OPINION OF ADVOCATE GENERAL MISCHO

delivered on 6 May 1999 *

1. Atlanta AG (hereinafter 'the appellant') asks the Court to set aside the judgment of the Court of First Instance in Case T-521/93, [1] in which that Court dismissed its claim for damages under Article 215 of the Treaty. The appellant advanced before the Court of First Instance a series of arguments on the basis of which it considered the Community to be under an obligation to compensate it for loss allegedly incurred by it as a result of the application of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas. [2]

2. The Court of First Instance having dismissed its action, the appellant has brought an appeal based on six pleas which I shall examine in turn.

Plea based on the decision of the Dispute Settlement Body of the World Trade Organisation (WTO)

3. In its reply the appellant contends, for the first time, that the common organisation of the market in the banana sector is unlawful under Community law, on the ground that the Dispute Settlement Body of the World Trade Organisation (WTO) found, in its decision of 25 September 1997, that Regulation No 404/93 was to a great extent incompatible with WTO rules.

4. In the view of the appellant, this decision, which is binding on the Community, means that the latter should suspend application of the common organisation of the market. It is, furthermore, a new fact on the strength of which the Court of Justice should set aside the contested judgment and refer the case back to the Court of First Instance.

5. The appellant does not reiterate, in the claims set out in its reply, the alleged obligation on the Community immediately to suspend application of Regulation No 404/93, but confines itself to repeating the claims contained in its application seeking to have the contested judgment set aside and the case referred back to the Court of First Instance.

6. I conclude from this that it was not the appellant's intention to submit in its reply a

* Original language: French.

1 — Judgment in Case T-521/93 *Atlanta and Others* v *European Community* [1996] ECR II-1707 (hereinafter 'the contested judgment').

2 — OJ 1993 L 47, p. 1.

new claim seeking suspension of application of Regulation No 404/93. Made in the context of an action for damages, such a claim would furthermore have been manifestly inadmissible.

7. As regards the appellant's claim for the contested judgment to be set aside on the grounds of the WTO decision, it must be pointed out first of all that it was made in the context of an appeal.

8. Under Article 168a of the EC Treaty (now Article 225 EC), appeals are limited to points of law. In the instant case, therefore, it is necessary to examine whether or not the Court of First Instance infringed Community law in not taking into consideration the binding nature of the WTO rules, as interpreted by the WTO decision of 25 September 1997.

9. As this decision arose after the contested judgment, the latter clearly cannot be found at fault for having not taken it into account.

10. The decision could however, even though it occurred after the contested judgment, be a further argument in support of a plea now submitted that the Court of First Instance erred in refusing to find that the Community was in breach of WTO rules.

11. For this to be the case, however, the appellant would still have had to raise such a plea in its notice of appeal, which it did not do.

12. Nothing prevented the appellant from challenging, in its appeal, the finding of the Court of First Instance that Atlanta could not rely, in any way whatsoever, on provisions of the General Agreement on Tariffs and Trade (hereinafter 'GATT').

13. It could have contended, *inter alia*, as the Council explained at the hearing, that the contested judgment should have taken account of the implications of the replacement of GATT by the WTO Agreement, and in particular of the strengthening of the provisions on the settlement of disputes.

14. Whatever view one takes, the WTO decision therefore has no relevance whatsoever to how the Court of Justice must assess the merits of the appeal.

15. Nor can the appellant rely on Article 42 of the Rules of Procedure of the Court of Justice, which provides that no

new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

16. This possibility must be interpreted restrictively, as it is an exception to the prohibition on new pleas. Consequently, it can be relied on only where the party in question was prevented from submitting the plea at an earlier stage because of a link between the plea and a new matter of law or of fact.

17. At the same time, however, a party cannot be allowed to use the pretext of a new fact to introduce, at a later stage in the proceedings, a plea which it could perfectly well have raised previously.

18. It has been seen above that the appellant could have raised at the appeal stage an argument as to the binding nature of the GATT provisions, subsequently replaced by the WTO Agreement.

19. The appellant stresses, however, that it is not basing its case on a possible breach of substantive GATT provisions or those of WTO. The plea raised is in its view of a different kind and much more limited; it is based on the fact that decisions of the WTO Dispute Settlement Body are binding on the Community. The infringement committed by the latter consists of legislative provisions having been applied to the appellant in disregard of the binding effect on the Community of the decision of the WTO Dispute Settlement Body.

20. It should be noted, however, that the binding effect of the decision necessarily flows from the fact that the Community is bound by the WTO Agreement in its entirety. It is inextricably linked to the alleged incompatibility of the Community's conduct with WTO provisions. That these are provisions relating to dispute settlement rather than substantive provisions is irrelevant here, all the more so as the decision of the Dispute Settlement Body derives from application of those substantive provisions.

21. It is beyond doubt, therefore, that by this plea the appellant seeks to challenge the contested judgment for failing to take into consideration the binding effect of the WTO Agreement, which replaced GATT. As I have stated above, the appellant should have included this plea in its appeal and challenged the finding by the Court of First Instance that it could not rely on the provisions of GATT.

22. It is apparent from the foregoing that this plea is inadmissible.

23. As a secondary point I would comment, in passing, that the plea would in any event be unfounded. The appellant could not profitably set up the incompatibility of Regulation No 404/93 with the WTO Agreement to contest the reasoning of the Court of First Instance. The latter, basing itself on the judgment of the Court of Justice [3] in the action for annulment brought by the Federal Republic of Germany against the same regulation, held that the appellant could not plead any breach of GATT. It was not therefore required to determine whether there was such a breach in the case before it and did not address the issue.

24. What is more, if even one were obliged, which one is not, to follow the appellant's interpretation and accept that the plea of failure to observe the decision of 25 September 1997 cannot be considered to amount in fact to a claim that Regulation No 404/93 is incompatible with the WTO Agreement as such and that it could not have been raised before the decision of the Dispute Settlement Body, this would not assist the appellant's case.

25. One would in that case have to determine whether that decision were capable of forming the basis of liability of this nature. It is apparent from case-law [4] of the Court of Justice that for the Community to incur liability the provision which it is claimed has been breached must be intended to protect individuals. The question would therefore arise as to whether the decision were such as to afford to individuals the protection which the appellant is claiming.

26. Given the characteristics of the WTO dispute settlement regime, this question must be entered into, even without its being necessary to decide whether the case-law of the Court of Justice on the possibility of relying on GATT provisions should be applied by extension to the WTO Agreement.

27. It is clear from the provisions of the WTO Understanding on Rules and Procedure Governing the Settlement of Disputes that a decision of the Appellate Body does not impose on the party whose legislation is found to be contrary to WTO provisions a duty immediately to amend that legislation.

28. Article 21(3) of the aforementioned understanding provides expressly that a WTO member has a 'reasonable period of time' in which to implement the decision of the Appellate Body. In the present case, this time was set at 15 months, during which period WTO rules therefore in no manner prevented the common organisation of the market from remaining in force. With all the more reason, therefore, they cannot be considered to impose any form of duty to

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

4 — See, for example, Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975.

make good loss ensuing from application of those market regulations.

29. Under Article 22 of the dispute settlement understanding, the market regulations in question could moreover be retained for a longer period, provided the parties to the dispute settlement enter into an agreement on compensation. Failing such an agreement, maintenance of the regulations is still not excluded, but it becomes a possible ground for retaliatory measures by the aggrieved party.

30. Clearly, therefore, the rights which a decision of the Appellate Body would intend to confer on individuals have nowhere near the scope which the appellant seeks to give them.

31. Unlike, for example, a judgment in infringement proceedings, such a decision entails only an obligation to remedy the unlawful conduct in the future, accompanied by a number of conditions.

32. It follows, in the case in question, that the appellant cannot rely either on the provisions of the dispute settlement understanding or even on a decision of the Appellate Body to invoke an obligation for the Community to pay compensation for application of the common market conditions in question.

Plea concerning liability for a lawful legislative act

33. The appellant considers that the Court of First Instance wrongly dismissed as inadmissible, on the grounds that it was out of time, its plea of liability for a lawful legislative act.

34. It points out, firstly, that it had already advanced this argument in its application in pleading that it was subject to exceptional burdens ('Sonderopfer'). This, it argues, was not therefore a new plea and should have been considered by the Court of First Instance.

35. It must be observed, however, that all references in its application to 'exceptional burdens' are to be found in a context different from that of liability for a lawful legislative act. The concept is thus adduced to establish admissibility of the action for annulment brought by the appellant against Regulation No 404/93 and to substantiate the proposition that there had been breach of the principles of protection of legitimate expectations, of proportionality or of the right to property.

36. So, the 'exceptional burdens' concept is applied in the application only in relation to the existence of an unlawful act.

37. This is particularly clear at paragraph 372 of the application, to which the appellant and the French Government make reference. As pointed out by the latter, this is the only passage relating to the Community's liability in the application which makes reference to the concept of 'Sonderopfer', and it is headed 'serious infringement of the law' in the chapter on the 'unlawful conduct of the Council and the Commission'. Furthermore, in that passage the appellant stresses precisely the fact that the damage caused, being in the nature of an exceptional burden, was unlawful, not the possibility that it could constitute the basis for liability for a lawful act.

38. The appellant avers, further, that its submission cannot be held to be a 'new plea in law' as referred to in Article 48(2) of Rules of Procedure of the Court of First Instance and Article 42(2) of the Rules of Procedure of the Court of Justice, but at the very most a new argument in support of a plea already raised, and that it is therefore admissible.

39. The French Government, however, rightly refers to case-law of the Court of Justice according to which the prohibition on bringing new pleas extends, in the context of an action for damages, to the submission of a claim alleging failure to observe a superior rule of law not referred to in the application. [5]

5 — Joined Cases 279/84, 280/84, 285/84 and 286/84 *Walter Rau Lebensmittelwerke and Others* v *Commission* [1987] ECR 1069, paragraphs 37 and 38.

40. In the present case the appellant, not content with pleading a different ground of illegality, abandons all reference to the concept of illegality in order to try to found liability on a lawful act.

41. Since the Court of Justice has held that even raising a different ground of illegality falls within the prohibition on submitting new pleas, it is all the more evident that the prohibition applies to an argument which changes the basis of the alleged liability and abandons all reference to possible illegality.

42. The appellant argues, none the less, that liability for a lawful act and liability arising from an unlawful act are so similar that it is not possible to speak of a new plea in law in this context.

43. Both submissions, it contends, seek the same end, namely a remedy for loss, are based on the same facts and are made under the same article of the Treaty, that is, Article 215 of the EC Treaty (now Article 288 EC).

44. I believe, however, that these similarities are of such a general nature that it cannot be concluded from them that one is dealing with one and the same plea.

45. What I find of far greater significance, on the other hand, are the differences between the two submissions. As the Commission has pointed out, and contrary to what is stated by the appellant, the two forms of liability rest on fundamentally different premisses.

46. Liability for an unlawful act stems from three factors: unlawfulness, damage and the causal link between them. Provided that it is the result of the unlawful act, the damage does not need to amount to an exceptional burden.

47. Liability for a lawful act, on the other hand, arises solely from the fact that the act has given rise to specific damage, and it is the nature of this damage which forms the basis of the liability, no unlawful act being required.

48. As the Commission has remarked, these two forms of liability are therefore mutually exclusive, and not complementary, as the appellant suggests.

49. I would add that, as the Council has observed, the written submissions of the appellant itself shows that it does not always conceive the concept of a plea so broadly: it itself rightly describes as independent pleas the various principles which it claims have been breached.

50. Therefore, if it were to apply coherently the criteria on which it seeks to rely in relation to liability for a lawful act, it would have to classify all those principles as, at most, mere arguments in support of the same, single plea.

51. Nor am I persuaded by the conclusions which the appellant seeks to draw from the legislative intention behind the prohibition on new pleas in law under the Rules of Procedure.

52. It maintains that this provision is intended, on the one hand, to prevent procedural time-limits from being circumvented, and, on the other, to ensure that no party's rights are jeopardised. In the present case, however, no time-limit would, in the appellant's view, have been circumvented as it could still have brought a new action based on liability for a lawful act. Allowing it to submit this plea in these proceedings is therefore, in its view, not only possible but even desirable in terms of economy of procedure.

53. Nor, it claims, would the position of the defendants have been affected.

54. This line of argument amounts to justifying the introduction of a plea at the reply stage on the ground that there are still the rejoinder and the hearing in which the

plea can be discussed. It thus overlooks the fact that the aim of those provisions of the Rules of Procedure is precisely to enable the defendant to adopt a position on all the pleas alleged against it right from the time it files the defence.

55. The interpretation posited is also shaken by the fact that the wording of the Rules of Procedure clearly excludes the production of new pleas in circumstances such as those of the present case. The appellant is therefore seeking to rely on an interpretation which would be *contra legem*.

56. It follows from the foregoing that the Court of First Instance was correct in dismissing as inadmissible the plea of liability for a lawful act on the grounds that it was out of time. It is therefore unnecessary to consider the various arguments advanced on the merits of this plea.

Plea of breach of the rights of the defence

57. The appellant's arguments on this point reveals that, just as it does not distinguish between liability for an unlawful act and no-fault liability, it does not dwell on the difference in nature between a legislative act and an individual act.

58. The appellant claims that the Court of First Instance erred in holding that the right to be heard in an administrative procedure concerning a specific person could not be transposed to the context of a legislative process leading to the adoption of general laws.

59. It contends, rather, that the procedural rights available to an individual to defend itself against injury can never be dependent on the form taken by this injury and that this principle is enshrined in the fourth paragraph of Article 173 of the Treaty.

60. It adds that the Court of First Instance gave its view in the form of unproven statements and therefore failed to give reasons for its decision.

61. I am not convinced by the appellant's line of argument.

62. The fourth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC), which it cites in support of its contention, does not bolster its

argument. That provision lays down the principle that an individual can only institute an action for annulment against an act of direct and individual concern to that individual.

63. One cannot logically conclude from this, as the appellant does, that the requirements imposed by the rights of the defence would be the same in the context of those acts as in that of legislative acts.

64. Nor are the examples from case-law cited by the appellant, relating in particular to anti-dumping measures, any more convincing. They all relate to acts found by the Court of Justice to be of direct and individual concern to the individual claimants. The latter were, in consequence, entitled to challenge those acts and to rely in particular on the rights of the defence.

65. It was because of the manner in which the claimant undertakings were affected by the contested acts that there was a need to protect the rights of the defence. This latter concept can only be entertained therefore where the individual situation of an undertaking is directly at issue.

66. On the other hand, where an undertaking is affected by a legislative act which affects all operators in the same category alike, the link between its individual situation and the act in question becomes a different one. Infringement of its rights is no longer an individual infringement such as to enable the undertaking to be considered to be like a defendant in administrative proceedings and thus to enjoy the rights of the defence.

67. By order of 21 June 1993 in Case C-286/93 (now Case T-521/93), [6] the Court of Justice dismissed the action for annulment brought by the applicants against Regulation No 404/93 on the grounds that this measure was not of direct and individual concern to them.

68. They were not, therefore, entitled to invoke the rights of the defence so as to require that they be consulted at the time of adoption of Regulation No 404/93.

69. The Court of First Instance was accordingly correct to find that '[I]n the context of a procedure for the adoption of a Community act based on an article of the Treaty, the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question'.

70. This plea also should therefore be dismissed.

6 — Not published in the ECR.

Plea of breach of the principles of non-discrimination and of freedom to pursue an economic activity

71. The appellant maintains that the Court of First Instance should have found that, even if Regulation No 404/93 was, to use the appellant's expression, valid in the abstract, application of the regulation to its specific circumstances was nevertheless unlawful because it infringed the principles of non-discrimination and of freedom to pursue an economic activity.

72. It is interesting to look at this plea against the background of how the appellant's argument has evolved. The foundation of its application to the Court of First Instance was illegality of the contested act. Following contrary judgments of the Court of Justice, it relied at the reply stage on liability for a lawful act. After the Court of First Instance declared this plea out of time, and without abandoning this approach, the appellant is now combining both lines of argument, accepting the validity of Regulation No 404/93 in the abstract whilst challenging it in terms of its specific application.

73. One is therefore strongly tempted to agree with the Commission when it writes that 'the reasoning of the appellant ... shows that this argument is a legal device designed solely to fit the purposes of the action and is pure invention'.

74. In any event, the Council is correct in pointing out that the reasoning set forth above amounts in practice to claiming no-fault liability on the part of the Community: in both cases there would be a lawful legislative act which would none the less produce an obligation to pay compensation. In its view, this ensues, in one case, directly from the fact that the damage arises from its exceptional burden and, in the other, indirectly from that fact, since the exceptionally onerous nature of the damage would render application of Regulation No 404/93 to the appellant unlawful and therefore entail liability on the part of the legislature.

75. Be that as it may, I do not share the Council's view that this finding alone enables it to be held that the plea is identical to the earlier plea and therefore inadmissible. It needs to be considered whether or not this plea, whilst leading to the same outcome as the previous plea, rests on a different basis and would therefore be admissible by virtue of this fact.

76. The theoretical foundation of the appellant's interesting argument lies in a two-stage conception of the protection of fundamental rights.

77. According to this, it must first be determined whether the provisions of a legislative act are compatible in general and abstract terms with fundamental rights. If they are, it should then be examined

whether the specific and individual application of the contested provisions to the specific and individual circumstances of an individual is compatible with the fundamental rights of that person.

78. As the Commission observes, it is correct to say that the protection of fundamental rights can been seen as operating on two levels.

79. First, fundamental rights bind on the legislature at the time of adoption of the legislative act. They then bind the authorities responsible for implementing the legislation.

80. Even where its provisions comply with fundamental rights, it may still happen that individual acts applying the legislation taken by the authorities responsible for its implementation contravene fundamental rights. It is against those acts that the individual should take action to have them declared invalid.

81. That invalidity will not affect in any way on the provisions of the regulation. It is only where breach of fundamental rights ensuing from implementing acts is the direct and inevitable consequence of the provisions of the legislation that the validity of those provisions will be affected. In such a case, however, it will not have been possible to ascertain in advance whether or not the aforementioned provisions complied with fundamental rights.

82. It is inconceivable for a regulation to be valid in the abstract but not so when applied to a specific context.

83. A finding by the Court of Justice that a regulation complies with a particular superior rule of law is not so abstract that the same regulation could, when it comes to be applied, give rise to infringement of that same rule. Were this to be the case, it is hard to see what sense there would be in the Court's finding which would be so abstract as to be in reality meaningless.

84. The principles invoked in the present case by the appellant are a perfect example of this. To take the principle of non-discrimination, for example, the Court of Justice found that Regulation No 404/93 was not in breach of this principle.

85. If the words are to have any sense, that finding, however abstract it may be, means that there can be no case in which the provisions of Regulation No 404/93 breach the aforementioned principle. I fail to see, therefore, how a party, whatever its individual circumstances, could contend that when applied to it the provisions of the regulation, independently of any unlawful

implementing act, infringe the principle of non-discrimination. If such circumstances did exist, the Court of Justice simply would not have been able to find that the regulation complied with that principle.

86. The same applies to the principle of freedom to pursue an economic activity.

87. The Court of First Instance was therefore correct when, relying on case-law of the Court of Justice on Regulation No 404/93, it dismissed the pleas based on the two principles discussed.

88. This ground of appeal should therefore also be dismissed.

Plea of breach of the principle of protection of legitimate expectations

89. The appellant's arguments concerning breach of the principle of protection of legitimate expectations reveal an interpretation of the nature of that principle at odds with that discernible from the case-law of the Court of Justice.

90. The appellant lays stress on its particular circumstances as grounds for a legitimate expectation that transitional arrangements would be applied preventing it from suffering adverse consequences as a result of the entry into force of Regulation No 404/93. It advances in particular the size of its investment in jeopardy, the impossibility of finding alternative sources of supply and the need to honour shipping contracts.

91. None of these considerations, however, has any relevance in this context. It is clear from case-law that it is not the specific circumstances of an operator which trigger application of the principle of protection of legitimate expectations, but only the conduct of the authority. It is where this conduct was such as to give rise to an expectation on the part of operators as to measures likely to be adopted by the authority that they are entitled to require this legitimate expectation to be protected.

92. In the present case, however, the appellant has not put forward, nor is it able to put forward, any evidence of such conduct by the legislature. On the contrary, the very wording of the 'Banana Protocol', annexed to the Implementing Convention on the Association of the Overseas Countries and Territories with the Community and an integral part of the Treaty, confirms the transitional nature of the Protocol. Nor could operators have ever been in any doubt as to the fact that completion of the internal market would necessarily entail the end of arrangements for the import of

bananas differing from one Member State to another.

93. It follows that the Court of First Instance correctly dismissed the appellant's claim of breach of the principle of protection of legitimate expectations by referring to settled case-law of the Court of Justice:

'Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power will be maintained ...'.[7]

94. It is apparent from the foregoing that it is unnecessary to examine the appellant's contention that the Court of First Instance gave too restrictive an interpretation to the conditions necessary for the principle to apply in requiring that the legislature had to have given 'precise assurances' rather than inducing 'reasonable expectations'.

95. In any event, as has been seen, it advances no argument enabling it to be concluded that there was any conduct by the legislature covered by any of those expressions.

7 — See the judgment in Case C-280/93 *Germany* v *Council*, cited above, paragraph 80.

Plea of alleged unlawful delegation of the Council's legislative power to the Commission

96. The appellant contends that the Council should itself, in Regulation No 404/93, have defined the concept of operator. This definition is, in its view, an essential component of the common organisation of the market in bananas set up by that regulation and cannot be seen as merely an implementing matter definition of which the Council was able delegate to the Commission.

97. It claims also that, by devoting not a single word to this separate plea in law, the Court of First Instance failed to comply with its obligation to give reasons for dismissing the plea.

98. The 'pleas of breach of the provisions relating to the legislative procedure' were considered by the Court of First Instance at paragraphs 77 and 78 of the contested judgment, having been set out as follows in the first sentence of paragraph 75:

'As regards the plea of breach of the provisions relating to the legislative procedure, the applicants maintain in substance that the Council did not respect the Commission's right of initiative and that the Parliament ought to have been consulted again after the Commission's initial proposal had been amended'.

99. Quite clearly, even though this description is qualified by the term 'in substance', it cannot be found to contain any reference whatsoever to the plea raised by the appellant.

100. The Court of First Instance's consideration of this plea refers only, at paragraph 77 of its judgment, to Case C-280/93 *Germany* v *Council*, paragraphs 27 to 43 inclusive. These deal with three issues: breach of the Commission's right of initiative, failure to give reasons and the fact that there should have been fresh consultation of the Parliament.

101. There is, on the other hand, no reference to the plea of allegedly unlawful delegation of the Council's power to the Commission, which comes as little surprise as this plea seems not to have been raised before the Court of Justice by the German Government.

102. In contrast to the French Government, I do not believe the Court of First Instance was correct to find that the applicants had withdrawn this plea. Indeed, in the context of their observations submitted on 16 January 1996, at the request of the Court of First Instance, on the consequences of the *Atlanta Fruchthandelsgesellschaft II* [8] judgment, for the proceedings then in progress, to which the French Government refers, the applicants had stated that they maintained all their pleas. They added, it is true, that they were going to 'concentrate' on four of them. This likewise implies, at the same time, that they were retaining the other pleas.

103. In my view, the Court of First Instance was therefore wrong not to address the plea of alleged unlawful delegation of the Council's power to the Commission. The contested judgment should therefore be set aside in so far as it concerns Atlanta, the only one of the applicants to have lodged an appeal.

104. The documents in the case are sufficiently complete as regards this plea to enable the Court of Justice to give final judgment itself. It is unnecessary therefore to refer the matter back to the Court of First Instance.

105. Examination of Regulation No 404/93 reveals a number of factors, highlighted by the French Government, which provide sufficient clarification of the concept of operator within the meaning of that regulation. It should be noted also that this term is of common usage in the context of common market organisations. The Council was not required, therefore, to give it a generic definition.

106. The second subparagraph of Article 19(1) of Regulation No 404/93 states that operators must be 'established in the

8 — Case C-466/93 *Atlanta Fruchthandelsgesellschaft (II)* v *Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799.

Community' and have 'marketed on their own account a minimum quantity of bananas of the above origins, to be determined'.

107. These origins derive in particular from the 13th recital in the preamble to Regulation No 404/93 which provides that 'a distinction must be made when administering the tariff quota between, on the one hand, operators who have previously marketed third country bananas and non-traditional ACP bananas and, on the other, operators who previously marketed bananas produced in the Community and traditional ACP bananas while leaving a quantity available for new operators who have recently embarked on commercial activity or are about to embark on commercial activity in this sector'.

108. Article 15(5) of Regulation No 404/93, as in force at the time when the action was commenced, defines 'marketing' as placing on the market, not including making the product available to the final consumer.

109. Finally, the 15th recital in the preamble to the regulation provides that 'in adopting additional criteria which operators should respect, the Commission is guided by the principle whereby the licences must be granted to natural or legal persons who have undertaken the commercial risk of marketing bananas and by the necessity of avoiding disturbing normal trading relations between persons occupying different points in the marketing chain'.

110. The Council has therefore complied with its obligations as legislature since it did define the basic elements of the matter to be regulated, as it is bound to do according to case-law. [9] It merely conferred on the Commission power to implement the rules laid down by it, in accordance with Article 145 of the EC Treaty (now Article 202 EC).

111. It must, therefore, be concluded that this plea cannot found the appellant's action either.

The other conditions to be satisfied in order for the Community to incur non-contractual liability

112. The appellant criticises the Court of First Instance for having examined, amongst the conditions to be satisfied in order for liability for an unlawful act to be incurred, only that concerning the illegality of the act, even though the other conditions were satisfied.

9 — See, for example, Case 25/70 *Einfuhr -und Vorratsstelle für Getreide und Futtermittel Köster, Berodt & Co.* [1970] ECR 1161, paragraph 6.

113. As the Court of First Instance correctly observed, it is settled case-law that, in order for the Community to incur non-contractual liability, three conditions must be fulfilled: there must be unlawful conduct, actual damage and a causal link between them.

114. Having established that the first condition was not satisfied, the Court of First Instance was no longer required to examine the others.

Facts adduced by the appellant

115. The appellant lays a degree of emphasis on a number of facts which it considers to be specific to its situation. Whilst not expressly basing a ground of appeal on them, it seems nevertheless to be criticising the Court of First Instance for not taking them into consideration.

116. I should point out here that, contrary to what is stated by the appellant, these facts are not undisputed. The French Government expressly contests both the very existence of damage and the fact that it is specific to the applicants in the action before the Court of First Instance, compared with all other importers of 'third country' bananas, and, again, the causal link with the adoption of Regulation No 404/93.

117. Furthermore, the factors in question are completely irrelevant. However exceptional and onerous the loss alleged may be, it cannot overcome the inadmissibility on which this argument of the appellant has foundered.

118. Nor, for the reasons set out above, do these considerations enable the legality of application of Regulation No 404/93 to be put once more in issue.

119. I would add that the fact, put forward by the appellant, that the interpenetration of the markets sought by the legislature has not occurred is not of itself such as to call into question the validity of Regulation No 404/93, in the absence of any manifest error of assessment on the part of the legislature. Provided that the measures adopted by the latter are not vitiated by any such error, the fact that they did not have the desired effect does not affect their validity.

120. Finally, it should be noted that the appellant considers that part of the market is closed to it owing to the existence of long-term delivery agreements. This consideration, likewise, cannot affect the validity of Regulation No 404/93, but may well, on the other hand, fall within the scope of application of the Treaty rules on competition, of which fact, it may be assumed, the appellant is aware.

Conclusion

121. Having regard to the foregoing, I propose that the Court should decide as follows:

— The judgment of the Court of First Instance of 11 December 1996 in Case T-521/93 *Atlanta and Others* v *European Community* is set aside inasmuch as it dismissed the action of Atlanta AG;

— The claim for damages brought by Atlanta AG against the European Community is dismissed;

— Atlanta AG is ordered to pay costs.