OPINION OF ADVOCATE GENERAL ELMER

delivered on 24 June 1997 *

1. In the present case the Finanzgericht (Finance Court) Hamburg (Germany) has requested the Court to give a preliminary ruling on a number of questions on the interpretation of the first paragraph of Article 234 of that Treaty, on the relations between GATT (General Agreement on Tariffs and Trades) [1] and Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas [2] (hereinafter 'the basic regulation') and on the validity of Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of the basic regulation as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No 1442/93 [3] (hereinafter 'the GATT regulation').

Proceedings before the national court and the questions referred for a preliminary ruling

2. T. Port GmbH & Co. KG (hereinafter 'T. Port') imported only small quantities of bananas during the reference period 1989, 1990 and 1991 — the reason given was that a Colombian supplier had failed to honour its commitments — and therefore received import licences which only covered small quantities for 1993, 1994 and 1995, in accordance with the provisions of the basic regulation.

3. It was in those circumstances that T. Port applied for additional import licences by way of interim relief. By interlocutory order of 9 February 1995 the Hessischer Verwaltungsgerichtshof (Higher Administrative Court) allowed its application and awarded T. Port additional licences; at the same time it referred a number of questions to the Court, which the Court answered in a judgment delivered on 26 November 1996, *T. Port*. [4]

4. On 10 May 1995 T. Port submitted fresh applications for interim measures to the Finanzgericht Hamburg, which, by four orders of 19 May and 8, 21 and 28 June 1995, allowed those applications, stating that in its view there was some doubt as to whether the basic regulation was applicable in Germany, since it considered that the regulation infringed the GATT rules, which were applicable in Germany. At the same time the

* Original language: Danish.

1 — General Agreement on Tariffs and Trade, concluded in 1947 (hereinafter 'GATT 1947') and as renewed in 1994, in conjunction with the establishment of the World Trade Organization (WTO) (hereinafter 'GATT 1994').

2 — OJ 1993 L 47, p. 1, as last amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agricultural sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105).

3 — OJ 1993 L 49, p. 13.

4 — Case C-68/95 *T. Port* v *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065.

Finanzgericht Hamburg referred a number of questions to the Court for a preliminary ruling on the interpretation of the first paragraph of Article 234 of the Treaty in conjunction with the GATT (Case C-182/95 *T. Port* v *Hauptzollamt Hamburg-Jonas*, hereinafter '*T. Port II*'). The four orders were annulled by the Bundesfinanzhof (Federal Finance Court) by order of 22 August 1995. T. Port referred this decision to the Bundesverfassungsgericht (Federal Constitutional Court), which has not yet given judgment. The proceedings before the Court in *T. Port II* are stayed for the time being.

5. Following the judgment of 22 August 1995 of the Bundesfinanzhof the Hauptzollamt (Principal Customs Office) Hamburg-Jonas adopted decisions on 29 August and 1 September 1995 claiming post-clearance payment of the customs duty on the bananas which T. Port had imported from Ecuador on 22 May 1995 pursuant to the four decisions of the Finanzgericht Hamburg. T. Port lodged an administrative complaint against those decisions and requested that they be suspended. According to the information provided, the Hauptzollamt Hamburg-Jonas has not yet reached a decision on the complaints. However, it dismissed the applications for suspension of enforcement of the decisions by decisions of 5 and 10 September 1995, whereupon T. Port requested the Finanzgericht to order that they be suspended.

6. By decisions of 22 and 27 September 1995 the Finanzgericht Hamburg allowed the applications for suspension of enforcement of the decisions of the Hauptzollamt Hamburg-Jonas claiming post-clearance payment, on the ground that in its view there was legitimate doubt as to the legality of the decisions requiring post-clearance payment, since, according to the Finanzgericht Hamburg, the basic regulation was incompatible with the GATT provisions, which were applicable in Germany. Pursuant to those decisions, the enforcement of the decisions of the Hauptzollamt Hamburg-Jonas requiring post-clearance payment of the customs duty was suspended pending a ruling by the Court on the questions originally referred by the Finanzgericht Hamburg in *T. Port II*.

7. In those circumstances, the decisions of 22 and 27 September 1995 of the Finanzgericht Hamburg concerning the present case must be interpreted as requesting the Court, in the new case, to answer the same questions as those put by the same national court in *T. Port II*. In other words, the national court seeks an answer to the following questions:

'1. Is the first paragraph of Article 234 of the EC Treaty to be interpreted as meaning that the application of Articles I, II and III of GATT takes precedence in the Federal Republic of Germany over Articles 18 and 19 in conjunction with Article 17 of Regulation (EEC) No 404/93?

2. (a) Is Regulation (EC) No 478/95 based on Regulation (EEC) No 404/93 valid?

(b) If so, is the first paragraph of Article 234 of the EC Treaty to be interpreted as meaning that the application of Article XIII of GATT takes precedence over that regulation?

3. In the event that questions 1 and 2(b) are answered in the affirmative: are Community citizens entitled to rely in proceedings before the courts of Member States of the Community on the precedence of the aforesaid GATT provisions as regards their application?'

8. Question 1 and question 2(b) both concern the interpretation of the first paragraph of Article 234 of the Treaty in conjunction with the various GATT provisions. I consider it appropriate to deal with those questions together, before answering question 2(a) on the validity of the GATT regulation and then, if necessary, question 3 on the direct effect of the GATT rules.

Question 1 and question 2(b), on the interpretation of the first paragraph of Article 234 of the Treaty

9. The first paragraph of Article 234 of the Treaty provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Members States on the one hand, and one or more third countries on the other, are not to be affected by the provisions of the Treaty.

10. By its first question and part (b) of its second question, the national court seeks to ascertain whether the first paragraph of Article 234 of the Treaty is to be interpreted as meaning that in the Federal Republic of Germany the GATT rules prevail over the provisions of the basic regulation or those of the GATT regulation.

11. The provisions of the basic regulation to which the national court refers are, first, Article 17, which provides that the importation of bananas into the Community is to be subject to the submission of an import licence. The next provision is Article 18, which fixes an annual tariff quota of 2.1 million tonnes for 1994 and 2.2 million tonnes for 1995 for third-country bananas and

non-traditional ACP bananas, [5] and which provides that, within the framework of the tariff quota, imports of third-country bananas are to be subject to a levy of ECU 75 per tonne and imports of non-traditional ACP bananas to a zero duty, while third-country bananas and non-traditional ACP bananas imported in excess of the quota are to be subject to a customs duty of ECU 850 and ECU 750 per tonne respectively. Finally, the national court refers to Article 19, which provides that the tariff quota is to be subdivided according to different rates among three categories of operators.

12. The GATT regulation divided the tariff quota provided for in Article 18 of the basic regulation for the importation of third-country bananas and non-traditional ACP bananas into import quotas based on countries or groups of countries, according to the Framework Agreement on Bananas annexed to the Marrakesh Protocol, which forms an integral part of GATT 1994, which is itself an integral part of the WTO Agreement. [6]

13. T. Port claims that, in accordance with the case-law of the Court, it is for the national court to ascertain to what extent provisions of agreements concluded by the Member State concerned prior to the entry into force of the Treaty preclude the application of Community law and that the GATT provisions referred to by the national court preclude the application of the basic regulation and the GATT regulation.

14. The Commission and the Council contend that the first paragraph of Article 234 of the Treaty concerns the rights and obligations arising from agreements concluded before the entry into force of the EEC Treaty. GATT 1947 was, of course, concluded by the Member States before the entry into force of the Treaty. Pursuant to the case-law of the Court, however, it is necessary in such a situation to ascertain whether the agreement imposes on a Member State obligations whose performance may be demanded by a non-member country which is a party to the agreement. It is apparent from the documents before the Court that the bananas imported by T. Port came from Ecuador. That country was never a party to GATT 1947 and is therefore unable to rely on rights under that agreement. That is sufficient to preclude any question of the application of the first paragraph of Article 234 in the present case.

15. The Council, supported by the German, Spanish and French Governments and by the United Kingdom, further maintains that the Community has taken over the rights and obligations of the Member States arising from GATT and that it has exclusive competence for trade with non-member countries. The obligations arising from GATT therefore lie on the Community and no longer on the individual Member States.

5 — Non-traditional ACP bananas mean bananas from the ACP countries (the countries of Africa, the Caribbean and the Pacific which have signed the Lomé Convention) imported into the Community in excess of the traditional quantities indicated in an annex to the basic regulation.

6 — For further information on these international agreements and their ratification by the Community, see paragraphs 11 to 18 of my Opinion of 24 June 1997 in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, I-978.

16. In the relations between Member States of the WTO, and hence parties to GATT 1994, I consider that it follows from Article 59(1)(a) of the Vienna Convention on the Law of Treaties of 23 May 1969 that GATT 1994 has replaced GATT 1947 with effect from 1 January 1995, when GATT 1994 entered into force. [7] The WTO Agreement, and hence GATT 1994, was concluded, as regards commercial policy, by the Community, [8] which, under Article 113 of the Treaty, has exclusive competence for commercial policy. Accordingly, claims arising from GATT 1994 can only be addressed to the Community and not to the various Member States.

17. It is expressly stated in the order for reference that the case pending before the national court concerns bananas imported from Ecuador. That country was not a party to GATT 1947 and did not become a member of the WTO, and hence GATT 1994, until 21 January 1996, that is to say after 22 May 1995, the date on which the bananas in question were imported into Germany.

18. When the bananas were imported Ecuador was therefore unable to assert any claim under either GATT 1947 or GATT 1994.

19. Thus in the case pending before the national court it would be a purely theoretical exercise to consider what would apply in the case of bananas imported before 31 December 1995, the date on which GATT 1947 ceased to exist, from a Member State of GATT 1947 which did not become a member of GATT 1994. I therefore see no reason to express a view on the question whether in that case such a non-member country would have been able to assert a claim against the Federal Republic of Germany or whether, as the Council maintains, such a claim could only have been raised against the Community. [9]

20. In those circumstances, I propose that the Court's answer to the first question and part (b) of the second question should be that the first paragraph of Article 234 of the Treaty is to be interpreted as meaning that it does not allow a national court to refuse to apply the provisions of the basic regulation or the GATT regulation in a case concerning imports of bananas from a non-member country which is not a party to an international agreement concluded by the Member States before the entry into force of the Treaty.

Question 2(a), on the validity of the GATT regulation

21. By part (a) of its second question the national court seeks to ascertain whether the GATT regulation is rendered invalid in so

7 — See the rules on entry into force in Article XIV of the WTO Agreement.

8 — See Opinion 1/94 of the Court of 15 November 1994 [1994] ECR I-5267, paragraph 34.

9 — The question of the relations between Community law and national law in connection with GATT 1947 has been much discussed by German writers: see Ernst-Ulrich Petersmann in Groeben, Thiesing, Ehlermann, *Kommentar zum EWG-Vertrag*, fourth edition, Nomos Verlagsgesellschaft, Baden Baden, pp. 5740 to 5753, with commentaries criticising the Court's case-law.

far as it breaches the prohibition on discrimination laid down in the second subparagraph of Article 40(3) of the Treaty and Article XIII of GATT, on the ground that the tariff quota is divided without taking account of previous imports.

22. The German Government claims that the GATT regulation is not valid. In that regard it refers to its submissions in Case C-122/95 *Germany* v *Council*.

23. The Spanish and French Governments and the United Kingdom claim that no factors of such a kind as to affect the validity of the GATT regulation have been disclosed. The French Government, in particular, claims that, according to the case-law of the Court, the fact that the division of quotas in the GATT regulation does not accurately reflect previous import flows is not contrary to Article 40 of the Treaty. The division of quotas between the countries participating in the framework agreement is not unconnected with previous imports from those countries, however. Moreover, the GATT regulation shares 46.5% of the tariff quota, or more than one million tonnes, between countries which are not members of the framework agreement, including Ecuador, and therefore does not limit imports from those countries to an unacceptable degree. The Spanish Government places particular emphasis on the fact that, in accordance with the case-law of the Court, the GATT is not to be taken into consideration when determining the validity of a Community regulation.

24. The Commission claims that the division of import quotas between the various countries and groups of countries in the context of the framework agreement on bananas and the GATT regulation was essentially based on average imports of bananas from those countries during a reference period from 1990 to 1992.

25. As regards the precise content of the prohibition on discrimination in the second subparagraph of Article 40(3) of the Treaty in relation to non-member countries, the Court held as follows in *Faust* v *Commission*: [10]

'Although Taiwan certainly appears to have been treated by the Commission less favourably than certain non-member countries, it should be remembered that there exists in the Treaty no general principle obliging the Community, in its external relations, to accord to non-member countries equal treatment in all respects. It is thus not necessary to examine on what basis Faust might seek to rely upon the prohibition of discrimination between producers or consumers within the Community contained in Article 40 of the Treaty. It needs merely to be observed that, if different treatment of non-member countries is compatible with Community law, different treatment accorded to traders within the Community must also be regarded as compatible with Community law, where that different treatment is merely an automatic consequence of the different treatment accorded to non-member countries with which such traders have entered into commercial relations' (paragraph 25).

10 — Case 52/81 *Offene Handelsgesellschaft in Firma Werner Faust* v *Commission* [1982] ECR 3745.

26. It follows from the foregoing passage that any inequality in treatment of non-member countries in the division of the tariff quota owing to the fact that no account was taken of previous quantities of imports, and likewise the difference in treatment accorded to Community operators as a consequence of their business relations with the non-member countries concerned, are not contrary to the second subparagraph of Article 40(3) of the Treaty.

27. Furthermore, the Court has established, in *International Fruit Company and Others*, [11] *Schlüter*, [12] *SIOT* [13] and *SPI and SAMI*, [14] that Articles II, III, V, VI, VIII and XI of GATT cannot be invoked before the national courts to support a challenge to the validity of a measure of Community law. The Court reached that conclusion on the basis of considerations concerning the general scheme of GATT, namely that it is was based on the principle of negotiations undertaken on a reciprocal and mutually advantageous basis and was characterised by the flexibility of its provisions, in particular those concerning the possibilities of derogation, the measures which might be taken in cases of exceptional difficulty and the settlement of differences between the contracting parties. [15] In my opinion the same apples to Articles I and XIII of the GATT. Furthermore, in *Chiquita Italia* [16] the Court also made the following general statement:

'Consequently, these features [of GATT] 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' (paragraph 29).

28. The WTO Agreement, and hence GATT 1994, were approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [17] (hereinafter 'the GATT decision'). The eleventh recital in the preamble to that decision is worded as follows:

'... by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts.'

11 — 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.

12 — Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135.

13 — Case 266/81 *SIOT* v *Ministero delle Finanze* [1983] ECR 731.

14 — Joined Cases 267/81, 268/81 and 269/81 *Amministrazione delle Finanze dello Stato* v *SPI and SAMI* [1983] ECR 801.

15 — See *SPI and SAMI*, cited above, paragraph 23.

16 — Case C-469/93 *Amministrazione delle Finanze delle Stato* v *Chiquita Italia* [1995] ECR I-4533.

17 — OJ 1994 L 336, p. 1.

29. I consider that, in accordance with the foregoing, the Court's case-law concerning GATT 1947 should be transposed to GATT 1994.

30. It follows from the abovementioned judgment of the Court in *International Fruit Company and Others* and from *Germany* v *Council* [18] that the validity of a regulation cannot be affected by provisions which do not have direct effect. That reason is sufficient to preclude the validity of the GATT regulation from being affected by Article XIII of GATT.

31. While also referring, as regards the arguments of the Federal Republic of Germany, to my Opinion of 24 June 1997 in Case C-122/95 *Germany* v *Council*, I therefore propose that the Court's answer to the second question should be that, in the light of the order for reference and from other points emerging from the documents before the Court, examination of the GATT regulation has failed to disclose any factor of such a kind as to call its validity into question.

Question 3, on direct effect

32. As its actual wording indicates, there is no need to answer the third question unless the first question and part (b) of the second question are answered in the affirmative. As we have seen, I propose that the Court should answer these questions in the negative, and I therefore propose that it leave the third question unanswered.

Conclusion

33. In those circumstances, I propose that the Court answer the questions referred by the Finanzgericht Hamburg as follows:

(1) Article 234(1) of the Treaty is to be interpreted as meaning that it does not allow a national court to refuse to apply the provisions of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, as last amended by Council Regulation (EEC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements

18 — Case C-280/93 *Germany* v *Council* [1994] ECR I-4973.

concluded during the Uruguay Round of multilateral trade negotiations, or Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of the basic regulation as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No 1442/93, in a case concerning imports of bananas from a third country which is not a party to an international agreement concluded by Member States before the entry into force of the Treaty.

(2) Examination of Regulation No 478/95 in the light of the order for reference and of other points emerging from the documents before the Court has failed to disclose any factor of such a kind as to call in question the validity of that regulation.