JUDGMENT OF THE COURT
10 March 1998 *

In Joined Cases C-364/95 and C-365/95,

REFERENCES to the Court under Article 177 of the EC Treaty by the Finanzgericht Hamburg (Germany), for a preliminary ruling in the proceedings pending before that court between

T. Port GmbH & Co.

and

Hauptzollamt Hamburg-Jonas

on the interpretation of Article 234 of the EC Treaty, on the validity of Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No 1442/93 (OJ 1995 L 49, p. 13) and on the direct effect of the provisions of the General Agreement on Tariffs and Trade (GATT),

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet, R. Schintgen (Rapporteur), (Presidents of Chambers), G. F. Mancini, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch and P. Jann, Judges,

Advocate General: M. B. Elmer,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— T. Port GmbH & Co., by G. Meier, Rechtsanwalt, Cologne,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the Spanish Government, by A. J. Navarro González, Director-General for Community Legal and Institutional Coordination, and R. Silva de Lapuerta, Abogado del Estado, of the State Legal Service, acting as Agents,

— the French Government, by C. de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and G. Mignot, Foreign Affairs Secretary in the same directorate, acting as Agents,

— the United Kingdom Government, by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and D. Anderson, Barrister,

— the Council of the European Union, by A. Brautigam and J. Huber, Legal Advisers, and J.-P. Hix, of its Legal Service, acting as Agents, and

— the Commission of the European Communities, by D. Booß and P. J. Kuyper, Legal Advisers, and K.-D. Borchardt, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of T. Port GmbH & Co., represented by G. Meier; the German Government, represented by E. Röder; the Spanish Government, represented by R. Silva de Lapuerta; the French Government, represented by F. Pascal, Attaché d'Administration Centrale in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent; the Council, represented by A. Brautigam, J. Huber and J.-P. Hix; and the Commission, represented by P. J. Kuyper and K.-D. Borchardt, at the hearing on 4 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 24 June 1997,

gives the following

Judgment

1 By orders of 22 and 27 September 1995, received at the Court on 16 November 1995, the Finanzgericht (Finance Court), Hamburg, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 234 of that Treaty, on the validity of Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No 1442/93 (OJ 1995 L 49, p. 13) and on the direct effect of the provisions of the General Agreement on Tariffs and Trade (hereinafter 'GATT').

2 Those questions were raised in proceedings brought by T. Port GmbH & Co., a traditional importer of third-country bananas, against Hauptzollamt (Principal Customs Office) Hamburg-Jonas concerning the post-clearance recovery of customs duties on imports of bananas from Ecuador.

Legislative background

3 Title IV of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) substituted a common regime governing trade with third countries for the various national regimes previously in force.

4 The first paragraph of Article 17 of Regulation No 404/93 provides:

'Any importation of bananas into the Community shall be subject to the submission of an import licence issued by the Member States at the request of any party concerned, irrespective of his place of establishment within the Community, without prejudice to the special provisions made for the implementation of Articles 18 and 19.'

5 Article 18(1), as originally worded, provided that a tariff quota of 2 000 tonnes (net weight) was to be opened each year for imports of third-country bananas and non-traditional ACP bananas. Within the framework of the tariff quota, imports of third-country bananas were subject to a customs duty of ECU 100 per tonne, whilst there was no duty on imports of non-traditional ACP bananas.

6 Article 19(1) subdivides the tariff quota opened as follows: 66.5% to the category of operators who previously marketed third-country and/or non-traditional ACP bananas, 30% to the category of operators who marketed Community and/or traditional ACP bananas and 3.5% to the category of operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992.

7 Article 19(2) provides that each operator is to obtain import licences on the basis of the average quantities of bananas that he has sold in the three most recent years for which figures are available.

8 Article 20 of Regulation No 404/93 requires the Commission to adopt detailed rules for implementing Title IV, which may relate in particular to the issue of import licences.

9 The Commission thus adopted Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6). That regulation reproduces the above allocation of the tariff quota among the three categories of operators, referred to as 'Categories A, B and C'.

10 On 19 February 1993 the Republic of Colombia, the Republic of Costa Rica, the Republic of Guatemala, the Republic of Nicaragua and the Republic of Venezuela asked the Community to open consultations under Article XXII: 1 of GATT in relation to Regulation No 404/93. The consultations were unsuccessful and therefore, in April 1993, the Latin American States concerned initiated the dispute settlement procedure provided for in Article XXIII: 2 of GATT.

11 On 18 January 1994 the panel set up under that procedure submitted a report concluding that the import regime introduced by Regulation No 404/93 was incompatible with the GATT rules.

12 That report was not adopted by the parties to GATT.

13 On 28 and 29 March 1994 the Community came to an arrangement with the Republic of Colombia, the Republic of Costa Rica, the Republic of Nicaragua and the Republic of Venezuela, known as the Framework Agreement on Bananas (hereinafter 'the Framework Agreement').

14 The Framework Agreement comprises two documents: the first, entitled 'Agreed outcome of the negotiations between Colombia, Costa Rica, Nicaragua, Venezuela and the European Community on the EC's import regime for bananas', constitutes a sort of preamble to the agreement itself; the second document, entitled 'Framework Agreement on Bananas', contains the technical provisions of the arrangement with the Latin American countries.

15 The first document states:

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

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

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

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

16 Point 1 of the second document, which constitutes the Framework Agreement properly so called, fixes the global basic tariff quota at 2 100 000 tonnes for 1994 and 2 200 000 tonnes for 1995 and the following years, subject to any increase resulting from the enlargement of the Community.

17 In point 2, the Framework Agreement lays down the percentages of that quota allocated to Colombia, Costa Rica, Nicaragua and Venezuela respectively. Those States are to receive 49.4% of the total quota, whilst the Dominican Republic and the other ACP States are granted 90 000 tonnes for non-traditional imports, the balance being allocated to the other third countries.

18 Points 3 to 5 deal with the application or modification of the country quotas in the event of one country being unable to fulfil its quota or in the event of an increase in the global quota.

19 Point 6 provides that the management of the quotas, including any increase, is to remain unchanged as laid down in Regulation No 404/93. That point provides further:

'the supplying countries with country quotas may deliver special export certificates for up to 70% of their quota, which, in turn, constitute a prerequisite for the issuance, by the Community, of certificates for the importation of bananas from said countries by "Category A" and "Category C" operators.

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

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

21 Under points 8 and 9, the agreed system is to be operational by 1 October 1994 at the latest and to expire on 31 December 2002.

22 Points 10 and 11 provide:

'This agreement will be incorporated into the Community's Uruguay Round Schedule.

This agreement represents a settlement of the dispute between Colombia, Costa Rica, Venezuela, Nicaragua and the Community on the Community's banana regime. The parties to this agreement will not pursue the adoption of the GATT panel report on this issue.'

23 Points 1 and 7 of the Framework Agreement were incorporated in Schedule LXXX to GATT 1994, which lists the Community customs concessions. GATT 1994 in turn constitutes Annex 1A to the Agreement establishing the Word Trade Organisation (hereinafter 'the WTO'). An annex to Schedule LXXX reproduces the Framework Agreement.

24 On 25 July 1994 the Federal Republic of Germany sought an Opinion from the Court as to the compatibility of the Framework Agreement with the Treaty.

25 By judgment of 5 October 1994 in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, the Court dismissed the action brought by the Federal Republic of Germany for the annulment of Regulation No 404/93.

26 On 21 December 1994 the Commission adopted Regulation (EC) No 3224/94 laying down transitional measures for the implementation of the Framework Agreement on Bananas concluded as part of the Uruguay Round of multilateral trade negotiations (OJ 1994 L 337, p. 72).

27 On 22 December 1994 the Council unanimously adopted Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

28 Article 1(1) of that decision indicates that, among others, the Agreement establishing the WTO and the Agreements in Annexes 1, 2 and 3 to that Agreement, including GATT 1994, are approved on behalf of the Community with regard to that portion of them which falls within its competence.

29 By application lodged at the Court Registry on 10 April 1995, the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EC Treaty for the annulment of Decision 94/800 to the extent to which it relates to conclusion of the Framework Agreement (Case C-122/95).

30 Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105) has an Annex XV relating to bananas. That annex provides that Article 18(1) of Regulation No 404/93 is to be amended so that, for 1994, the tariff quota is fixed at 2 100 000 tonnes and, for the following years, at 2 200 000 tonnes. In the framework of that tariff quota, imports of third-country bananas are to be subject to a customs duty of ECU 75 per tonne.

31 Regulation No 478/95, based in particular on Article 20 of Regulation No 404/93, is concerned with the adoption of the measures necessary for implementation, no longer on a transitional basis, of the Framework Agreement.

32 Article 1(1) of Regulation No 478/95 provides:

'The tariff quota for imports of bananas from third countries and non-traditional ACP bananas referred to in Articles 18 and 19 of Regulation (EEC) No 404/93 shall be divided into specific shares allocated to the countries or groups of countries referred to in Annex I ...'

33 Annex I contains three tables: the first gives the percentages of the tariff quota allocated to the Latin American States in the Framework Agreement; the second subdivides the quota of 90 000 tonnes of non-traditional bananas; and the third provides that all the other third countries are to receive 50.6% of the total quota.

34 According to Article 3(2) of Regulation No 478/95:

'For goods originating in Colombia, Costa Rica or Nicaragua, the application for an import licence of Category A or C, as referred to in Article 9(4) of Regulation (EEC) No 1442/93, shall also not be admissible unless it is accompanied by an export licence currently valid ...'

35 In its Opinion of 13 December 1995 (Opinion 3/94 [1995] ECR I-4577) the Court found that there was no need to respond to the request for an Opinion made by the Federal Republic of Germany, that request having become devoid of purpose because the Framework Agreement, incorporated in the agreements reached in the Uruguay Round multilateral negotiations, had been concluded after the request was submitted to the Court.

The facts of the cases before the national court

36 T. Port GmbH & Co. (hereinafter 'T. Port'), a traditional importer of third-country bananas, obtained from the Bundesanstalt für Landwirtschaft und Ernährung (Federal Office for Agriculture and Food, hereinafter 'the Bundesanstalt') licences to import third-country bananas, against payment of customs duty of ECU 100

per tonne for the second half of 1993 and for 1994, and ECU 75 per tonne for 1995, on the basis of quantities sold during the reference years 1989, 1990 and 1991.

37 In 1994 T. Port, pleading that it was suffering hardship, requested additional licences from the Bundesanstalt.

38 In the course of that procedure, the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse), by order of 9 February 1995, instructed the Bundesanstalt to issue to T. Port further import licences for 1995 and referred questions to the Court of Justice for a preliminary ruling concerning the rules governing cases of hardship (judgment of 26 November 1996, Case C-68/95 *T. Port* v *Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065).

39 After using those licences, T. Port asked the Hauptzollamt Hamburg-Jonas, in March 1995, to grant customs clearance for a consignment of bananas from Ecuador without requiring it either to produce import licences or pay the customs duty due.

40 T. Port instituted proceedings before the Bundesverfassungsgericht (Federal Constitutional Court) against the negative decision of the Hauptzollamt Hamburg-Jonas, which had been confirmed by decision of the Federal Ministry of Finance, and against Regulation No 478/95.

41 By order of 26 April 1995 the Bundesverfassungsgericht declined to give judgment in those proceedings on the ground that T. Port was required first to make an application for an interim order safeguarding its rights. The Bundesverfassungsgericht stated that it was not impossible that the court hearing the application for interim relief might, in view of the inconsistency between Regulation No 404/93 and the obligations incumbent on the Federal Republic of Germany under GATT, decide not to apply that regulation for the time being. It also pointed out the

courts of appropriate jurisdiction had not yet examined the legality of Regulation No 478/95.

42 T. Port, in reliance on the decision of the Bundesverfassungsgericht, again asked the Hauptzollamt Hamburg-Jonas to grant customs clearance for the consignment of bananas and to apply a lower rate of customs duty.

43 Following a further refusal by the Hauptzollamt Hamburg-Jonas, T. Port applied to the Finanzgericht Hamburg for an interim order safeguarding its rights. T. Port claimed that Regulations Nos 404/93 and 478/95, although valid under Community law, should be regarded as legal measures adopted outside the scope of Community competence, within the meaning of the Bundesverfassungsgericht's 'Maastricht' judgment of 12 October 1993, by reason of their incompatibility with GATT. The same was true, it claimed, of the judgment in *Germany* v *Council*, cited above, in which the Court of Justice held Regulation No 404/93 to be valid. Those legal measures, which undermined the substance of T. Port's fundamental rights, were thus not applicable in Germany.

44 By order of 19 May 1995 the Finanzgericht Hamburg upheld T. Port's application and, by interim order, instructed the Hauptzollamt Hamburg-Jonas to release into free circulation the consignment of bananas purchased by T. Port in Ecuador, without presenting an import licence and at the lower rate of duty of ECU 75 per tonne. In that order it stated that Regulations Nos 404/93 and 478/95 infringed the GATT rules and that, by virtue of the first paragraph of Article 234 of the Treaty, the Federal Republic of Germany was entitled not to apply, for the time being, provisions of Community law that infringed GATT. In the same order it referred four questions to the Court of Justice for a preliminary ruling (Case C-182/95 *T. Port* v *Hauptzollamt Hamburg-Jonas*).

45 On 8, 21 and 28 June 1995, the Finanzgericht Hamburg made three further orders relating to further consignments of bananas imported by T. Port from Ecuador.

46 By judgment of 22 August 1995 the Bundesfinanzhof annulled the four orders of the Finanzgericht Hamburg on the ground that no final decision had been taken in the main proceedings when the bananas were released into free circulation.

47 T. Port appealed against that judgment to the Bundesverfassungsgericht.

48 Pursuant to Article 82a(1)(b) of the Rules of Procedure of the Court, the President of the Court, by decision of 8 September 1995, stayed the proceedings in Case C-182/95 *T. Port* v *Hauptzollamt Hamburg-Jonas* pending delivery of the Bundesverfassungsgericht's judgment.

49 By decisions of 29 August and 1 September 1995 the Hauptzollamt Hamburg-Jonas required post-clearance recovery of the customs duties payable on the bananas which T. Port had imported from Ecuador without presenting the requisite import licences.

50 By decisions of 5 and 12 September 1995 the Hauptzollamt Hamburg-Jonas dismissed T. Port's applications for suspension of the operation of those decisions.

51 In response to applications by T. Port, the Finanzgericht Hamburg, by orders of 22 and 27 September 1995, suspended the operation of the decisions of the Hauptzollamt Hamburg-Jonas of 29 August and 1 September 1995 amending customs duties, without requiring a guarantee to be furnished.

52 For the rest, the Finanzgericht Hamburg recognises that, following the judgment in *Germany* v *Council*, cited above, Regulation No 404/93, save for the provisions at issue in the judgment in Case C-68/95 *T. Port*, cited above, must be regarded as valid under Community law. It nevertheless considers that the provisions of that regulation and of Regulation No 478/95 are contrary to certain fundamental GATT rules which the Federal Republic of Germany, as a contracting party to GATT, is required to observe. In those circumstances, the question arises, in its view, whether, having regard to the first paragraph of Article 234 of the Treaty, the application in Germany of the relevant GATT rules must take precedence over that of Regulations Nos 404/93 and 478/95.

53 The national court also states that the right of the courts of appropriate jurisdiction, recognised by the Bundesverfassungsgericht in the abovementioned order of 26 April 1995, to give an interim decision on the conflict between the application of Regulation No 404/93 and the obligations incumbent on the Federal Republic of Germany under GATT necessarily implies that a person subject to Community law may rely on certain GATT provisions in legal proceedings. It therefore considered that the question of the direct effect of the provisions of GATT should once again be referred to the Court of Justice, even though, in earlier decisions, in particular in *Germany* v *Council*, cited above, the Court of Justice had found that the GATT rules do not display the unconditional nature which is an essential precondition for them to be recognised as rules of international law that are immediately applicable in the domestic law of the contracting parties.

54 Finally, the national court entertains doubts as to the compatibility of Regulation No 478/95 with the general principle of non-discrimination, as stated in particular in the second subparagraph of Article 40(3) of the EC Treaty.

55 Consequently, the Finanzgericht Hamburg considered that the final decision to be given in each of the cases before it called for an answer to the first three questions which it had already submitted to the Court in Case C-182/95 *T. Port* v *Hauptzollamt Hamburg-Jonas*. It therefore decided to stay proceedings pending a preliminary ruling from the Court, in both cases, on the following questions:

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

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

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

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

56 By order of the President of the Court of 15 December 1995 the two cases were joined for the purposes of the written and oral procedure and the judgment.

57 In view of the considerations set out in the national court's orders for reference, it is appropriate to examine together the first question and the second part of the second question, which both concern the interpretation of the first paragraph of Article 234 of the Treaty, in relation to various GATT provisions. It is then appropriate to consider the third question, which depends on an affirmative answer to the first question and the second part of the second question, and relates to the direct effect of GATT provisions. The first part of the second question, which relates to the validity of Regulation No 478/95, should be examined last.

The interpretation of the first paragraph of Article 234 of the Treaty

58 By its first question and the second part of its second question, the national court wishes essentially to ascertain whether the first paragraph of Article 234 of the Treaty must be interpreted as allowing disapplication of Articles 17, 18 and 19 of Regulation No 404/93 and of Regulation No 478/95 on the ground that those measures are contrary to Articles I, II, III and XIII of GATT.

59 Under the first paragraph of Article 234 of the Treaty, the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand, and one or more third countries on the other, is not to be affected by the provisions of the Treaty.

60 According to settled case-law (see in particular Case C-124/95 *The Queen* v *HM Treasury and Bank of England* ex parte *Centro-Com* [1997] ECR I-81, paragraphs 56 and 57), the purpose of that provision is to make clear, in accordance with the principles of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of third countries under an earlier agreement and to comply with its corresponding obligations. Consequently, in order to determine whether a Community rule may be deprived

of effect by an earlier international agreement, it is necessary to examine whether that agreement imposes on the Member State concerned obligations whose performance may still be required by third countries which are parties to it.

61 Thus, for a Community provision to be deprived of effect as a result of an international agreement, two conditions must be fulfilled: the agreement must have been concluded before the entry into force of the Treaty and the third country concerned must derive from it rights which it can require the Member State concerned to respect.

62 However, it is clear from the documents before the Court that the main proceedings are concerned with post-clearance recovery of customs duties payable on bananas imported from Ecuador in 1995.

63 Furthermore, Ecuador was not a contracting party to GATT 1947 and did not become a member of the WTO, and therefore a party to GATT 1994, until 1996.

64 It follows that neither GATT 1947, concluded before the entry into force of the Treaty, nor GATT 1994 can be effectively relied on, in circumstances such as those of the present cases, to preclude the application, under the first paragraph of Article 234 of the Treaty, of provisions of Regulations Nos 404/93 and 478/95.

65 The answer to the first question and the second part of the second question must therefore be that the first paragraph of Article 234 of the Treaty must be interpreted as not applying to cases involving imports of bananas from a third country which is not a party to an international agreement concluded by Member States before the entry into force of the Treaty.

The direct effect of the provisions of GATT

66 The third question, concerning the direct effect of the provisions of GATT, was submitted only in case the first question and the second part of the second question were answered in the affirmative.

67 In view of the negative answer given to those questions in paragraph 65 of this judgment, there is no need to answer the third question.

The validity of Regulation No 478/95

68 By the first part of its second question, the national court queries the validity of Regulation No 478/95. It is clear from the order for reference that it considers that regulation to be contrary to Article XXIII of GATT because the general rules for dividing up the quotas take no account of earlier imports.

69 For the reasons given in relation to the answer to the first question and the second part of the second question, it is unnecessary for the Court to give a ruling on this point.

70 The national court also asks whether Regulation No 478/95 should be declared invalid on the ground that the system for allocating the tariff quota which it introduces is contrary to the general principle of non-discrimination, as stated in the second paragraph of Article 40(3) of the Treaty.

71 T. Port and the German Government submit that the allocation of country quotas to certain third countries, under Article 1(1) of Regulation No 478/95, limits the import opportunities of economic operators who traditionally import bananas from other third countries. They also consider that, in the case of imports from the third countries to which country quotas have been allocated, Regulation No 478/95 discriminates against Category A and C operators, as compared with Category B operators, in that, by virtue of Article 3(2), only the former are required to obtain export licences from the competent authorities in the third countries concerned in order to import bananas from those countries.

72 The French Government submits that the Community is not required to accord equal treatment to the various third countries and that a difference of treatment between economic operators must be accepted if it is the consequence of differences in the treatment accorded to those countries. It also observes, as does the Commission, that the country quotas allocated to the third countries party to the Framework Agreement essentially reflect the average quantities previously imported from those same countries.

73 At the hearing, the Spanish and French Governments, the Council and the Commission also stated that the difference in treatment arising from the exemption of Category B operators from the obligation to obtain export licences was objectively justified by the need to restore, between them and Category A and C operators, the competitive balance which Regulation No 404/93 was designed to establish. They state in that connection that, in *Germany* v *Council*, cited above, the Court recognised the legality of certain advantages afforded to Category B operators because of the need to achieve such a balance. However, the increase in the tariff quota and the lowering of the customs duty provided for in the Framework Agreement and incorporated into Regulation No 404/93 by Regulation No 3290/94 had the effect of disturbing that balance to the detriment of Category B operators.

74 In considering whether Regulation No 478/95 is contrary to the general principle of non-discrimination, as stated in Article 40(3) of the Treaty, it is necessary to distinguish between the introduction of country quotas and the exemption of Category B operators from the requirements of the export-licence system.

75 With regard to the first aspect, it must be emphasised that, in *Germany* v *Council*, cited above, the Court held that it was lawful to introduce the global tariff quota for imports of third-country and non-traditional ACP bananas as distinct from traditional imports from the ACP countries which enjoyed favourable terms under the Lomé Convention.

76 It must also be borne in mind that there is no general principle of Community law obliging the Community, in its external relations, to accord third countries equal treatment in all respects. Therefore, as the Court held in Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 25, if different treatment of third countries is compatible with Community law, then different treatment accorded to traders within the Community must also be regarded as compatible with Community law where that different treatment is merely an automatic consequence of the different treatment accorded to third countries with which such traders have entered into commercial relations.

77 Here, it is clear that the restrictions on import opportunities which the introduction of country quotas is likely to entail for economic operators in Categories A and C are the automatic consequence of differences in the treatment accorded to third countries, depending on whether or not they are parties to the Framework Agreement and on the size of the quota allocated to them in that agreement.

78 As to the exemption of Category B operators from the export-licence system, that difference in treatment is not the automatic consequence of any difference of treatment of some third countries as compared with others.

79 That difference in treatment derives not from the fact that the export-licence system, as provided for in the Framework Agreement and implemented by Regulation No 478/95, is applicable to imports from certain third countries, whether or not they are parties to the Framework Agreement, but from the fact that, among the Community operators who have entered into commercial relations with third countries imports from which are subject to the export-licence system, some are under an obligation to obtain export licences whilst others are exempt from that requirement.

80 It constitutes, moreover, a clear difference in the treatment of Category A and C operators as compared with Category B operators, since, as asserted by the German Government, which has not been contradicted on that point, application of the export-licence system to Category A and C operators means that they have to pay a price for bananas from the third countries concerned which is some 33% higher than that paid by Category B operators.

81 It is therefore necessary to consider whether that difference of treatment is incompatible with the prohibition laid down in the second subparagraph of Article 40(3) of the Treaty, which is merely a specific enunciation of the general principle of equality, one of the fundamental principles of Community law (see in particular Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, paragraph 7, Joined Cases 124/76 and 20/77 *Moulins et Huileries de Pont-à-Mousson and Another* v *Office Interprofessionnel des Céréales* [1977] ECR 1795, paragraph 16, Case 125/77 *Koninklijke Scholten-Honig* v *Hoofdproduktschap voor Akkerbouwprodukten* [1978] ECR 1991, paragraph 26, and

Joined Cases 103/77 and 145/77 *Royal Scholten-Honig* v *Intervention Board for Agricultural Products* [1978] ECR 2037, paragraph 26), or whether, on the contrary, it may be objectively justified, as contended by the Spanish and French Governments, the Council and the Commission, by the need to restore the competitive balance between those categories of operators.

82 In that regard, it must be emphasised that, as the Court recognised in *Germany* v *Council*, cited above, the common organisation of the market in bananas, as established by Regulation No 404/93, and in particular the system of tariff-quota allocation, involves certain restrictions or differences of treatment detrimental to Category A and C operators, whose opportunities for importing bananas from third countries have thereby been restricted, whereas Category B operators, who had previously been obliged to market essentially Community and ACP bananas, have gained an opportunity to import specified quantities of third-country bananas.

83 The Court held that such a difference in treatment is not contrary to the general principle of non-discrimination in so far as it is inherent in the objective of integrating previously compartmentalised markets, bearing in mind the different situations of the various categories of economic operators before the establishment of the common organisation of the market, and that pursuit of the objective of the common organisation, which is to guarantee disposal of Community production and traditional ACP production, entails the striking of a balance between the various categories of economic operators in question (paragraph 74).

84 Accordingly, where the balance thus achieved by Regulation No 404/93 has been disturbed because one or more of the parameters on which it is based — such as, for example, the level of the tariff quota or that of the customs duties on imports — have been changed, albeit for reasons unconnected with the common organisation of the market in the bananas sector, it may prove necessary to restore that

balance. The question remains, however, whether in this case it was proper to do so, to the detriment of Category A and C operators, by means of a measure such as the exemption of Category B operators from the export-licence system, as provided for in Article 3(2) of Regulation No 478/95.

85 The system for the allocation of the tariff quota, as established by Regulation No 404/93, which reserves 30% of it to Category B operators, is also applicable to the increase of that quota agreed upon in the Framework Agreement.

86 Category B operators therefore benefit, in the same way as Category A and C operators, from the quota increase and the concomitant lowering of customs duties which, according to the Spanish and French Governments, the Council and the Commission, are the cause of the disturbance of the balance between the various categories of operator concerned. In addition, the restrictions and differences in treatment to which Category A and C operators are subject as a result of the banana import regime set up by Regulation No 404/93 also apply to the part of the quota corresponding to that increase.

87 Therefore, recourse to a measure such as the one contained in Article 3(2) of Regulation No 478/95 can be justified only if it is shown that the balance disturbed by the increase in the tariff quota and the concomitant lowering of customs duties, which also benefit Category B operators, could be restored only by granting a substantial advantage to that same category of operators and, thus, at the cost of introducing a new difference in treatment detrimental to the other categories of operators who had already, when the tariff quota and the machinery for dividing it up were introduced, been subjected to similar restrictions and differences in treatment.

88 As is clear from the judgment delivered by the Court today in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, that is not the case.

89 In view of all the foregoing considerations, the answer to the third question must be that Regulation No 478/95 is invalid to the extent to which Article 3(2) thereof imposes only on Category A and C operators the obligation to obtain export licences for bananas from Colombia, Costa Rica or Nicaragua.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Finanzgericht Hamburg by orders of 22 and 27 September 1995, hereby rules:

1. The first paragraph of Article 234 of the EC Treaty must be interpreted as not applying to cases involving imports of bananas from a third country which is not a party to an international agreement concluded by Member States before the entry into force of the Treaty.

2. **Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No 1442/93 is invalid to the extent to which Article 3(2) thereof imposes only on Category A and C operators the obligation to obtain export licences for bananas from Colombia, Costa Rica or Nicaragua.**

Rodríguez Iglesias Gulmann Wathelet Schintgen

Mancini Kapteyn Murray Edward

Puissochet Hirsch Jann

Delivered in open court in Luxembourg on 10 March 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President