OPINION OF ADVOCATE GENERAL LENZ

delivered on 16 February 1995 *

A — Introduction

1. The main proceedings before the Tribunale di Trieste concern the consumer tax on fresh bananas which was introduced in Italy with effect from 1 January 1965 by Law No 986/64 of 9 October 1964. [1] The amount of the tax was increased over the years.

2. The Court of Justice has already had to consider this tax on several occasions. In two judgments of 7 May 1987 it held that the tax was incompatible with Article 95 of the EC Treaty in so far as it was charged on bananas originating in other Member States [2] and on bananas originating in non-member countries which were in free circulation in the Community. [3] The Court regarded the tax in question as internal taxation within the meaning of Article 95 (and not as a charge having an effect equivalent to a customs duty, within the meaning of Articles 9 and 12 of the EC Treaty), even though banana production in Italy was extremely small. [4] It also held that that tax was a protective measure within the second paragraph of Article 95, since it was of such a nature as to protect Italian fruit production. [5]

3. The firm Chiquita SpA imported two consignments of bananas from Columbia and Honduras into Italy in early April 1990. [6] In order to avoid the obligation to pay the said consumer tax, Chiquita applied to the Pretore di Trieste. In those proceedings it submitted that the tax in question infringed Community law. The Pretore accepted that submission and thereupon made an interim order allowing Chiquita to import the bananas into Italy without paying the consumer tax.

Shortly afterwards, Chiquita imported into Italy two further consignments of bananas, from Columbia and Santa Lucia. For that purpose Chiquita again obtained an interim order from the Pretore di Trieste allowing it to carry out the import without having to pay the consumer tax.

* Original language: German.

1 — *Gazzetta Ufficiale della Repubblica Italiana* (GURI) No 264 of 27 October 1964, p. 4580.

2 — Judgment in Case 184/85 *Commission* v *Italy* [1987] ECR 2013.

3 — Judgment in Case 193/85 *Co-Frutta* v *Amministrazione delle Finanze dello Stato* [1987] ECR 2085.

4 — Judgment in *Co-Frutta*, cited above (note 3), paragraphs 10 to 13.

5 — Judgment in *Commission* v *Italy*, cited above (note 2), paragraph 13; judgment in *Co-Frutta*, cited above (note 3), paragraph 22.

6 — The national court states that the shipment was to arrive in Trieste on 7 April 1990.

4. The Amministrazione delle Finanze dello Stato (the Italian customs authority) thereupon applied, in the substantive proceedings before the Tribunale di Trieste, for a finding in both cases that the tax at issue was lawful and its levying permissible. The Tribunale di Trieste ordered the two cases to be joined.

5. The Italian consumer tax on bananas was abolished by Law No 428/90 of 29 December 1990. [7] According to the national court, that law did not have retroactive effect, however, so that it need not be considered in the present case.

6. While the proceedings before the Tribunale di Trieste were pending, the Court of Justice gave judgment on 9 June 1992 in the *Simba* case, [8] which also concerned the compatibility with Community law of the consumer tax in question. In the cases which gave rise to that judgment, the undertakings concerned (of which Chiquita was one) had imported bananas from non-member countries directly into Italy. The Court confirmed in that judgment that the consumer tax at issue was internal taxation within the meaning of Article 95 of the EC Treaty. [9] It stated that Article 95 of the EC Treaty is applicable only to products imported from other Member States, and therefore does not extend to products imported directly from non-member countries. [10]

7. The Court further held that the EC Treaty does not contain any provision for trade with non-member countries corresponding to Article 95, and the tax in question was therefore not in breach of Article 113 of the EC Treaty. [11] The Court went on to state, in paragraphs 19 to 22 of the judgment:

'19. Nonetheless, while the Treaty does not itself include provisions which prohibit possible discrimination in the application of internal taxes to products imported directly from non-member countries, account should be taken, in the current cases, of international agreements between the Community and non-member countries in which consignments of bananas originate and which, possibly, contain clauses of a nature such as to influence the outcome of the disputes in the main proceedings (see the judgment in Case 148/77, above). [12]

20. It should be noted in that connection that, under Article 139(2) of the aforementioned Third ACP-EEC Convention, the Community and its Member States undertook, under the general trade arrangements,

7 — Published in the supplement to GURI No 10 of 12 January 1991.

8 — Judgment in Joined Cases C-228/90, C-229/90, C-230/90, C-231/90, C-232/90, C-233/90, C-234/90, C-339/90 and C-353/90 *Simba and Others* [1992] ECR I-3713.

9 — Ibid., paragraph 12.

10 — Ibid., paragraph 14.

11 — Ibid., paragraphs 17 and 18.

12 — This is a reference to the Court's judgment in Case 148/77 *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787.

not to adopt protectionist measures against products imported from ACP States.

21. The Court expressly emphasized in its judgments in Cases 184/85 and 193/85 the protectionist nature of a duty such as the national tax on consumption with regard to home-produced table fruit originating in the Member State in question.

22. It is a matter for the national courts, where appropriate, after having referred to the Court for a preliminary ruling on their interpretation, to determine whether the provisions of international agreements are of a nature effectively to prohibit a Member State from levying a duty such as the national tax on consumption on consignments of fresh bananas imported directly from the non-member countries concerned.'

Finally, the Court observed that a duty such as the consumer tax at issue does not have to be paid if the national law on which the duty is based is incompatible with provisions of Community law which are based on international agreements and confer rights on individuals. [13]

13 — Ibid., paragraph 28.

8. Chiquita thereupon paid the consumer tax in respect of the bananas imported from Honduras. It maintains, however, its refusal to pay that tax on the imports from Columbia and Santa Lucia on the grounds that in that respect the tax infringes Article III of the General Agreement on Tariffs and Trade of 30 October 1947 (hereinafter 'GATT') and provisions of the agreements concluded between the ACP States and the EC (hereinafter 'the Lomé Conventions').

9. The Tribunale di Trieste therefore referred the following questions to the Court for a preliminary ruling:

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

(b) If so, is an internal charge such as the consumer tax on fresh bananas

introduced by Italy by Law No 986/64 and amended by Law No 873/82, already applied to the said products imported from non-member countries who are parties to GATT or to the ACP-EEC Conventions, contrary to Community convention law and should it accordingly be disapplied by the national court?'

B — Opinion

Preliminary observation

10. By its first question the national court appears at first sight to be seeking clarification of the question whether any provisions of GATT or the agreements between the ACP States and the EC have direct effect in the Community legal order. From the second question and the order for reference as a whole, however, it can be seen that the Tribunale di Trieste is merely considering the possibility that the consumer tax at issue might infringe certain provisions of those agreements. The question of direct effect need therefore be discussed, logically, only for those provisions of those agreements which may be relevant here in the first place.

11. With reference to the standard to be applied in such an examination, the parties to the present proceedings are agreed in referring — quite rightly — to the Court's consistent case-law to the effect that a provision of an agreement concluded by the Community with non-member countries is to be regarded as being directly applicable 'when, regard being had to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. [14] That obviously applies also to agreements such as GATT which were concluded not by the Community itself but by its Member States, but where — as regards the fulfilment of the obligations arising under those agreements — the Community has taken the place of the Member States.

Article III of GATT

12. In the present proceedings Chiquita relies on the first two paragraphs of Article III of GATT. Paragraph 1 of that article provides:

'The contracting parties recognise that internal taxes and other internal charges, and laws, regulations and requirements affecting

14 — Judgment in Case C-18/90 *Kziber* [1991] ECR I-199, paragraph 15; see also the judgment in Case 12/86 *Demirel* [1987] ECR 3719, paragraph 14.

the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.' [15]

That provision must therefore be compared with the second paragraph of Article 95 of the EC Treaty. Under Paragraph 2 of Article III of GATT no higher internal charges may be imposed on imported products than on domestic products of the same type. That provision can be compared with the first paragraph of Article 95 of the EC Treaty. As I have already stated, the Court, in the two abovementioned judgments of 1987, considered the consumer tax at issue to be a protective charge caught by the second paragraph of Article 95 of the EC Treaty. From that alone it follows that it is at most Paragraph 1 of Article III of GATT which could be relevant in the present case.

13. The Court has of course held in its judgment of 12 December 1972 in the *International Fruit Company* case that the Community too is bound by the provisions of GATT. [16] It also stated that to answer the question whether the provisions of GATT have direct effect in the Community legal order, 'the spirit, the general scheme and the terms of the General Agreement must be considered'. [17]

In its examination of that question the Court observed that GATT, which according to its preamble is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements', is characterized by the 'great flexibility' of its provisions. [18] It drew attention in particular to the provisions relating to derogations from the general rules, the possibility of taking measures when confronted with exceptional difficulties and the settlement of conflict between the contracting parties.

As the Court found, the measures provided for in GATT for the settlement of such conflicts include, depending on the situation, written recommendations or proposals which are to be 'given sympathetic consideration' and 'investigations possibly followed by recommendations, consultations between or decisions of the contracting parties, including that of authorizing certain contracting parties to suspend the application to any others of any obligations or concessions under the General Agreement and, finally, in

15 — The German text of GATT can be found in *Besonderes Anlagenband I zum BGBl. 1951.*

16 — Judgment in Joined Cases 21/72 to 24/72 *International Fruit Company* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219, paragraphs 14 to 18.

17 — Ibid., paragraphs 19 and 20.

18 — Ibid., paragraph 21.

the event of such suspension, the power of the party concerned to withdraw from that agreement'. [19]

Finally, the Court noted that where, by reason of an obligation assumed under GATT or of a concession relating to a benefit, some producers suffer or are threatened with serious damage, Article XIX of GATT gives a contracting party power 'unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter is urgent and on a temporary basis, without prior consultation'. [20]

14. The Court drew the conclusion that the provision at issue in that case, Article XI of GATT, did not have direct effect. [21]

15. The Court subsequently confirmed that decision on several occasions and held with respect to a number of provisions of GATT that they did not have direct effect in the Community legal order. [22] Only recently, in its judgment of 5 October 1994 [23] — in which it dismissed the application brought by the Federal Republic of Germany against Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas — the Court once again confirmed the settled case-law. [24] If Chiquita argues in support of its view that there has been a change in the case-law of the Court of Justice on the question of the direct effect of provisions of GATT, that argument can therefore not be accepted.

16. Chiquita is however correct in maintaining that the provision of GATT under consideration here — namely Paragraph 1 of Article III — does not appear to have been expressly considered in the above cases. The French Government is admittedly of a different view on this point, and relies on the Court's judgment in *SPI and SAMI*. [25] However, it appears to me that in that case the Court had to rule only on *Paragraph 2* — not on *Paragraph 1* — of Article III of GATT. Nevertheless, I see no reason why the conclusion reached by the Court with respect to that provision should not also be applied to Paragraph 1 of Article III of GATT.

19 — Ibid., paragraph 25.

20 — Ibid., paragraph 26.

21 — Ibid., paragraph 27.

22 — Judgments in Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135, paragraphs 29 and 30, in Case 266/81 *SIOT* v *Ministero delle Finanze* [1983] ECR 731, paragraph 28, in Joined Cases 267/81 to 269/81 *Amministrazione delle Finanze dello Stato* v *SPI and SAMI* [1983] ECR 801, paragraph 23, and in Joined Cases 290/81 and 291/81 *Singer and Geigy* v *Amministrazione delle Finanze dello Stato* [1983] ECR 847, paragraphs 7 and 8.

23 — Judgment in Case C-280/93 *Germany* v *Council*, [1995] ECR I-4973.

24 — Ibid., paragraphs 105 to 108.

25 — Cited in note 22.

17. However, in the light of the abovementioned judgment of the Court of 5 October 1994, it appears to me to be unnecessary to discuss the point further. Whatever one may think of that decision in other respects, as regards clarity at least (including clarity on the point at issue here) it leaves nothing to be desired. The Court states in that judgment that the special features of GATT, mentioned above, show that 'the GATT rules are not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT'. [26] That general formulation shows in my opinion that, in principle, no provisions of GATT have direct effect in the Community legal order. [27]

18. Chiquita also submits that the Court has in its case-law already identified as having direct effect provisions in other agreements between the Community and non-member countries, the content and wording of which has corresponded to Article III of GATT. It is not necessary to decide whether the cases [28] cited by Chiquita in this connection in fact concerned provisions which corresponded to *Paragraph 1* of Article III of GATT. In any event, it should be pointed out that according to the case-law of the Court provisions with similar or even identical wording need not however necessarily be interpreted in the same way, but instead particular regard must be had in each case to the objective pursued by the provision in question, with the context of the relevant provision having special importance. [29] As the abovementioned decisions of the Court make clear, however, GATT has special features which prevent its provisions being acknowledged as having direct affect.

19. Chiquita submits as an alternative argument that even if the Court reaches the conclusion that Article III of GATT has no direct affect, it should still consider the national court's second question. The Court is being asked, in other words, even in that event to discuss the question whether a charge such as that at issue here is compatible with Paragraph 1 of Article III of GATT as a matter of *substantive law*. That proposal appears to have been based on two considerations. Firstly, the representative of Chiquita explained at the hearing before the Court that the Italian courts, when applying the national rules, took care to interpret those rules in a manner consistent with GATT. A decision of the Court of Justice holding that

26 — Cited above (note 23), paragraph 110. The Court observes, however, that provisions of GATT are to be examined when reviewing the lawfulness of Community acts 'if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT' (Ibid., paragraph 111).

27 — See however the exception — not relevant in the present case — in areas which have a specific connection with GATT (see note 26).

28 — Judgments in Case 17/81 *Pabst und Richarz* v *Hauptzollamt Oldenburg* [1982] ECR 1331; Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641; and Case 253/83 *Kupferberg* v *Hauptzollamt Mainz* [1985] ECR 157.

29 — See, among recent decisions, in particular the judgment in Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraphs 10 and 11, with further references to the case-law.

a tax such as that at issue here was incompatible with GATT might therefore be of use to Chiquita in its proceedings before the Italian courts. Secondly, Chiquita evidently takes the view that a corresponding decision of the Court of Justice might form the basis for a later claim for damages against the Italian State. It refers in that connection to the Court's *Francovich* judgment. [30]

20. I do not consider that the Court should follow that suggestion by Chiquita. The national court put the second question only in case a (relevant) provision of GATT had direct effect. That decision of the Tribunale di Trieste should be respected by the Court, since it is presumably based on a deliberate choice. The Tribunale clearly expresses in its precisely formulated order for reference that it does not share Chiquita's opinion on the question of the direct effect of provisions of GATT and the Lomé Conventions. [31] Since the Tribunale took that view, the obvious thing to do would have been also to ask the question as to substantive compatibility with GATT in the event that the relevant provision of GATT was not to be taken as having direct affect. Since the national court did not do so, it is to be presumed that it did not regard the question as of importance.

21. Moreover, it seems to me extremely doubtful that an infringement of provisions of GATT by a Member State can found a claim to damages by the traders affected. The abovementioned decisions of the Court on the question of the direct effect of provisions of GATT are ultimately based on the consideration that infringements by individual contracting parties are not to be justiciable, but instead are to be dealt with by the contracting parties affected or by all the contracting parties together on the basis of the machinery provided for in GATT for the settlement of disputes. Settlement of such disputes is thus reserved to the *contracting parties*. It seems self-evident to me, however, that Chiquita's view cannot be reconciled with that, since if, in the event of an infringement of provisions of GATT by a Member State, the traders affected were given the right to claim damages from that Member State, that would give those traders the possibility of — indirectly — enforcing compliance with GATT.

To be sure, I would not exclude the possibility that in exceptional cases an infringement of provisions of GATT might give rise to a liability in damages to the traders concerned. In particular, one might envisage a case where in such a situation the Community makes no use of the possibilities provided for in GATT of freeing itself from its obligations, but agrees that the dispute should be decided by a neutral tribunal, and then however refuses to comply with the decision. Whether such an extreme case can occur at all is doubtful, however: it is surely to be

30 — Judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357.

31 — If the Tribunale di Trieste nevertheless asks the Court for a preliminary ruling, that is presumably attributable to the encouragement given by the Court itself in its judgment of 9 June 1992.

presumed that the Community and the Member States will always act in consciousness of their obligations under GATT and are immune to temptations to distort the free movement of goods by protectionist measures.

I should add that these comments relate exclusively to the GATT in question here. What effects the agreement signed on 15 April 1994 setting up the World Trade Organisation could have in this respect need not be discussed here.

22. Purely for the sake of completeness, I also observe that the reference by Chiquita to the *Francovich* judgment is likely to be misleading. That case concerned a directive, intended to protect employees in the event of their employer's insolvency, which had not been transposed by Italy into national law. The Court found that the provisions of the directive — with the exception of one (admittedly essential) point — fulfilled all the requirements for direct effect under Community law. Only the identity of the person liable to pay the claims given by the directive was not certain, since the directive left it to the Member States to make a choice in that respect. That case can therefore not be compared with the present one. The lack of direct effect of the provisions of GATT is not attributable to the absence of one of several factors, but has its basis in the very nature of those provisions.

Provisions of the Lomé Conventions

Preliminary observation

23. Before discussing the question whether certain provisions of the Lomé Conventions can have direct effect, it is appropriate first to establish which Lomé Convention could be applicable in the present case. The first of the so-called Lomé Conventions was of course concluded on 28 February 1975. [32] That convention was later replaced by the Second Lomé Convention [33] signed on 31 October 1979, which was itself subsequently replaced by the Third Lomé Convention of 8 December 1984. [34] The Fourth Lomé Convention, [35] concluded on 15 December 1989, currently applies. The imports to which the present case relates were carried out in April 1990 or at a later date. In this connection the French Government rightly draws attention to Decision No 2/90 of the ACP-EEC Council of Ministers of 27 February 1990, [36] which decided that a number of provisions

32 — See Council Regulation (EEC) No 199/76 of 30 January 1976 on the conclusion of the ACP-EEC Convention of Lomé (OJ 1976 L 25, p. 1). The text of the convention is annexed to that regulation.

33 — See Council Regulation (EEC) No 3225/80 of 25 November 1980 on the conclusion of the Second ACP-EEC Convention signed at Lomé on 31 October 1979 (OJ 1980 L 347, p. 1).

34 — See the Decision of the Council and the Commission (86/125/EEC, ECSC) of 24 March 1986 on the conclusion of the Third ACP-EEC Convention (OJ 1986 L 86, p. 1).

35 — See the Decision of the Council and the Commission (91/400/ECSC, EEC) of 25 February 1991 on the conclusion of the Fourth ACP-EEC Convention (OJ 1991 L 229, p. 1).

36 — OJ 1990 L 84, p. 2.

of the *Fourth* Lomé Convention — including the ones relevant here [37] — were already to be applied from 1 March 1990. Those provisions are therefore the ones to be discussed here. The point is not of particular importance, however, since the Third Lomé Convention contains provisions which are largely identical.

Possible direct effect of provisions of the Lomé Conventions

24. Both Chiquita and the French Government and the Commission assume that provisions of the Lomé Conventions can have direct effect. The Italian Government takes the opposite view, which is presumably also that of the national court. The Court has not yet made a definitive pronouncement on this point. In the *Razanatsimba* case [38] in 1977 a question was referred to the Court by which the national court sought to know whether a certain provision of the first Lomé Convention had direct effect. The Court did not expressly answer that question, but merely stated that there was no infringement of the provision in question. Chiquita, the French Government and the Commission rightly draw attention in this connection, however, to the Court's judgment in the *Bresciani* case. [39] That case concerned a provision of the Convention of Association between the European Economic Community and the African States and Madagascar associated with the Community — the so called second Yaoundé Convention [40] — which referred to corresponding provisions of the EC Treaty. The Court stated that in order to answer the question whether that provision had direct effect, 'regard must be simultaneously paid to the spirit, the general scheme and the wording of the Convention and of the provision concerned'. [41] In the context of its examination, it stated:

'It is apparent from these provisions that the Convention was not concluded in order to ensure equality in the obligations which the Community assumes with regard to the Associated States, but in order to promote their development .... This imbalance between the obligations assumed by the Community towards the Associated States, which is inherent in the special nature of the Convention, does not prevent recognition by the Community that some of its provisions have a direct effect.' [42]

The Court reached the conclusion, on the basis of those considerations, that the provision of the Yaoundé Convention in question had direct effect.

37 — See Article 2(1)(b) (for the provisions on trade cooperation appearing in Part Three, Title 1) and Article 2(1)(f) (for Protocol No 5 on bananas).

38 — Judgment in Case 65/77 [1977] ECR 2229.

39 — Judgment in Case 87/75 *Bresciani* v *Amministrazione Italiana delle Finanze* [1976] ECR 129.

40 — See Council Decision 70/539/EEC of 29 September 1970 (OJ, English Special Edition, Second Series I, External Relations (2)). The text of the second Yaoundé Convention is annexed to that decision.

41 — Cited above (note 39), paragraph 16.

42 — Ibid., paragraphs 22 and 23.

25. Such an imbalance between the respective obligations of the contracting parties is also a feature of the Lomé Conventions, of which the Yaoundé Conventions were precursors. The decision just cited therefore immediately makes it plain that that circumstance does not preclude the possibility of direct effect for provisions of the Lomé Conventions. [43] The Italian Government's objection that the Lomé Conventions were not intended to regulate trade within a uniform market but essentially pursued objectives of development policy therefore does not convince me either, since similar considerations also apply to the Yaoundé Conventions, the provisions of which — as the abovementioned judgment shows — can have direct effect. The Italian Government also observes, finally, that the Lomé Conventions contained provisions on the settlement of disputes between the contracting parties, according to which such disputes have to be referred to a Council of Ministers or Committee of Ambassadors. [44] It argues that in view of that circumstance, the possibility of giving provisions of those conventions direct effect appears to be excluded. Against that it must be stated that the second Yaoundé Convention also contained a comparable rule. [45]

26. The conclusion must therefore be that provisions of the Lomé Conventions *can* have direct effect. Whether this is actually the case cannot be decided generally. Instead, it is 'only the nature of the obligation at issue in the actual case' which is decisive here. [46]

The provisions of Chapter 1 of Title I of Part Three and Article 1 of Protocol 5 on bananas of the Fourth Lomé Convention

27. In the present proceedings the parties have discussed a number of provisions of the Fourth Lomé Convention which in their opinion are of importance for answering the questions referred. The only one of them which is clearly not relevant for the present case is Article 168(1) of the Convention, which states that products originating in the ACP States are to be imported into the Community free of customs duties and charges having equivalent effect. As I said at the beginning, the Court has in its case-law classified the consumer tax in question as *internal taxation*, not as a charge having

43 — That conclusion was drawn by Advocate General Reischl in his Opinion of 9 November 1977 in the *Razanatsimba* case [1977] ECR 2241, at p. 2243.

44 — See Article 352 et seq. of the Fourth Lomé Convention.

45 — Under Article 53 of that Convention, disputes were to be submitted to the so-called Council of Association (on which, see Article 42 of the Convention). If the Council could not bring about an amicable settlement, the matter could be referred to an arbitration court.

46 — As Advocate General Reischl said in his Opinion in the *Razanatsimba* case, cited above (note 43), p. 2243.

equivalent effect to a customs duty, with a result that that provision is not applicable here. [47]

28. For the sake of clarity, I will first cite the other provisions which have been discussed in the present proceedings.

The first of them is Article 169(1) of the Convention, which reads as follows:

'The Community shall not apply to imports of products originating in the ACP States any quantitative restrictions or measures having equivalent effect.'

That provision, like the abovementioned Article 168, is in Chapter 1 of Title I of Part Three of the convention. That Chapter is headed 'General trade arrangements'. Under Article 177(1) the Community may take, or may authorize the Member States to take, safeguard measures, 'should application of this Chapter result in serious disturbances in a sector of the economy of the Community or of one or more of the Member States, or jeopardize their external financial stability, or if difficulties arise which may result in a deterioration thereof'. Article 177(2) then provides that:

'The Community and its Member States undertake not to use other means for protectionist purposes or to hamper structural development. The Community will refrain from using safeguard measures having the same effect.'

Under Article 183 of the Convention, the contracting parties, in order to permit the improvement of the conditions under which bananas originating in the ACP States are produced and marketed, agree to 'the objectives set out in Protocol 5'. Article 1 of

47 — I merely mention in passing that as Advocate General in the *Co-Frutta* case, I argued in my Opinion of 16 October 1986 that the Italian consumer tax on bananas was not internal taxation within the meaning of Article 95 of the EC Treaty, but was to be assessed in the light of Articles 9 and 12 of the EC Treaty as a charge having an effect equivalent to a customs duty ([1987] ECR 2095, at p. 2100). I maintained that point of view in my Opinion of 13 December 1991 in the *Simba* case ([1992] ECR I-3732). Considering the question freely, I still regard that proposition as preferable. It would moreover also much simplify the solution to the present case, since Article 168(1) — which would then be the relevant one — of the Convention is very similar to Articles 9 and 12 of the EC Treaty and can in my opinion very well be regarded as having direct effect. But to adapt an old saying, *Curia locuta, causa finita*.

Protocol 5 on bananas (hereinafter 'the Banana Protocol') provides:

'In respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present.'

Article 177(2) of the Convention

29. The focus of interest in the present proceedings was first *Article 177(2)* of the Convention.

30. Chiquita argued that that provision had direct effect. It was clear, unambiguous and unconditional, and prohibited the Community and its Member States from applying protectionist measures to imports from ACP States. As the Court had already held, however, the charge in question was such a protectionist measure. In contrast to Article 95 of the EC Treaty, internal taxation was admittedly not expressly mentioned in Article 177(2) of the Convention. That provision was, however, a comprehensive one and thus applied to internal taxation too. If that were denied, the provision would be deprived of useful effect, since the other conceivable forms of protectionist measures — customs duties and charges having equivalent effect on the one hand and quantitative restrictions and measures having equivalent effect on the other hand — were already prohibited by other provisions of the Convention (namely Articles 168(1) and 169(1), referred to above). In fact, therefore, only internal charges were left as the possible subject matter of Article 177(2). Moreover, the Court had in its judgment in the *Simba* case referred precisely to that provision (or the corresponding provision of the Third Lomé Convention) when speaking of provisions in international agreements which could be of relevance for assessing the lawfulness of the charge at issue. In Chiquita's opinion, the Court had even in that judgment already made a binding ruling that the charge at issue infringed that provision.

31. All the other parties who have taken part in the proceedings before the Court — the Italian Government, the French Government and the Commission — consider, by contrast, that Article 177(2) of the Convention does not have direct effect, or at least has not been infringed in the present case.

32. It is not altogether easy to answer the question raised here. That is shown simply by the fact that, according to the information (not disputed in this respect) supplied by Chiquita, the *travaux préparatoires* to the Italian law which abolished the charge in

question in 1990 give as reasons *inter alia* the obligations entered into towards the ACP States, whereas the Italian Government in the present proceedings denied precisely that the charge infringed the Lomé Conventions. That circumstance is of no importance, however, for the Court's interpretation of the Lomé Convention.

33. It must be said that the thesis put forward by Chiquita is compatible with the wording of the provision. The Italian Government's attempt to distinguish between protectionist charges such as the Italian consumer tax at issue here on the one hand and measures 'for protectionist purposes' within the meaning of Article 177(2) of the Convention on the other hand is unconvincing. A measure which protects 'only' a single undertaking or a single sector is just as protectionist by nature as a measure which is intended to protect the entire economy of a State from foreign competition. In my opinion the provision encompasses protectionism of all varieties.

However, it appears doubtful whether Article 177(2) of the Convention can even be regarded as having direct effect at all. The French Government's objection that the Lomé Conventions pursued different objectives from the EC Treaty and regulated only inter-State relationships is admittedly not sound, since the Court — as I have already mentioned [48] — has, regardless of that, already confirmed the possibility of direct effect for provisions of the Yaoundé Conventions (comparable with the Lomé Conventions). However, the mere comparison with the — substantially more precise — wording of Article 95(2) of the EC Treaty suggests that in this case the provision is one of merely programmatic character.

34. Ultimately, however, nothing turns on this point anyway, since in my opinion Article 177(2) of the Convention in any case does *not* bear the meaning ascribed to it by Chiquita. It is not disputed that the Fourth Lomé Convention (as also the earlier Lomé Conventions) does not contain any provision aimed *expressis verbis* at internal taxation. Whereas in Articles 168(1) and 169(1) the Convention thus has provisions which are comparable with Articles 9 and 12 or with Article 30 of the EC Treaty, there is no provision comparable with Article 95 of the EC Treaty and specifically referring to inland taxation.

35. The view that Article 177(2) could be regarded as such a provision is opposed in the first place by *systematic* considerations. The other paragraphs of that article deal with *safeguard measures* which are permitted

48 — See above, paragraph 24 et seq..

exceptionally in the event of particularly serious problems. Indeed, the *second sentence* of Article 177(2) also refers to such safeguard measures. The provision under consideration here therefore deals with a problem of a general nature. It is thus most unlikely that the Community and the ACP States would have inserted a rule on internal taxation precisely into such a provision, and what is more, without even mentioning the concept of internal taxation. I am admittedly unable to accept the Commission's view that the interpretation put forward by Chiquita would have the consequence that Articles 168(1) and 169(1) of the Convention would be superfluous, since customs duties or charges having equivalent effect on the one hand and quantitative restrictions and measures having equivalent effect on the other hand are protectionist measures *par excellence*. As we know from the extensive case-law on Articles 9, 12 and 30 of the EC Treaty, those provisions also cover a large number of measures which are not protectionist in intention. It remains the case however, that a rule with the content asserted by Chiquita appears systematically inappropriate in a provision on safeguard measures.

The Italian Government also quite correctly observes that it is to be presumed that the Community and the ACP States would, had a provision on inland taxation been intended to be included in the Lomé Conventions, have chosen a formulation based on Article 95 of the EC Treaty, as can be found in other agreements between the Community and non-member countries. It refers to the first paragraph of Article 9 of the Agreement between the Community and Israel of 11 May 1975, [49] the first paragraph of Article 33 of the Cooperation Agreement with Morocco of 27 April 1976 [50] and the first paragraph of Article 32 of the Cooperation Agreement with Tunisia of 25 April 1976. [51] Since those provisions all correspond, I shall quote only the relevant paragraph from the agreement with Israel, which reads as follows:

'The Contracting Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party.'

That provision clearly resembles the *first paragraph* of Article 95 of the EC Treaty. A provision corresponding to the *second paragraph* of Article 95 of the EC Treaty is significantly absent from the agreement. The Lomé Convention in question here contains no comparable provision, with respect *either* to the first paragraph *or* to the second paragraph of Article 95 of the EC Treaty, with so

49 — See Regulation (EEC) No 1274/75 of the Council of 20 May 1975 concluding the Agreement between the European Economic Community and the State of Israel (OJ 1975 L 136, p. 1).

50 — See Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 1).

51 — See Council Regulation (EEC) No 2212/78 of 26 September 1978 (OJ 1978 L 265, p. 1).

clear a reference to internal taxation. That too supports the view that Article 177(2) of the Fourth Lomé Convention does not have the content claimed by Chiquita. Moreover, Chiquita's interpretation would be remarkable for a further reason too, since in that case the Convention would have a provision corresponding to the second paragraph of Article 95 of the EC Treaty, but no provision with a content similar to that of the first paragraph of Article 95.

36. Those reservations, based on the system of the Convention, against the interpretation put forward by Chiquita are also supported by considerations which derive from the *legislative history*, insofar as that can be tracked.

The first Lomé Convention of 1975 in fact contained no provision comparable with the present Article 177(2). [52] The Second Lomé Convention of 1979 was the first to contain the following provision, as paragraph 2 of Article 12 on safeguard measures:

'The Community and its Member States undertake not to use safeguard measures or other means for protectionist purposes or to hamper structural development.'

The corresponding provision of the Third Lomé Convention of 1984 — Article 139(2) — used the same wording.

The provision under consideration in the present case was thus only *subsequently* added to the Lomé Conventions. [53] The fact that that paragraph was inserted into the provision on safeguard measures and subsequently left there can probably only be understood as meaning that it was taken as belonging to the field of safeguard measures. If the provision had been intended to pursue the purpose asserted by Chiquita, it would logically have been placed alongside the provisions corresponding to Articles 9, 12 and 30 of the EC Treaty, as a separate provision with equal status.

52 — See Article 10 of the first Lomé Convention, cited above (note 32).

53 — The provision of the Fourth Lomé Convention under consideration in the present case has a slightly different wording from its predecessors in the Second and Third Lomé Conventions. The alteration was probably intended to clarify the meaning of the provision. I see no difference in content between the two versions.

37. Should any doubts nevertheless remain, a look at the second Yaoundé Convention, mentioned above, should suffice to dispel them. In that convention there is — in Article 5 — an express provision on internal taxation, which reads as follows:

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

That convention — the predecessor of the Lomé Conventions — thus contains a provision modelled on the first paragraph of Article 95 of the EC Treaty. If there is no corresponding provision in the 'general trade arrangements' of the Lomé Conventions, that can probably only be understood as a deliberate decision to exclude that question from the matter being regulated and reserve it to the competence of the Community and its Member States (or as the case may be the ACP States). If that is the case for the subject-matter of *the first paragraph* of Article 95, the same must apply all the more for the matters covered by *the second paragraph* of Article 95, in respect of which neither the second Yaoundé Convention nor the Lomé Conventions contain a comparable provision.

38. In view of the above considerations, the question naturally arises of what meaning Article 177(2) of the Convention in fact has. If one looks back at the history, one finds that the possibility of resorting to safeguard measures was not made use of by the Community during the period in which the first Lomé Convention was in force. [54] The ACP States nevertheless urged that the possibility should be removed altogether. The Community declined, however, to comply with that wish. [55] In this context there is much to be said for the Commission's view that the provision — which first appears in the Second Lomé Convention — had the purpose of assuring the ACP States that the Community and its Member States would resort to safeguard measures only in the cases expressly provided for by the Convention and would in no event misuse them for protectionist purposes. The intention was also to make it clear that no other means would be used serving protectionist purposes or having the objective of hampering structural development. That would explain why the provision was placed in the article on safeguard measures and why, as the second paragraph, it immediately follows the provision which permits such safeguard measures. The provision is thus of purely programmatic

54 — Jean Raux, 'Les accords externes de la CEE Originalités de Lomé II', in: *Revue du Droit Européen* 1980, p. 694, at p. 699.

55 — See on this point Giorgio Maganza, 'La Convention de Lomé', in: Jacques Megret/Michel Waelbroeck/Jean-Victor Louis/Daniel Vignes/Jean-Louis Dewost (ed.), *Le Droit de la Communauté Economique Européenne*, vol. 13, Brussels 1990, p. 408.

character and in any event does not enlarge the obligations assumed by the Community in the substantive provisions of the Convention concerning access to the market of products from ACP States.

39. Article 177(2) of the Convention is therefore inapplicable in the present case. The question as to the direct effect of that provision need therefore not be discussed further. In accordance with what has been said above, the existence of such effect would in any case have to be denied.

Article 169(1) of the Convention

40. Should its argument with respect to Article 177(2) of the Convention not find favour with the Court, Chiquita then submits that the tax at issue would infringe *Article 169(1)* of the Convention, which has direct effect. The elegant argument supporting that theory, which the representative of Chiquita again pleaded with great skill at the hearing before the Court, is based on the consideration that Article 30 of the EC Treaty is a comprehensive provision which in principle covers all obstructions to the free movement of goods. It therefore applies in principle also to restrictions of trade which arise from the levying of internal taxes. If in the field covered by the EC Treaty the latter situations are nevertheless not assessed by reference to Article 30, that is because the EC Treaty provides a special provision for such cases, Article 95. Chiquita refers in this connection to the opinions of several prominent legal writers, which — for reasons which I am about to explain — I will not go into here, and relies in particular on the Court's judgment of 22 September 1988 in Case 45/87. [56] In that judgment the Court indeed stated that Article 30 envisages 'the elimination of all measures of the Member States which impede imports in intra-Community trade, whether the measures bear directly on the movement of imported goods or have the effect of indirectly impeding the marketing of goods from other Member States. The fact that some of those barriers must be considered in the light of specific provisions of the Treaty, such as the provisions of Article 95 relating to fiscal discrimination, in no way detracts from the general character of the prohibitions laid down by Article 30.' [57]

In Chiquita's opinion, the Lomé Convention contains a provision corresponding to Article 30, namely Article 169(1). Since the Convention — as must be presumed for the purposes of this alternative argument — does not, however, contain any provision parallel to Article 95 of the EC Treaty, there is nothing to prevent recourse being had to the provision which corresponds to Article 30 of the EC Treaty, whose subsidiary nature must therefore come into play here. In the absence

56 — *Commission* v *Ireland* [1988] ECR 4929.
57 — Ibid., paragraph 16.

of a specific provision, the tax at issue must therefore be assessed with reference to Article 169(1) of the Convention and — since it hinders the free import of bananas from ACP States — be classified as incompatible with that provision. [58]

41. The Commission and the Italian Government oppose that argument. They rely in particular on the judgment of the Court in Case 27/67, [59] in which the Court expressed the opinion that a tax could not come under Article 30 and Article 95 at the same time. [60]

42. In my opinion there is much to be said for the view put forward by Chiquita, as regards the interpretation of the *EC Treaty*. The judgment just cited can be reconciled with that view without great difficulty, if one bears in mind that the Court focused on the existing legal position, in which a specific tax must indeed be assessed with respect either to Article 30 or to Article 95, but not both provisions at once, with Article 95 of the EC Treaty being regarded as a *lex specialis*. If I nevertheless do not discuss this argument further, there is a very simple reason for that. The view is based on the supposition that both the EC Treaty and the Lomé Conventions are intended to guarantee free movement of goods, free from hindrances of whatever type. In other words, it assumes that the Lomé Conventions *too* apply to internal taxes. As I think I have demonstrated, however, that is precisely not the case. The Lomé Conventions do not contain *any parallel provision* to Article 95 of the EC Treaty, and in all probability that is the result of a deliberate decision by the contracting parties. In that respect the EC Treaty simply goes considerably further than the Lomé Conventions. Those existing differences must be respected. It is therefore not possible — if one wishes to avoid being guilty of a *petitio principii* — to apply the considerations (possibly) underlying the EC Treaty on the relationship between Article 30 and Article 95 to the Lomé Conventions.

43. Article 169(1) is therefore not applicable to hindrances to trade which result from the imposition of internal taxes.

Article 1 of the Banana Protocol

44. Not until the hearing before the Court did the representative of Chiquita — in case the Court should decline to follow his other

58 — Merely for the sake of completeness, I note that the restrictions of Article 169(1) contained in Article 169(2) (in conjunction with Article 168(2)) was not discussed further in the present proceedings, since until the entry in force of Regulation 404/93 (on which see paragraph 15) bananas were not the subject of a common organization of the market.

59 — *Fink-Frucht* v *Hauptzollamt München-Landsbergerstraße* [1968] ECR 223.

60 — Ibid., p. 231.

arguments — rely also, with respect to subsequent *increases* in the contested tax, on Article 1 of the Banana Protocol in support of his view. It should be observed, however, that the questions referred by the Tribunale di Trieste refer to provisions of the Lomé Conventions generally and that the Banana Protocol is specifically mentioned in the order for reference. As is shown by the written observations of the Italian Government, in which the significance of that protocol is discussed, it was also perfectly evident that those provisions might be of importance for the present case. No reasons can therefore be seen why those provisions should not be considered for the purpose of answering the questions referred.

45. I am also of the opinion that that provision is applicable in the present case and that Chiquita can rely on it.

46. The content of Article 1 of the Banana Protocol seems to me to be perfectly clear. The Community and its Member States undertake not to make conditions worse for the access to the market of bananas from ACP States and undertake to continue existing favourable treatment. This is thus a *standstill obligation* of a type also met with in the field of the EC Treaty. The provision admittedly applies only to the ACP States' 'traditional' markets. If an ACP State previously regularly exported a certain quantity of bananas to a Member State of the Community, the protection provided by Article 1 of the Banana Protocol applies to those imports, but does not extend to imports exceeding those traditional quantities. Whether a specific case concerns traditional markets within the meaning of that provision should, however, be ascertainable without difficulty, since this is a pure question of fact. In my opinion, the wording of Article 1 means that it cannot be regarded as a provision which is merely programmatic. The case may very well be different for the other provisions of the Banana Protocol. Article 1, however, is clear, unambiguous and unconditional, and hence — as the Italian Government too conceded in their written observations — capable of having direct effect. The fact that the provision is expressed as being for the benefit of the ACP States — not the individual traders — does not prevent that conclusion. The standstill obligation in Article 12 of the EC Treaty, whose direct effect was declared by the Court in its landmark decision in the *Van Gend & Loos* case, [61] is also addressed, according to its wording, only to the Member States. Despite the differences between the EC Treaty and the Lomé Conventions, it appears to me legitimate in this respect to regard Article 1 of the Banana Protocol as also having direct effect.

47. That direct effect can only benefit Chiquita, however, if the provision in question is applicable at all in the present case. On this

61 — Judgment in Case 26/62 [1963] ECR I.

point, it must first be noted that an increase in a tax such as that at issue here does indeed make access to the market less favourable, since the price of the bananas affected is thereby forced up and their sale made more difficult. The prohibition in Article 1 of the Banana Protocol of making access to the market less easy applies of course not only to *new* measures but also to the *aggravation of existing* measures. That that is so can be seen simply by looking at Article 12 of the EC Treaty, where that is specifically laid down for the area dealt with there.

It is questionable, however, whether Article 1 of the Banana Protocol applies *at all* to internal taxation. As I have already stated when discussing Articles 169(1) and 177(2) of the Convention, there is much to support the view that the field of internal taxation was deliberately excluded from the 'general trade arrangements' (Chapter 1 of Title I of Part Three of the Fourth Lomé Convention). One might therefore assume that that also applied to the Banana Protocol. However, the opposite view seems to me to be preferable. Article 183 of the Convention, which refers to the Banana Protocol, is not in the chapter on 'General trade arrangements', but in the following chapter, Chapter 2, entitled 'Special undertakings on rum and bananas'. It is thus a *special provision*, which may consequently very well have a more comprehensive extent than the general rule. The wording of Article 1 of the Banana Protocol is also broad enough to allow it to be applied to internal taxation. In my opinion, that also corresponds to the purpose of the provision better than a restrictive interpretation. The extent of the standstill obligation is already much cut down by the restriction to access to (and advantages on) the *traditional* markets. Moreover, it only covers measures taken after the relevant date. I therefore see no justification for a further restriction of that provision, which is after all intended, according to Article 183 of the Convention, to permit the improvement of the conditions under which bananas from the ACP States are produced and marketed. That provision therefore also precludes increases in internal taxes, if the conditions of access of bananas from ACP States to their traditional markets are made less favourable thereby or their advantages on those markets reduced.

48. As Chiquita has correctly observed, a corresponding standstill obligation can already be found in the preceding Lomé Conventions, so that the starting point for the application of Article 1 of the Banana Protocol coincides with the entry into force of the earliest of the Lomé Conventions applicable to imports from the relevant ACP State. The national court will have to take note in this connection that Santa Lucia was not a contracting State to the first Lomé Convention, but appears to have participated in this form of cooperation with the Community only from the Second Lomé Convention on.

C. Conclusion

49. I therefore propose that the Court give the following answer to the questions of the Tribunale di Trieste:

1. Article III of the General Agreement on Tariffs and Trade of 30 October 1947 (GATT) does not have direct effect under Community law which individuals could rely on before the courts of the Member States.

2. Articles 169(1) and 177(2) of the Fourth ACP-EEC Convention of 15 December 1989 do not preclude an internal tax such as the consumer tax on fresh bananas formerly imposed in Italy under Law No 986/64.

3. Article 1 of Protocol 5 on bananas of the Fourth ACP-EEC Convention has direct effect. That provision prohibits the imposing of new internal taxes or increasing of existing taxes after the entry into force of the Convention, in so far as exports of bananas from ACP States to Community markets are thereby placed in a less favourable position than before as regards access to their traditional markets and their advantages on those markets.