned were not required to pay such a duty.

18 In response to that judgment Chiquita Italia paid the consumption tax on bananas imported from Honduras. On the other hand, it still refuses to pay that tax with regard to imports from Columbia and Saint Lucia on the ground that it is, in that respect, contrary to Article III of the GATT and provisions of the ACP-EEC Conventions.

19 Since it took the view that the solution to the dispute pending before it depended on the interpretation of the GATT and of the Lomé Conventions, the national court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Having regard to the judgment of the Court of Justice of 9 June 1992 in Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90, with particular reference to the force of Community convention law, do the GATT and the ACP-EEC Conventions confer rights on individuals which are enforceable in the signatory States, and which, if infringed, give rise to the obligation for national courts to disapply domestic rules which are contrary to and incompatible with the GATT and those conventions?

2. If so, is an internal charge such as the consumption tax on fresh bananas introduced by Italy by Law No 986/64 and amended by Law No 873/82, already applied to the said products imported from non-member countries which are parties to the GATT or to the ACP-EEC Conventions, contrary to Community convention law and should it accordingly be disapplied by the national court?'

20 Since the national court has not specified the ACP-EEC Convention to which it is referring, it must first be determined which of the four ACP-EEC Conventions applies in the present case.

21 The imports which gave rise to the levying of the tax at issue took place as from April 1990.

22 The provisions relied on by the various interveners are contained in either Part Three, Title I of the Fourth ACP-EEC Convention, signed at Lomé on 15 December 1989 (OJ 1991 L 229, p. 1), or in Protocol No 5 on bananas (OJ 1991 L 229, p. 213), which both entered into force on 1 March 1990 (Article 2 of Decision No 2/90 of the ACP-EEC Council of Ministers of 27 February 1990 on transitional measures to be applied from 1 March 1990, OJ 1990 L 84, p. 2).

23 In those circumstances reference must therefore be made solely to the Fourth ACP-EEC Convention.

Question 1

24 In substance the national court's first question seeks to ascertain whether the GATT and the Fourth ACP-EEC Convention may contain provisions of such a nature as to confer rights on individuals which they may enforce in national courts in order to challenge the application of conflicting national provisions.

25 In that regard the Court has consistently held that the question of the direct effect of provisions contained in an agreement concluded by the Community with non-member countries invariably involves an examination of the spirit, general scheme and terms of that agreement (see, in particular, the judgment in Joined Cases 21/72, 22/72, 23/72 and 24/72 *International Fruit Company and Others* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219).

26 As regards the GATT, the Court has consistently held, most recently in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 106, that the GATT, which according to its preamble is based on the principle of negotiations undertaken on 'the basis of reciprocal and mutually advantageous arrangements', is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.

27 The Court stated (at paragraph 107) that those measures included, for the settlement of conflicts, depending on the case, written recommendations or proposals which are to be 'given sympathetic consideration', investigations possibly followed by recommendations, consultations between or decisions of the contracting parties, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under the GATT, and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement.

28 It also noted (at paragraph 108) that where, by reason of an obligation assumed under the GATT or of a concession relating to a preference, some producers suffered or were threatened with serious damage, Article XIX gave a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter was urgent and on a temporary basis, without prior consultation (see the judgments in Joined Cases 21/72 to 24/72 *International Fruit Company*, cited above, paragraphs 21, 25 and 26; Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135, paragraph 29; Case 266/81 *SIOT* v *Ministero delle Finanze* [1983] ECR 731, paragraph 28; and Joined Cases 267/81, 268/81 and 269/81 *SPI and SAMI* [1983] ECR 801, paragraph 23).

29 Consequently, those features preclude an individual from invoking provisions of the GATT before the national courts of a Member State in order to challenge the application of national provisions.

30 As regards the Fourth ACP-EEC Convention, the Italian Government considers that, in view of its aims and general principles, that Convention, which seeks to promote the economic, cultural and social development of the ACP States, is like the GATT in that it does not contain provisions of such a nature as to confer on individuals rights which they may invoke before national courts.

31 In that regard, it should be noted that the Fourth ACP-EEC Convention, like the ACP-EEC Conventions which preceded it or the Conventions of Association between the European Economic Community and the African States and Madagascar, is not of the same nature as the GATT, as follows from paragraphs 26 to 29 above.

32 Those conventions are characterized by a quite appreciable imbalance in the level of obligations undertaken by the contracting parties. Their general aim is to promote the economic and social development of the non-member countries participating in them, in particular through an improvement in the conditions of access for their products to the Community market. In that regard, the question arises as to whether that imbalance precludes certain of their provisions from having direct effect.

33 The conventions represent, in fact, an extension of the association arrangements which had originally been established unilaterally by the EEC Treaty.

34 In paragraph 23 of its judgment in Case 87/75 *Bresciani* v *Amministrazione delle Finanze* [1976] ECR 129 the Court held, with regard to the Second Association Agreement between the European Economic Community and the African States and Madagascar signed at Yaoundé on 29 July 1969 (OJ, English Special Edition (Second Series, I External Relations (2)), which preceded the ACP-EEC Conventions, that that imbalance in the obligations assumed by the Community towards the Associated States, which was inherent in the special nature of the convention, did not prevent recognition by the Community that some of its provisions had direct effect.

35 It must therefore be held that the Fourth ACP-EEC Convention may contain provisions of such a nature as to confer rights on individuals which they may invoke before the national courts.

36 That conclusion is not affected by the argument of the Italian Government to the effect that the Fourth ACP-EEC Convention lays down a special procedure for settling disputes between the contracting parties; Article 53 of the Second Yaoundé Convention also contained similar arrangements and yet, in the judgment cited above, the Court recognized that some of its provisions had direct effect.

37 Having regard to the foregoing, the answer to the first question should be that the GATT does not contain any provisions of such a nature as to confer rights on individuals which they may invoke before national courts in order to challenge the application of conflicting national provisions and that the Fourth ACP-EEC Convention may contain such provisions.

Question 2

38 The national court's second question essentially seeks to establish whether certain provisions of the GATT or of the Fourth ACP-EEC Convention may be interpreted as precluding an internal tax which, like that provided for in the Italian Law No 986/64 as amended by Law No 873/82, applies to products imported from non-member countries which are parties to those conventions.

39 In view of the answer which has been given regarding the provisions of the GATT, the second question needs to be answered only in so far as it concerns the provisions of the Fourth ACP-EEC Convention.

40 First of all, it should be stated that the provisions of the Fourth ACP-EEC Convention have, since their entry into force, been an integral part of the Community's legal order.

41 Chiquita Italia argues that Article 177(2) of the Fourth ACP-EEC Convention must be compared to Article 95 of the EC Treaty and, consequently, like that provision, must be regarded as having direct effect.

42 That argument cannot be accepted. First, the Fourth ACP-EEC Convention does not contain provisions which expressly relate to internal taxation. Thus, while Articles 168(1) and 169(1) of that convention contain provisions comparable to Articles 9, 12 and 30 of the EC Treaty, no provision comparable to Article 95 of the EC Treaty, which would apply specifically to internal taxation, was laid down.

43 As the Italian Government rightly points out, if the Community and the ACP States had wished to deal with the question of internal taxation in the framework of the general trade arrangements put in place by the convention, they would have done so precisely by adopting a provision modelled on Article 95 of the EC Treaty.

44 Next, it should be emphasized that Article 177(2) of the Fourth ACP-EEC Convention should not be read out of context. It forms part of a provision devoted to safeguard measures which may be taken in the event of serious disturbances in a sector of the economy of the Community or of one or more of the Member States, or of risks of deterioration in a sector as a result of the application of the general trade arrangements put in place by the convention.

45 It must therefore be held that if the parties to the convention had wished to pursue the goal to which Chiquita Italia refers, they would have placed that provision on the same footing as the provisions of the convention corresponding to Articles 9, 12 and 30 of the EC Treaty and would not therefore have merely included it in an article relating to safeguard measures.

46 Finally, as the Advocate General observes in point 37 of his Opinion, Article 5 of the Second Yaoundé Convention (OJ, English Special Edition (Second series, I External Relations (2), p. 5)), which preceded the Lomé Conventions, provides, in terms similar to Article 95(1) of the EC Treaty, as follows:

'Without prejudice to the special provisions laid down in this Convention, each Contracting Party shall refrain from any internal fiscal measure or practice that directly or indirectly leads to discrimination between its own products and like products originating in the territory of the other Contracting Parties.'

47 The fact that such a provision was not then included in the 'General Trade Arrangements' of the Lomé Conventions indicates that the parties to the convention wished to exclude it from the scope of those arrangements.

48 Chiquita Italia also argues, in the alternative, that Article 169(1) of the Fourth ACP-EEC Convention, which provides that the Community is not to apply any quantitative restrictions or measures having equivalent effect to imports of products originating in the ACP States, is capable of applying in the present case.

49 It states that that article corresponds to Article 30 of the EC Treaty. The Court held in paragraph 16 of its judgment in Case 45/87 *Commission* v *Ireland* [1988] ECR 4929 that Article 30 of the Treaty envisaged the elimination of all measures of the Member States which impeded imports in intra-Community trade, whether the measures bore directly on the movement of imported goods or had the effect of indirectly impeding the marketing of goods from other Member States. The fact that some of those barriers had to be considered in the light of 'specific provisions of the Treaty, such as the provisions of Article 95 relating to fiscal discrimination, in no way detracts from the general character of the prohibitions laid down by Article 30'.

50 Chiquita Italia claims that if the Court were to hold that the Fourth ACP-EEC Convention does not contain provisions corresponding to Article 95 of the EC Treaty, Article 169(1) of that convention would then apply, since that provision, like Article 30 of the EC Treaty, constitutes a *lex generalis*, to which it would be necessary to refer in the absence of any specific provisions.

51 That argument of Chiquita Italia presupposes that both the EC Treaty and the Fourth ACP-EEC Convention seek to ensure a free movement of goods which is exempt from any obstacle whatsoever, including those resulting from discriminatory internal taxation.

52 That line of argument cannot be adopted. It follows from the settled case-law of the Court that the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country depends *inter alia* on the aim pursued by each provision in its particular context and that a comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard (see, in particular, the judgment in Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraph 11).

53 As explained above, in the absence of specific provisions relating to internal taxation, it must be held that the parties to that convention did not intend to regulate the matter within the framework of the general trade arrangements put in place.

54 During the oral procedure, Chiquita Italia also invoked Article 1 of Protocol No 5 which provides that: 'In respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present'.

55 According to Chiquita Italia, that provision constitutes a 'standstill' clause which is capable of having direct effect. It was already contained in the First ACP-EEC Convention, which entered into force on 1 April 1976 (OJ 1976 L 25, p. 1). It was then maintained in the Second, Third and Fourth Lomé Conventions. It could therefore be properly invoked in order to challenge the Italian tax increases after 1 April 1976.

56 The Italian Government considers that, although the provision in question does entail a standstill obligation as regards present conditions of access for ACP bananas to their traditional markets, it cannot, however, apply in relation to the Italian tax since that tax has been in existence since 1964, that is to say, before the entry into force of the Fourth ACP-EEC Convention.

57 It should first be observed that, unlike the other provisions of Protocol No 5 on bananas, Article 1 is worded in clear, precise and unconditional terms and consequently individuals can rely directly on it.

58 Nevertheless, it is necessary to establish whether that provision may be relied on as against increases in internal taxation such as the Italian consumption tax on bananas.

59 Article 1 of Protocol No 5 on bananas takes the form of a standstill clause. In other words, that provision aims to ensure the access of bananas from ACP States to their traditional markets upon conditions and according to rules which are no less favourable than those which existed when it entered into force. However, that guarantee of access benefits bananas from ACP States only up to the quantities imported when that provision entered into force.

60 It cannot be denied that that standstill clause precludes increases in a tax such as the tax at issue. Such increases lead to increases in the price of the bananas concerned and, accordingly, they make it more difficult to sell them on the market in question.

61 Nor is it possible to draw argument from the fact that the area of internal taxation was excluded by the General Trade Arrangements put in place by Title I, Chapter 1, of Part Three of the Fourth ACP-EEC Convention. Article 183 of the Convention, which refers to the Protocol on bananas, is included in Chapter 2 of Title I of Part Three of the Fourth Convention under the heading 'special undertakings on rum and bananas'. It is therefore a special provision which, applying the principle *lex specialis derogat generali*, may perfectly well establish legal arrangements different from those put in place for other products originating in the ACP States.

62 Finally, the first three ACP-EEC Conventions all contained a standstill clause worded in terms similar to those in Article 1 of Protocol No 5 on bananas.

63 Having regard to the fact that the first ACP-EEC Convention entered into force on 1 April 1976, it must therefore be concluded that the ACP-EEC Conventions preclude increases in internal taxation on bananas originating in the ACP States, such as the Italian consumption tax, where those increases took place after 1 April 1976 and their effect is to put those banana exports in a situation less favourable than before, as regards access to their traditional markets and the advantages they enjoy on those markets.

Costs

64 The costs incurred by the Italian and French Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber)

in answer to the questions referred to it by the Tribunale di Trieste, by order of 10 November 1993, hereby rules:

1. The General Agreement on Tariffs and Trade does not contain provisions of such a nature as to confer rights on individuals which they could rely on before national courts in order to challenge the application of conflicting national provisions. The Fourth ACP-EEC Convention may contain such provisions.

2. The ACP-EEC Conventions preclude increases in internal taxation on bananas originating in the ACP States, such as the Italian consumption tax, where those increases take place after 1 April 1976 and their effect is to put those banana exports in a situation less favourable than before, as regards access to their traditional markets and the advantages they enjoy on those markets.

Kakouris Hirsch Schockweiler

Kapteyn Murray

Delivered in open court in Luxembourg on 12 December 1995.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber