OPINION OF ADVOCATE GENERAL ELMER

delivered on 24 June 1997 *

1. By application lodged at the Court on 10 April 1995, the Federal Republic of Germany, supported by the Kingdom of Belgium, brought an action against the Council for annulment of the first indent of Article 1(1) of 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) [1] (hereinafter 'the Council decision'), in conjunction with point 1 of the Marrakesh Protocol in Annex 1A to the Agreement establishing the World Trade Organisation (hereinafter 'the WTO Agreement'), to the extent that the Council thereby approved the conclusion of the Framework Agreement on Bananas with Costa Rica, Colombia, Nicaragua and Venezuela (hereinafter 'the Framework Agreement on Bananas'). The Federal Republic of Germany also claims that the Council should be ordered to pay the costs.

2. The Council, supported by the Kingdom of Spain, the French Republic and the Commission, submits that the application should be dismissed as inadmissible or, in the alternative, as unfounded. The Council also submits that the Federal Republic of Germany should be ordered to pay the costs.

Facts and legal framework

3. Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas [2] (hereinafter 'the basic regulation') substituted a common organisation of the market in the banana sector for the various national regimes previously in force. Those national regimes were divided into two groups. In the first, which included France, Spain and the United Kingdom, domestically-produced bananas and bananas produced in ACP countries [3] enjoyed a privileged position. In the second group, which included Germany, Belgium and the Netherlands, there were no quantitative restrictions on imports of Latin-American bananas. [4]

* Original language: Danish.

1 — OJ 1994 L 336, p. 1.

2 — OJ 1993 L 47, p. 1.

3 — 'ACP' is an abbreviation for the countries of Africa, the Caribbean and the Pacific with which the Community concluded the Lomé Convention.

4 — See the second recital in the preamble to the basic regulation.

4. The preamble to the basic regulation contains, *inter alia*, the following recitals:

'... so that the Community can respect Community Preference and its various international obligations, that common organisation of the market should permit bananas produced in the Community and those from the ACP States which are traditional suppliers to be disposed of on the Community market providing an adequate income for producers and at fair prices for consumers without undermining imports of bananas from other third countries suppliers [third recital];

...

... in order to ensure satisfactory marketing of bananas produced within the Community and of products originating in the ACP States within the framework of the Lomé Convention Agreements, while maintaining traditional trade patterns as far as possible, provision should be made for the annual opening of a tariff quota; ... on the one hand, imports of bananas from third countries would be subject to a tariff of ECU 100 per tonne, which corresponds to the current rate under the Common Customs Tariff, and, on the other hand, imports of non-traditional bananas from the ACP would be subject to zero duty in accordance with the abovementioned agreements ... [tenth recital];

... imports not falling within the tariff quota must be subject to sufficiently high rates of duty to ensure that Community production and traditional ACP quantities are disposed of in acceptable conditions' [5] [eleventh recital].

5. Title III of the basic regulation contains provisions on the compensation to be granted to Community producers. Article 12(2) provides that the maximum quantity of bananas produced in the Community and marketed for which compensation may be paid is to be fixed at 854 000 tonnes (net weight). Compensation is to be calculated on the basis of the difference between a flat-rate reference income and the average production income obtained during the year in question.

6. Title IV of the basic regulation contains provisions on trade with third countries. Article 15 defines 'traditional ACP bananas' with reference to the quantities of bananas set out in the annex exported by specific ACP States. It follows from that annex that the total quantity of traditional ACP bananas is 857 700 tonnes. 'Non-traditional ACP bananas' are bananas exported by ACP States which exceed the quantity defined in

5 — According to Article 18(2) of the basic regulation, the customs duty payable on imports in excess of the tariff quota is to be ECU 750 per tonne for non-traditional ACP bananas and ECU 850 per tonne for third-country bananas.

the annex for the country concerned or bananas exported by ACP States which are not referred to in the annex. 'Third-country bananas' are defined as those imported from third countries other than ACP States, which in practice means the Latin-American producer countries.

7. Articles 18(1) and 19 of the basic regulation are worded as follows:

'*Article 18*

1. A tariff quota of two million tonnes (net weight) shall be opened each year for imports of third-country bananas and non-traditional ACP bananas.

Within the framework of the tariff quota, imports of third-country bananas shall be subject to a levy of ECU 100 per tonne and imports of non-traditional ACP bananas shall be subject to a zero duty.

...

Article 19

1. The tariff quota shall be opened from 1 July 1993 for:

(a) 66.5% to the category of operators who marketed third country and/or non-traditional ACP bananas;

(b) 30% to the category of operators who marketed Community and/or traditional ACP bananas;

(c) 3.5% to the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992 [hereinafter "new operators"].

...'

8. Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, which are all banana-producing countries, considered that the basic regulation had substantially reduced their opportunities for exporting bananas to the Community. They therefore requested the Community on 19 February 1993 to open consultations under Article XXIII: 1 of the General Agreement on Tariffs and Trade (hereinafter 'GATT'), which provides that a contracting party which considers that one of its rights is rendered void or compromised may open negotiations with a view to obtaining compensation.

9. On 3 June 1993 the Commission recommended that the Council should authorise it to open negotiations on the bananas question, in accordance with Article XXVIII of the GATT, which provides that a contracting party is entitled to open negotiations with a view to amending obligations in force. [6]

10. On 29 September 1993 the Committee of Permanent Representatives of the Member States (hereinafter 'Coreper') proposed that the Council should give its authorisation for that purpose. On 18 and 19 October 1993 the Council adopted a decision in accordance with the Coreper proposal.

6 — Commission Document 7201/93, GATT 90; see Commission Document SEC (93) 866 final.

11. On 28 and 29 March 1994 the Commission concluded four separate draft agreements, couched in identical terms, with Colombia, Costa Rica, Nicaragua and Venezuela governing Community imports of bananas. Annex 1 to each of these agreements contains a document entitled 'Framework Agreement on Bananas'.

Each of the signed documents, headed 'Agreed outcome of the negotiations', provides as follows:

'The attached draft agreement on bananas represents a satisfactory outcome of the negotiations on bananas in the context of the Uruguay Round.

The agreement also constitutes the outcome of Article XXVIII negotiations and consultations on bananas between the EC and the abovementioned countries.

Furthermore, the agreement constitutes a settlement of the dispute on bananas which is the subject of a GATT panel report. It was agreed, therefore, that Colombia, Costa Rica, Nicaragua, Venezuela and the EC will not

pursue the adoption of the said panel report. [7]

Colombia, Costa Rica, Nicaragua and Venezuela agreed that they would not initiate GATT dispute settlement procedures against the EC's regime for bananas for the duration of the attached agreement.'

Point 1 of the annex (the Framework Agreement on Bananas) fixed the global basic tariff quota at 2 100 000 tonnes for 1994 and 2 200 000 tonnes for 1995 and the following years, subject to any increase resulting from the enlargement of the Community. [8]

Pursuant to point 2, the global tariff quota was subdivided into country quotas allocated to Costa Rica (23.4% of the quota), Colombia (21%), Nicaragua (3%) and Venezuela (2%), while the other third-country banana producers were allocated a quota of 46.32% in 1994 and 46.51% in 1995. Finally, the Dominican Republic and other ACP countries were allocated a fixed quota of 90 000 tonnes of non-traditional ACP bananas, which represents the remainder of the global tariff quota.

Point 6 of the Framework Agreement provides that:

'The management of the quotas ... is to remain unchanged as laid down in [the basic regulation]. However, the supplying countries with country quotas may deliver special export certificates for up to 70% of their quota, which, in turn, constitute a prerequisite for the issuance, by the Community, of certificates for the importation of bananas from the said countries by "Category A" and "Category C" operators.

The authorisation to deliver the special export certificates shall be granted by the Commission in order to make it possible to improve regular and stable trade relations between producers and importers and on the condition that the export certificates will be issued without any discrimination among the operators.'

7 — On 18 February 1994 a panel of experts had concluded in its report that the basic regulation was incompatible with the GATT. However, that report was not adopted.

8 — The global tariff quota was again increased to 2 553 000 in 1996 to cover the increased demand following the accession of new Member States to the European Union, in accordance with Article 1 of Commission Regulation (EC) No 1559/96 of 30 July 1996 increasing the volume of the tariff quota for banana imports provided for in Article 18 of Council Regulation No 404/93 for 1996 (OJ 1996 L 193, p. 12).

Point 7 fixes the in-quota customs duty at ECU 75 per tonne.

Point 10, moreover, provides that 'this agreement will be incorporated into the Community's Uruguay Round Schedule'.

Finally, point 11 provides that the agreement is to represent a settlement of the dispute concerning the Community's banana regime and that the parties to the agreement are not to pursue the adoption of the GATT panel report on that issue.

12. On 15 April 1994 the President of the Council and Commissioner Sir Leon Brittan concluded on behalf of the Community the final act of the Uruguay Round, which the Member States concluded in regard to matters within their own national competence. These agreements contain a summary of the outcome of the trade negotiations of the Uruguay Round, in particular the Agreement establishing the World Trade Organisation ('the WTO Agreement'). [9]

13. Article II(2) of the WTO Agreement provides that the agreements and associated legal instruments included in Annexes 1, 2 and 3 (the Multilateral Trade Agreements) are to be integral parts of the Agreement and binding on all Members. Annex 1A to the WTO Agreement contains Multilateral Agreements on Trade in Goods, including the General Agreement on Tariffs and Trade 1994, known as 'GATT 1994'.

14. Annexed to GATT 1994 is a protocol entitled the 'Marrakesh Protocol'. For each member, a list setting out the rights and obligations of each Member State is drawn up and annexed to that protocol. The list, which is binding on the Community, is entitled 'Schedule LXXX'. In columns 3 and 4 of the part headed 'Fresh bananas, other than plantains', Schedule LXXX fixes the quota (2 200 000 tonnes) and the customs duty applicable to the quota (ECU 75/tonne). Schedule LXXX also contains a column 7, entitled 'Other stipulations and conditions'. As regards bananas, that column states 'as indicated in the Annex'. The annex contains the full version of the Framework Agreement on Bananas.

15. On 26 October 1994 the Federal Republic of Germany requested the Court to give an opinion pursuant to Article 228(6) of the Treaty on the compatibility of the Framework Agreement on Bananas with the Treaty

9 — OJ 1994 L 336, p. 3 et seq.

and the fundamental principles of Community law.

16. 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, [10] Article 18(1) of the basic regulation was amended in so far as the tariff quota was increased by 200 000 tonnes to 2 200 000 tonnes, while the import levy on third-country bananas was reduced by ECU 25 to ECU 75 per tonne. That regulation also inserted into Article 20 of the basic regulation, which empowers the Commission to adopt detailed implementing rules, a provision allowing the Commission to adopt measures necessary to fulfil obligations arising from agreements concluded by the Community in accordance with Article 228 of the Treaty.

17. By Council Decision of 22 December 1994, which was adopted unanimously without the Federal Republic of Germany awaiting the opinion of the Court following its application of 26 October 1994, the Council approved the agreements concluded in the Uruguay Round negotiations.

Article 1 of the Council decision provides:

'Article 1

1. The following multilateral agreements and acts are hereby approved on behalf of the European Community with regard to that portion of them which falls within the competence of the European Community:

— [the WTO Agreement], and also the Agreements in Annexes 1, 2 and 3 to that Agreement;

...

2. The texts of the agreements and acts referred to in this Article are attached to this Decision.

3. The President of the Council is hereby authorised to designate the person empowered to take the measure provided for in Article XIV of [the WTO Agreement] in order to bind the European Community with regard to that portion of the Agreement falling within its competence.'

10 — OJ 1994 L 349, p. 105.

18. The Council decision was published in the *Official Journal of the European Communities* of 23 December 1994 under the heading 'II *Acts whose publication is not obligatory*'. It appears, however, that the issue concerned was not available until 13 February 1995. The WTO Agreement and Annexes 1 to 3, including, under Annex 1A, GATT 1994 and the Marrakesh Protocol, were annexed to the Council decision. The text of the Marrakesh Protocol published in the Official Journal contained the following postscript:

'[The agreed schedules of participants will be annexed to the Marrakesh Protocol in the treaty copy of the WTO Agreement]'. [11]

19. As already stated, on 10 April 1995 the Federal Republic of Germany brought the present action against the Council for the annulment of the first indent of Article 1(1) of the Council decision, in conjunction with point 1 of the Marrakesh Protocol set out in Annex 1A to the WTO Agreement, to the extent that the Council thereby approved the conclusion of the Framework Agreement on Bananas.

11 — As indicated above, the Framework Agreement is set out in the list which applies to the Community.

20. On 13 December 1995 the Court dismissed the request lodged by the Federal Republic of Germany on 26 October 1994 pursuant to Article 228(6) of the Treaty for an opinion on the compatibility of the Framework Agreement on Bananas with the Treaty and certain fundamental principles of Community law, [12] on the ground that the purpose of the procedure for requesting an opinion is to obtain a preliminary opinion, with the result that the request became devoid of purpose once the international agreement in question had been concluded.

Admissibility

21. The Council contends that the action should be dismissed as inadmissible and sets out a number of arguments concerning the time within which the action must be instituted and the significance of the fact that the Framework Agreement was approved by the Community and forms part of the WTO Agreement. These arguments will be examined separately below. The Council further submits that a separate argument relating to the procedure followed when the Agreement was concluded, which was put forward by the Belgian Government, should be dismissed. I shall examine that argument at the end of the present discussion.

12 — Opinion 3/94, [1995] ECR I-4577.

The period within which proceedings must be instituted under the fifth paragraph of Article 173 of the Treaty

22. The Council, supported by the Spanish and French Governments and the Commission, claims that the proceedings were not instituted within the period of two months provided for in the fifth paragraph of Article 173 of the Treaty. It maintains that time began to run on 22 December 1994, the day on which the Council decision came to the knowledge of the Federal Republic of Germany via its representative in the Council.

23. The German Government contends that the proceedings were instituted within the prescribed time. As the measure in issue was published, it follows expressly from the fifth paragraph of Article 173 of the Treaty that the period of two months begins to run on the day of publication, which, according to the case-law of the Court, is the day on which the relevant issue of the Official Journal became available.

24. The fifth paragraph of Article 173 of the Treaty provides that:

'The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.'

25. The Council decision [13] forming the subject-matter of the action for annulment was published on 23 December 1994, together with the annexes referred to therein, including the Marrakesh Protocol. In that regard, it is difficult to attach any importance whatsoever to the fact that the list annexed to the Marrakesh Protocol, in so far as concerns the Community, was not reproduced in the Official Journal, since there is a reference in brackets to the treaty copy of the WTO Agreement. It is the Council decision as such that forms the subject-matter of the action, and it was indeed published, irrespective of whether a document annexed to an annex to that decision was not reproduced in the published version.

26. According to the information before the Court, the issue of the Official Journal concerned was not available until 13 February 1995. It follows from the case-law of the Court that in such a case regard must be had to the date of actual publication. [14]

27. The Federal Republic of Germany lodged its application on 10 April 1995, and therefore within two months of the date of

13 — (Note relevant only to the Danish version.)

14 — Case C-337/88 *SAFA* v *Amministrazione delle Finanze dello Stato* [1990] ECR I-1, paragraph 12.

actual publication, so that the condition in the fifth paragraph of Article 173 of the Treaty appears at first sight to have been met.

28. It is necessary to consider, however, whether on closer examination the wording and purpose of that provision might lead to a restrictive interpretation, to the effect that the point at which time begins to run is not to be determined with reference to publication where publication is not obligatory.

29. The fifth paragraph of Article 173 provides that proceedings are to be instituted within two months 'of the publication of the measure, or of its notification to the plaintiff ... as the case may be'.

30. The expression 'as the case may be' must be taken to refer to the fact that certain measures are published while others are notified to the person to whom they are addressed. The criterion of the date on which the measure came to the knowledge of the applicant, within the meaning of the fifth paragraph of Article 173, becomes relevant only where the measure has been neither published nor notified to the person bringing an action.

31. It might be argued, admittedly, that the expression 'as the case may be' refers to Article 191, which contains provisions defining the measures to be published in the Official Journal and those which are to be notified to those to whom they are addressed. Had that been the intention, however, it would have been natural to indicate the connection a little more clearly than was done, for instance by inserting a reference to Article 191 into the fifth paragraph of Article 173. In its present form, the fifth paragraph of Article 173 simply indicates that when time begins to run, some measures have been published while others have been neither published nor notified, as the case may be.

32. The simplest solution is therefore to interpret the fifth paragraph of Article 173 literally and to take into consideration a period of two months from publication where the measure in question has actually been published. A provision which determines the time within which Member States and individuals may institute proceedings before the Court against Community measures must be as clear as possible. Individuals cannot reasonably be expected to investigate whether or not publication of a measure which has in fact been published was obligatory. Simplicity and clarity are necessary, especially where the right of Member States and individuals to legal protection is concerned.

33. The period for instituting proceedings laid down in the fifth paragraph of Article 173 has two objectives. First, it seeks to ensure that a plaintiff has a reasonable time in which to ascertain whether there are grounds for challenging a measure and, where appropriate, to prepare his application. Second, it seeks to ensure that a measure cannot become the subject of an action for annulment once a certain period has elapsed. In that regard, the Court has held that only a strict application of the time-limit laid down in the fifth paragraph of

Article 173 serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice. [15]

34. In my view, an interpretation to the effect that time begins to run when the measure is published in the Official Journal, irrespective of whether or not publication is obligatory, is consistent with the interests of legal certainty. Both the desire to ensure that a plaintiff has a reasonable time to protect his interests and the desire to ensure that after a specific time has elapsed individuals, institutions and Member States are able to rely on the binding force of the measure require that the rule used to determine the point at which time begins to run be clear and precise, so that individuals, institutions and Member States can know precisely when a period begins to run, and therefore when it expires. Such clarity is guaranteed if time is reckoned from the publication of the measure.

35. A restrictive interpretation of the fifth paragraph of Article 173, to the effect that where publication is not obligatory the period for instituting proceedings must begin to run when the measure comes to the knowledge of the plaintiff, would not permit a sufficient degree of clarity and precision to be attained, since it would often be necessary, in order to determine when the measure came to the plaintiff's knowledge, to embark upon a concrete evaluation of the evidence. The point in time at which the measure comes to the plaintiff's knowledge must therefore, in accordance with the wording of the fifth paragraph of Article 173, be used for the purpose of calculating when the period starts to run only where the measure was not actually published or notified to the plaintiff.

36. The fact that the Council decision had already come to the knowledge of the Federal Republic of Germany when it was adopted is irrelevant. That is entirely consistent with the situation of a Member State which seeks to challenge, for example, a regulation adopted by the Council, in which case time always begins to run when the regulation is published, notwithstanding that it has already come to the knowledge of that Member State.

37. Having regard to the foregoing considerations, I am of the opinion that the proceedings were not instituted out of time.

The significance of the fact that the Framework Agreement has entered into force

38. The Council maintains that a decision whereby the Community ratifies an international agreement cannot be challenged by an action for annulment, since the agreement binds the parties *vis-à-vis* contracting non-

15 — See, in particular, the order in Case C-59/91 *France* v *Commission* [1992] ECR I-525, paragraph 8.

member countries. Germany could simply have voted against the adoption of the Council decision, which had to be adopted unanimously.

39. The German Government, on the other hand, claims that the system of the Treaty precludes an interpretation to the effect that it is impossible to challenge a measure ratifying an international agreement which has been concluded. On that point, the Belgian Government further states that the only consequence of the annulment of the Framework Agreement would be that the Community and its Latin-American contracting partners would be required to open negotiations within the framework of the GATT with a view to concluding a fresh agreement or granting some other form of compensation.

40. In Opinion 3/94 the Court, as already stated, held that the Federal Republic of Germany's request for an opinion pursuant to Article 228(6) of the Treaty on the compatibility of the Framework Agreement with the Treaty had become devoid of purpose after the Framework Agreement had been incorporated in the agreements reached in the Uruguay Round negotiations and approved by the Community. It was therefore no longer an envisaged agreement within the meaning of Article 228(6).

41. In paragraphs 20, 21 and 22 of that opinion the Court held that:

'It cannot be contended that that interpretation undermines the judicial protection of the institution or Member State which requested the Opinion at a time when the agreement had not yet been concluded [paragraph 20].

The procedure under Article 228(6) of the Treaty aims, first, as has already been stated, to forestall difficulties arising from the incompatibility with the Treaty of international agreements binding the Community and not to protect the interests and rights of the Member State or Community institution which has requested the Opinion [paragraph 21].

In any event, the State or Community institution which has requested the Opinion may bring an action for annulment of the Council's decision to conclude the agreement and may in that context apply for interim relief [paragraph 22].'

42. It follows, according to the system of the Treaty, that an act whereby the Community approves an international agreement must be

susceptible to an action for annulment. [16] Otherwise, exercise of the powers delegated to the Community institutions in international matters would escape judicial review, under Article 173 of the Treaty, of the legality of the acts adopted. [17]

43. Where appropriate, it is necessary to decide on the basis of international law, in particular the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations, or between International Organisations, whether the annulment of an internal measure approving an international agreement implies that the Community is released, purely from the aspect of international law, from its international obligations under that agreement. [18]

The significance of the fact that the Framework Agreement forms part of the WTO Agreement

44. Lastly, the Council, continuing with the argument referred to in paragraph 38, submits that the application for annulment should be dismissed because the annulment of the Framework Agreement, which is one element of the overall outcome of the Uruguay Round, might upset the overall balance. In support of its argument, the Council refers to *LAISA and CPC España* v *Council*, [19] an action for the annulment of certain provisions of Annex I to the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties.

45. In that regard, it should be observed that the Court rejected the applications for annulment in *LAISA* v *Council* as inadmissible on the ground that it had no jurisdiction, since the contested provisions did not constitute an act of the Council but were *provisions of primary law* which, according to the Act, could not be suspended, amended or repealed otherwise than by means of the procedures laid down for the revision of the original Treaties.

46. To my mind, the Court's observation in paragraph 15 of that judgment that the Act of Accession affirmed the results of the accession negotiations, which constituted a totality, must not be taken out of its context and transposed to situations other than that to which those cases specifically related. The determining factor there was that the cases concerned not a *measure of secondary law* adopted by the Council but an *act of primary law* not covered by Article 173 of the Treaty, which, by its nature, does not provide for the annulment of such provisions. The Court therefore had no jurisdiction to deal with the matter.

16 — See also Case C-327/91 *France* v *Commission* [1994] ECR I-3641, paragraphs 15 and 16, Case 165/87 *Commission* v *Council* [1988] ECR 5545 and Opinion 1/75 [1975] ECR 1355.

17 — See *France* v *Commission*, cited in footnote 16, paragraph 16.

18 — See *France* v *Commission*, cited in footnote 16, paragraph 25.

19 — Joined Cases 31/86 and 35/86 [1988] ECR 2285.

47. The present case concerns a measure of secondary law adopted by the Council in the form of a decision. Such a measure is covered by Article 173 of the Treaty, which confers on the Court general jurisdiction to review the legality of measures adopted by the Council.

48. Moreover, to my mind it follows by implication from Opinion 3/94 that the institutions and Member States may challenge aspects of a Council decision which ratifies an entire international agreement. Were this not so, in many cases the judicial protection resulting from the right to bring an action for annulment, which the Court expressly recognised in paragraph 22 of the opinion, would in practice be rendered largely illusory.

49. I consider that this argument, too, must therefore be rejected.

The objection of inadmissibility in regard to the Kingdom of Belgium

50. The Belgian Government claims, separately, that the Commission integrated the Framework Agreement into the result of the Uruguay Round without being authorised to do so by the Council, so that the Framework Agreement infringes essential formal requirements, with the result, first, that the Agreement must be amenable to challenge irrespective of the overall result of the Uruguay Round and, second, that the Framework Agreement must be annulled.

51. The Council contends that this submission must be rejected, since, as an intervener, the Kingdom of Belgium cannot go beyond the parameters of the case determined by the application. Furthermore, the Council's approval of the overall result of the Uruguay Round corrects any procedural defects.

52. It should be observed that, according to Article 37(4) of the Statute, submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties. While there is no reason in principle why the arguments advanced by an intervener should not support submissions other than those which the party it supports has submitted, [20] it is none the less essential that those submissions do not alter the framework of the dispute as defined by the application and the defence. [21] In the first place, in accordance with general principles of procedural law, it is for the parties to define the framework of a dispute, so that they are not subsequently required to consider matters which they themselves did not raise. Second, it would be inappropriate,

20 — See, for example, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1.

21 — On this point, reference is made to Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 122.

with regard to the investigation and treatment of a case, to allow matters to be introduced which have no connection which the issues raised by the parties. In that regard, it will be noted that under Article 42(2) of the Rules of Procedure the parties are prohibited from raising any new pleas in law in the course of proceedings.

53. In my view, the Belgian Government's submission has no connection with the application submitted by the Federal Republic of Germany. I consider, therefore, that the submission that the Commission's treatment of the Framework Agreement is formally defective alters the framework of the case. It must therefore be considered inadmissible.

Substance

54. The German Government, supported by the Belgian Government, submits that the Framework Agreement on Bananas infringes a number of fundamental principles of Community law, including the right to pursue a trade or business, the right to property, the principle of the protection of legitimate expectations, the principle of proportionality and the principle of non-discrimination.

55. The Council, supported by the Spanish and French Governments and the Commission, contends that the Framework Agreement is compatible with Community law on all these points.

56. It should be observed at the outset that in *Germany* v *Council* [22] the Court held that the provision of the basic regulation introducing a tariff quota for third country and non-traditional ACP bananas of 70% for operators who had traditionally marketed third-country bananas and new operators and 30% for operators who had traditionally marketed Community bananas and ACP bananas did not infringe the fundamental principles of Community law.

57. The Framework Agreement on Bananas, which the Council, by its decision, integrated into the WTO Agreement, amended the basic regulation on four points. First, the tariff quota was increased by 200 000 tonnes and import duties reduced by ECU 25 to ECU 75. Second, approximately half of the tariff quota was divided into specific national quotas and, for that part of the quota, a system of export licences was introduced, under which the exporting country may require the third-country importers and new operators to possess such a licence, which is a condition of these operators being able to

22 — Case C-280/93 [1994] ECR I-4973.

import the products into the Community. It is only the system of national quotas and that of the export licences which form the subject-matter of the present action.

The system of national quotas

58. The German Government, supported by the Belgian Government, maintains that the provisions establishing specific national quotas restrict traders' opportunities for importing products from other countries and may deprive those traders of the value inherent in product brand-names based on the countries of origin.

59. The Council, supported by the Spanish and French Governments and the Commission, contends that the Community is entitled to confer on specific third countries special advantages in the form of export quotas.

60. In *Faust* v *Commission* [23] the Court held that there is in Community law no general principle obliging the Community, in its external relations, to accord to non-member countries equal treatment in all respects. It follows from that judgment that different treatment accorded to traders within the Community must also be regarded as compatible with Community law, where that different treatment is an automatic consequence of the different treatment accorded to non-member countries with which such traders have entered into commercial relations.

61. Community law therefore does not protect traders against any adverse effects associated with the Community's political relations with non-member countries, which, incidentally, may be difficult to distinguish from other general commercial risks. To accept the opposite argument might make it extremely difficult for the Community to adopt measures relating to commercial policy.

62. In the present case the disadvantages which might result for traders from the system of national quotas are precisely the consequence of the fact that third-country banana producers are accorded different treatment.

63. It is also necessary to take into consideration the fact that, according to the evidence before the Court, the quotas allocated correspond to the market shares held by the

23 — Case 52/81 [1982] ECR 3745, paragraph 25. The case concerned protective measures which had led to a significant drop in imports of preserved mushrooms from Taiwan.

producer countries concerned and that the Framework Agreement contains, in point 6, a provision designed to ensure that traditional trade patterns are maintained and that there is no discrimination between traders. In that regard, it is for the Commission to ensure that the provisions applicable to licences are in practice implemented in accordance with the requirements set out in the Framework Agreement.

64. In the light of the foregoing considerations, I consider that there is no ground for calling in question the system of national quotas established by the Framework Agreement.

The export-licence system

65. The German Government claims that the requirement for export licences imposed on third-country importers and new operators, and the exemption from that requirement for Community and ACP importers, constitutes unwarranted inequality of treatment which is the source of significant costs to third-country importers and new operators. Those costs, associated with the issue of export licences, amount in Colombia to some US $2.60 per carton (18 kg, corresponding to US $144 per tonne), which must be considered in relation to a carriage-free price of US $5 to 6 per carton (corresponding to between US $280 and 330 per tonne).

66. The Council, supported by the Spanish and French Governments and the Commission, claims that the system of export licences is necessary to ensure that the balance of the entire organisation of the market is maintained, in particular by ensuring that quotas are fairly distributed between the large multinational companies and small and medium-sized undertakings. In that regard, it is essential that the Commission, pursuant to point 6 of the Framework Agreement, should be responsible for authorising the issue of export licences. The fact that Community and ACP importers are exempted from the obligation to obtain a licence is not in any way discriminatory, since the situations are not comparable. In any event, any difference in treatment would be objectively justified. Community and ACP importers are affected by the increase in the tariff quota and the reduction in import duties for third-country bananas. Furthermore, imports of non-traditional ACP bananas within the quota are reduced to 90 000 tonnes. The export-licence system is therefore necessary to maintain the competitive balance between the various groups of traders. It is impossible to consider the charges imposed on traders in isolation, since the effects of the system must be evaluated from an overall perspective, traders being, in particular, able to pass on the charges to consumers, who will thus ultimately bear the costs. According to the Council's calculations, the charge of approximately US $2.60 per carton to which the German Government refers represents only

some 6.5% of the price paid by the final consumer.

67. Following the same reasoning as that applied above to the system of national quotas, I fail to see what fundamental rules or principles of Community law might preclude the establishment in an agreement between the Community and certain non-member countries of a system of export licences. Here, too, it is only a question of the regulation of trade with the non-member countries concerned by the agreement and the export licences concern, in particular, the conditions under which the non-member countries in question authorise exports of the goods. A system establishing a tariff quota and specific national quotas in practice allows the producer countries to which a quota is allocated to share the 'burden' of this division among their own traders. The fact that the Community links this system to the import licences which it grants does not alter anything in that regard, but ensures that the Community is able to act in such a way that the non-member countries concerned — in the present case the banana-producing countries of Latin America — do not abuse the system.

68. The Framework Agreement does not establish a general licensing system, but rather one which draws a distinction between various groups of traders within the Community. Third-country importers and new operators must therefore hold an export licence in order to be able to import products from the producer States concerned, whereas Community importers and ACP importers are exempted from the obligation to do so. It follows from point 6 of the Framework Agreement that the producer countries cannot require that the latter category of importers must obtain export licences.

69. Since the system of export licences is not only a source of administrative inconvenience but also entails the payment of duties to the countries which issue the licences, the products which third-country importers and new operators purchase in the producer countries concerned are in reality subjected to costs which the bananas which Community and ACP importers purchase in the same countries do not bear. The Framework Agreement therefore seems at first sight to involve unequal treatment of the traders concerned. The crucial point, however, is whether such inequality of treatment may be regarded as objectively justified by the special circumstances prevailing on the market in bananas, and in particular by the considerations underlying the basic regulation.

70. It follows from the recitals in the preamble to the basic regulation that the common organisation is intended to permit bananas produced in the Community and those from ACP States which are traditional suppliers to be disposed of on the Community market providing an adequate income for producers and at fair prices for consumers. In order to allow this objective to be achieved, a tariff quota is established, according to which bananas from third countries

are subject to a tariff of ECU 100 per tonne. Imports in excess of the quota are subject to an import duty of ECU 850 per tonne (ECU 750 per tonne in the case of non-traditional ACP bananas). Finally, Community and ACP importers are allocated a share of 30% of the quota.

71. In *Germany* v *Council* [24] the Court held that this system, and in particular the way in which the tariff quota is allocated, is objectively justified. First, it contributes to integrating previously compartmentalised national markets, since it encourages dealers in Community bananas and traditional ACP bananas to obtain supplies from third countries and encourages importers of third-country bananas to market Community and ACP bananas. In order to guarantee the disposal of Community bananas and traditional ACP bananas, it was necessary to ensure a certain competitive balance between the traders concerned, which was achieved as a result of, first, the import duty and, second, the fact that 30% of the quota was allocated to Community and ACP importers.

72. The Framework Agreement provides for a significant increase in the tariff quota and a substantial reduction in the import duties to which bananas from third countries are subject, which, other things being equal, has a negative effect on the competitive capacity of Community bananas and traditional ACP bananas. The increase of 200 000 tonnes in the tariff quota implies an increase in overall supply, which, other things being equal, creates pressure for a reduction in market prices, which in turn has an adverse effect on Community bananas and traditional ACP bananas, which, for a variety of reasons, are the most expensive. The reduction of ECU 25 per tonne in the customs duty for the global quota also substantially reduces the levelling of prices, an essential element in the basic regulation.

73. This deterioration in the competitive capacity of Community bananas and traditional ACP bananas caused by the increase in the tariff quota and the reduction in the customs duty primarily affects traders who have traditionally marketed Community bananas and traditional ACP bananas. These traders are required to base their activities mainly on these bananas, since, pursuant to the basic regulation, their access to the market in the more competitive bananas from non-member countries is restricted to 30% of the overall quota.

74. Accordingly, it is quite reasonable, in my view, to implement measures designed to maintain the balance which the basic regulation was intended to establish. That is of

24 — Case C-280/93 [1994] ECR I-4973.

crucial importance in a market such as the market in bananas, where the production, transport and distribution stages are very much integrated. In Title II the basic regulation directly encourages the setting up of producers' organisations responsible for sales and marketing. There is therefore a close relationship in this market between the production and the import and distribution stages. It is therefore necessary to maintain the traditional distribution channels to ensure the disposal of Community production and traditional ACP bananas.

75. It is next necessary to examine, in the light of the evidence before the Court, whether there is any basis for assuming that the measure actually adopted constitutes an appropriate and proportionate means of ensuring the necessary balance between traders.

76. It follows from the case-law of the Court that in matters concerning the common agricultural policy the Community legislature has a wide discretionary power and that the legality of the measure concerned can be affected only if it is manifestly inappropriate having regard to the objective pursued. [25]

25 — See, in particular, Case C-331/88 *The Queen* v *The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others* [1990] ECR I-4023, paragraph 14.

77. There appears, however, at first sight to be reason to exempt traders who have traditionally marketed Community bananas and traditional ACP bananas from the obligation to obtain export licences, since, as I have already mentioned, it was precisely these very traders who had been affected by the increase in the tariff quota and the reduction in the customs duty. It should be observed that in all likelihood the Commission had no alternative to accepting a system of national quotas, so that it was impossible to avoid entirely a requirement of export licences. The shares fixed within the overall quota were precisely what made such a system essential.

78. Whether that distinction exceeds what is necessary to ensure that a balance is restored between traders depends on a concrete and essentially economic evaluation of the way in which the increase in the tariff quota and the reduction of the customs duty affect the conditions of competition on the market in bananas. The Federal Republic of Germany has not established, or even put forward, a plausible argument, for example by submitting economic studies of the market, that the increase in the tariff quota and the reduction in the customs duty did not alter the competitive capacity of Community and ACP importers in comparison with the balance pursued by the basic regulation, or that the Framework Agreement has imposed burdens

on third-country importers in excess of what was necessary to restore that balance.

79. In the light of the foregoing considerations, I consider that the Federal Republic of Germany has failed adequately to establish that the exemption from the obligation to obtain export licences granted to traditional Community and ACP importers goes beyond what is necessary to ensure a competitive balance between the various traders. That submission should therefore also be rejected.

Costs

80. The Council has asked that the Federal Republic of Germany be ordered to pay the costs.

81. Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings.

82. I propose that the Court should order the Federal Republic of Germany to pay the costs.

Conclusion

83. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the action against the Council of the European Union.

(2) order the Federal Republic of Germany to pay the costs.

(3) order the Kingdom of Belgium, the French Republic, the Kingdom of Spain and the Commission of the European Communities to pay their own costs.