JUDGMENT OF THE COURT (Grand Chamber)

1 March 2005 *

In Case C-377/02,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Belgium), made by decision of 7 October 2002, received at the Court on 21 October 2002, in the proceedings

Léon Van Parys NV

v

Belgisch Interventie- en Restitutiebureau (BIRB),

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and A. Borg Barthet, Presidents of Chambers, J.-P. Puissochet, R. Schintgen (Rapporteur), N. Colneric, S. von Bahr, G. Arestis, M. Ilešič, J. Malenovský, J. Klučka and U. Lõhmus, Judges,

* Language of the case: Dutch.

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 September 2004,

after considering the observations submitted on behalf of:

— Léon Van Parys NV, by P. Vlaemminck and C. Huys, lawyers,

— Belgisch Interventie- en Restitutiebureau (BIRB), by E. Vervaeke, lawyer,

— the Council of the European Union, by M. Balta, K. Michoel and F.P. Ruggeri Laderchi, acting as Agents,

— the Commission of the European Communities, by T. van Rijn, C. Brown and L. Visaggio, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 November 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the validity 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) as amended by Council Regulation (EC) No 1637/98 of 20 July 1998 (OJ 1998 L 210, p. 28), Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32), Commission Regulation (EC) No 2806/98 of 23 December 1998 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the first quarter of 1999 and on the submission of new applications (OJ 1998 L 349, p. 32), Commission Regulation (EC) No 102/1999 of 15 January 1999 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the first quarter of 1999 (second period) (OJ 1999 L 11, p. 16), Commission Regulation (EC) No 608/1999 of 19 March 1999 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the second quarter of 1999 and on the submission of new applications (OJ 1999 L 75, p. 18), in the light of Articles I and XIII of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103, 'GATT 1994') which appears in Annex 1A of the Agreement establishing the World Trade Organisation ('WTO'), approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), and of Article 4 of the Framework agreement on cooperation between the European Economic Community and the Cartagena Agreement and its member countries, namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela, approved on behalf of the Community by Council Decision 98/278/EC of 7 April 1998 (OJ 1998 L 127, p. 10, 'the framework agreement').

2 The reference was made in proceedings between Léon Van Parys NV ('Van Parys') and Belgisch Interventie- en Restitutiebureau (the Belgian Intervention and Refund Board, 'BIRB'), concerning the latter's refusal to issue the former with import licences for certain quantities of bananas originating in Ecuador and Panama.

Law

The WTO agreements

3 By Decision 94/800, the Council of the European Union approved the agreement establishing the WTO together with the agreements set out in Annexes 1, 2 and 3 of that agreement ('the WTO agreements'), which include GATT 1994.

4 Under Article II(2) of the WTO Agreement:

'The agreements and associated legal instruments included in Annexes 1, 2 and 3 ... are integral parts of this Agreement, binding on all Members.'

5 Article I(1) of GATT 1994 provides:

'With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation ..., any advantage, favour, privilege or

immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.'

6 Article XIII of GATT 1994, on the non-discriminatory administration of quantitative restrictions, provides:

'1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party ..., unless the importation of the like product of all third countries ... is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

(a) wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed...;

(b) in cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;

(c) contracting parties shall not, except for purposes of operating quotas allocated in accordance with sub-paragraph (d) of this paragraph, require that import licences or permits be utilised for the importation of the product concerned from a particular country or source;

(d) in cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. ...

...

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party ...'

7 Article 3(2), (3), (5) and (7) of the Understanding on rules and procedures governing the settlement of disputes ('the understanding'), which forms Annex 2 of the agreement establishing the WTO, provide:

'2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. ...

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

...

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

...

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorisation by the [Dispute Settlement Body of the WTO, "the DSB"] of such measures.'

8 Article 21 of the understanding, entitled 'Surveillance of Implementation of [DSB] Recommendations and Rulings', provides:

'1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

...

3. At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. ...

...

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. ...

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. ...'

9 Lastly, Article 22 of the understanding, entitled 'Compensation and the Suspension of Concessions', provides:

'1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

...

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented'.

The framework agreement

10 Article 4 of the framework agreement provides:

'The Contracting Parties hereby grant each other most-favoured-nation treatment in trade, in accordance with the General Agreement on Tariffs and Trade (GATT).

Both Parties reaffirm their will to conduct trade with each other in accordance with that Agreement.'

Community legislation

11 Title IV of Regulation No 404/93 substituted, in the banana sector, a common system of trade with third States for the various, hitherto-existing national systems.

12 After certain third States complained, that common system of imports was the subject of a WTO dispute resolution procedure.

13 In a report of 9 September 1997, the Standing Appellate Body, established pursuant to Article 17 of the understanding, found that certain features of the system of trade with third States set up under Regulation No 404/93 were incompatible with Article I(1) and XIII of GATT 1994. That report was adopted by the DSB by decision of 25 September 1997.

14 Following that decision, the Council amended Title IV of Regulation No 404/93 by Regulation No 1637/98, so as to comply, as is stated in the second recital to that regulation, 'with the Community's international commitments under the World Trade Organisation (WTO)' and to the 'other signatories of the Fourth ACP-EC [Lomé] Convention ..., whilst achieving at the same time the purposes of the common organisation of the market in bananas'. Pursuant to the second paragraph of Article 2, Regulation No 1637/98 ceased to apply with effect from 1 January 1999, the expiry date of the 15-month period granted by the DSB to the European Community within which to comply with the DSB's decision of 25 September 1997.

15 The amended system for imports of bananas maintains the distinction under the former trade system between, on the one hand, traditional and non-traditional bananas originating in the African, Caribbean and Pacific States ('the ACP States'), and third State bananas, on the other.

16 Article 16(2) of Regulation No 404/93 as amended by Regulation No 1637/98 ('Regulation No 404/93') provides in that regard that:

'For the purposes of this Title ["Trade with third countries"]:

1. "traditional imports from ACP States" means imports into the Community of bananas originating in the States listed in the Annex hereto up to a limit of 857 700 tonnes (net weight) per year; these are termed "traditional ACP bananas";

2. "non-traditional imports from ACP States" means imports into the Community of bananas originating in ACP States but not covered by definition 1; these are termed "non-traditional ACP bananas";

3. "imports from non-ACP third States" means bananas imported into the Community originating in third States other than the ACP States; these are termed "third State bananas".'

17 The first paragraph of Article 17 of Regulation No 404/93 provides that 'any importation of bananas into the Community shall be subject to submission of an import licence issued by Member States to any interested party ... without prejudice to the special provisions made for the implementation of Articles 18 and 19'.

18 Article 18 of the same regulation provides:

'1. A tariff quota of 2 200 000 tonnes (net weight) shall be opened each year for imports of third State and non-traditional ACP bananas.

Imports of third State bananas under the tariff quota shall be subject to duty of ECU 75 per tonne, while imports of non-traditional ACP bananas shall be free of duty.

2. An additional tariff quota of 353 000 tonnes (net weight) shall be opened each year for imports of third State and of non-traditional ACP bananas.

Imports of third State bananas under this tariff quota shall be subject to duty of ECU 75 per tonne while imports of non-traditional ACP bananas shall be free of duty.

3. No duty shall be payable on imports of traditional ACP bananas.

4. Should there be no reasonable possibility of securing agreement of all WTO contracting parties with a substantial interest in the supply of bananas, the

Commission may under the procedure set out in Article 27 allocate the tariff quotas provided for in paragraphs 1 and 2 and the traditional ACP quantity between those States with a substantial interest in the supply.'

19 The annex to Regulation No 404/93, referred to in the first subparagraph of the second paragraph of Article 16 of that regulation, which was also amended by Regulation No 1637/98, contains a list of 12 supplier States of traditional ACP bananas to which an annual quota of 857 700 tonnes (net weight) is reserved without allocating maximum quantities to each of those States.

20 Article 19 of Regulation No 404/93 provides that imports are to be managed in accordance with 'the method based on taking account of traditional trade flows ("traditionals/newcomers").'

21 Pursuant to its duty, under Article 20 of Regulation No 404/93, to implement the new system of trade with third States, the Commission adopted Regulation No 2362/98. Article 4 of that regulation states as follows:

'1. Each traditional operator registered in a Member State in accordance with Article 5 shall receive, for each year and for all the origins listed in Annex I, a single reference quantity based on the quantities of bananas actually imported during the reference period.

2. For imports carried out in 1999 under the tariff quotas or as traditional ACP bananas, the reference period shall be made up of the years 1994, 1995 and 1996.'

22 Article 5 of Regulation No 2362/98 concerns the method for determining the reference quantity.

23 As for the method of issuing import licences, Article 17 of that regulation provides:

'Where, for a given quarter and for any one or more of the origins listed in Annex I, the quantities applied for appreciably exceed any indicative quantity fixed under Article 14, or exceed the quantities available, a percentage reduction to be applied to the amounts requested shall be fixed'.

24 Article 18 of the same regulation provides:

'1. Where a percentage reduction has been fixed for one or more given origins under Article 17, operators who have applied for import licences for the origin(s) concerned may:

(a) either renounce their use of the licence by informing the relevant issuing authority accordingly within 10 working days of publication of the Regulation fixing the reduction percentage, whereupon the security lodged against the licence shall be released immediately; or

(b) submit one or more fresh licence applications for the origins for which available quantities have been published by the Commission, up to an amount equal to or smaller than the quantity applied for but not covered by the original licence issued. Such requests shall be submitted within the time limit laid down in point (a) and shall be subject to all the conditions governing licence applications.

2. The Commission shall immediately determine the quantities for which licences can be issued for each of the origins concerned'.

25 Article 29 of Regulation No 2362/98 states:

'If the quantities covered by applications for licences in respect of the first quarter of 1999 covering imports from one or more of the origins listed in Annex I exceed 26% of the quantities set out in that Annex, the Commission shall fix a percentage reduction to be applied to all applications in respect of the origin(s) concerned'.

26 In application of Article 29 of Regulation No 2362/98, Article 1 of Regulation No 2806/98 fixes the reduction coefficients in the following terms:

'Import licences shall be issued under the arrangements for the importation of bananas, tariff quota arrangements and arrangements for traditional ACP bananas

for the first quarter of 1999 for the quantity indicated in the licence application, multiplied by reduction coefficients of 0.5793, 0.6740 and 0.7080 for applications indicating the origins "Colombia", "Costa Rica" and "Ecuador" respectively'.

27 Pursuant to Article 18(2) of Regulation No 2362/98, Regulation No 2806/98 also fixes the quantities for which licence applications may still be lodged in the first quarter of 1999. Those new applications are the subject of Regulation No 102/1999, Article 1(1) of which fixes reduction coefficients of 0.9701 in respect of applications for imports of traditional ACP bananas originating in 'Panama' and 0.7198 in respect of bananas originating in 'Others'. The applications in respect of origins other than those mentioned in Article 1(1) may, pursuant to Article 1(2), be satisfied in full.

28 Regulation No 608/1999 concerns applications for licences for the second quarter of 1999. It fixes the reduction coefficients for applications to import bananas indicating the origins 'Colombia', 'Costa Rica' and 'Ecuador' at 0.5403, 0.6743 and 0.5934 respectively. For applications in respect of origins other than those just mentioned, the Member States may issue import licences for the quantity indicated in the application.

29 In a report dated 12 April 1999, a panel, instituted at the request of the Republic of Ecuador pursuant to Article 21(5) of the understanding, stated that the new system of trade with third States as established by Regulation No 1637/98 had not removed the infringement of Articles I(1) and XIII of GATT 1994. The DSB adopted that report on 6 May 1999.

30 The Community system was subsequently amended by Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2).

The dispute in the main proceedings and the questions referred for a preliminary ruling

31 Van Parys, established in Belgium, has imported bananas into the European Community from Ecuador for more than 20 years.

32 On 14 December 1998, Van Parys applied to the BIRB for import licences, during the first quarter of 1999, in respect of 26 685 935 kg of bananas originating in Ecuador. The BIRB issued licences for the quantities referred to in the applications, subject to a reduction coefficient of 0.7080 fixed by Regulation No 2806/98.

33 On 8 January 1999, Van Parys made, pursuant to Article 18 of Regulation No 2362/98, three new applications for licences in respect of the unallocated quantity for the importation of bananas originating in Panama and in other third States. The BIRB also applied a reduction coefficient to those applications pursuant to Regulation No 102/1999.

34 On 5 March 1999, Van Parys applied for licences in respect of the second quarter of 1999 to import 35 224 757 kg of bananas originating in Ecuador. That application was acceded to, subject to the deduction of an amount corresponding to the reduction coefficient of 0.5934 fixed by Regulation No 608/1999.

35 Van Parys brought two actions before the Raad van State against the decisions of the BIRB refusing to issue it with import licences for the full amounts applied for. In its actions it submitted that those decisions were unlawful because of the unlawfulness, in the light of the WTO rules, of the regulations governing imports of bananas into the Community on which those decisions are based.

36 Considering that, in accordance with the Court's case-law, it is not for the national courts to rule on the validity of Community measures, the Raad van State decided to stay the proceedings and refer to the Court the following questions for a preliminary ruling:

'1. Do ... Regulation (EEC) No 404/93 ... as amended by ... Regulation (EC) No 1637/98 ..., ... Regulation (EC) No 2362/98 ..., ... Regulation (EC) No 2806/98 ..., ... Regulation (EC) No 102/[19]99 ... and Regulation (EC) No 608/1999 ... infringe Article I, Article XIII:1 and Article XIII:2(d) of GATT 1994, taken separately or together, inasmuch as they:

— introduce to the benefit of twelve countries named in the annex to Regulation No 1637/98 a joint quota of a maximum of 857 700 [tonnes] of bananas

("traditional ACP bananas") and, moreover, in that that quota does not accord with a distribution of trade that approaches trade without restrictions in so far as it is included in the system introduced by Regulation No 1637/98, the import of bananas being regulated solely on the basis of a tariff quota;

— introduce a tariff quota for a total quantity of 2 535 000 tonnes for third countries and for non-traditional ACP bananas and then allocate that tariff quota in percentage terms on the basis of a non-representative period, since the import of bananas in the period from 1994 to 1996 was already subject to restrictive conditions?

2. Do the regulations referred to in paragraph 1 infringe Article 4 of the framework agreement ... inasmuch as by that agreement, the European Community undertook to have its relations with Ecuador governed by the provisions of GATT and to grant that country most-favoured-nation treatment?

3. Do the regulations referred to in paragraph 1 hereof infringe the principle of the protection of legitimate expectations and the principle of good faith in international public law and international customary law, inasmuch as the Commission has not fulfilled the obligations arising for the Community from GATT 1994, has misused legal procedures and has not taken account of judicial proceedings and of the outcome of an international dispute settlement procedure inasmuch as, despite declarations made at the time of the adoption of Regulation No 1637/98, it has not established a system under which import licences for bananas are issued to "genuine importers"?

4. Has the Commission exceeded the authority given to it by ... Regulation No 404/93, as amended by Regulation No 1637/98, by adopting the tariff quota for

the import of bananas while disregarding the obligations which arise for the Community from GATT 1994 and GATS [General Agreement on Trade in Services] or which must, where appropriate, be taken into account, because of its avowed intention to adapt the regime for the import of bananas into the Community to the applicable WTO agreements, as a positive rule of law to be integrated into Community law?'

The first, third and fourth questions

37 By its first, third and fourth questions, the referring court essentially asks the Court to assess the validity of Regulations No 404/93, 2362/98, 2806/98, 102/1999 and 608/1999 in the light of Articles I and XIII of GATT 1994.

38 Before making that assessment, it is necessary to answer the question whether the WTO agreements give Community nationals a right to rely on those agreements in legal proceedings challenging the validity of Community legislation where the DSB has held that both that legislation and subsequent legislation adopted by the Community in order, inter alia, to comply with the relevant WTO rules are incompatible with those rules.

39 It is settled case-law in that regard that, given their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47; order of 2 May 2001 in Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159, paragraph 24; Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569,

paragraph 93; Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 53 and Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 52).

40 It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see, as regards GATT 1947, Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paragraphs 19 to 22, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31, and, as regards the WTO agreements, *Portugal* v *Council*, paragraph 49, and *Biret International* v *Council*, paragraph 53).

41 In the present case, by undertaking after the adoption of the decision of the DSB of 25 September 1997 to comply with the WTO rules and, in particular, with Articles I (1) and XIII of GATT 1994, the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the impossibility of relying on WTO rules before the Community Courts and enabling the Community Courts to exercise judicial review of the relevant Community provisions in the light of those rules.

42 First, it should be noted that even where there is a decision of the DSB holding that the measures adopted by a member are incompatible with the WTO rules, as the Court has already held, the WTO dispute settlement system nevertheless accords considerable importance to negotiation between the parties (*Portugal* v *Council*, paragraphs 36 to 40).

43 Thus, although, in the absence of a resolution mutually agreed between the parties and compatible with the agreements in question, the main purpose of the dispute settlement system is in principle, according to Article 3(7) of the understanding, to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that provision provides, however, that where the immediate withdrawal of the measures is impracticable, compensation may be granted or the application of concessions or the enforcement of other obligations may be suspended on an interim basis pending the withdrawal of the inconsistent measure (see, to that effect, *Portugal* v *Council*, paragraph 37).

44 It is true that, according to Articles 3(7) and 22(1) of the understanding, compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings of the DSB are not implemented within a reasonable period of time, the latter of those provisions showing a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question (*Portugal* v *Council*, paragraph 38).

45 However, Article 22(2) provides that, if the Member concerned fails to enforce those recommendations and decisions within a reasonable period, if so requested, and within a reasonable period of time, it is to enter into negotiations with any party having invoked the dispute settlement procedures with a view to agreeing compensation. If no satisfactory compensation has been agreed within 20 days after the expiry of the reasonable period, the complainant may request authorisation from the DSB to suspend, in respect of that member, the application of concessions or other obligations under the WTO agreements.

46 Furthermore, Article 22(8) of the understanding provides that the dispute remains on the agenda of the DSB, pursuant to Article 21(6) of the understanding, until it is resolved, that is until the measure found to be inconsistent has been 'removed' or the parties reach a 'mutually satisfactory solution'.

47 Where there is no agreement as to the compatibility of the measures taken to comply with the DSB's recommendations and decisions, Article 21(5) of the understanding provides that the dispute shall be decided 'through recourse to these dispute settlement procedures', including an attempt by the parties to reach a negotiated solution.

48 In those circumstances, to require courts to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of reaching a negotiated settlement, even on a temporary basis (*Portugal* v *Commission*, paragraph 40).

49 In the dispute in the main proceedings, it is apparent from the file that:

— after declaring to the DSB its intention to comply with the DSB's decision of 25 September 1997, the Community amended its system for imports of bananas upon the expiry of the period allocated to it for that purpose;

— as a result of the challenge by the Republic of Ecuador to the compatibility with the WTO rules of the new system of trade with third States arising from

Regulation No 1637/98, the matter was referred to an ad hoc panel pursuant to Article 21(5) of the understanding and that panel held in a report adopted by the DSB on 6 May 1999 that that system continued to infringe Articles I(1) and XIII of GATT 1994;

— in particular, the United States of America was authorised, in 1999, pursuant to Article 22(2) of the understanding and following an arbitration procedure, to suspend concessions to the Community up to a certain level;

— the Community system was the subject of further amendments introduced by Regulation No 216/2001, applicable with effect from 1 April 2001 pursuant to the second paragraph of Article 2;

— agreements were negotiated with the United States of America on 11 April 2001 and with the Republic of Ecuador on 30 April 2001, with a view to bringing the Community legislation into conformity with the WTO rules.

50 Such an outcome, by which the Community sought to reconcile its obligations under the WTO agreements with those in respect of the ACP States, and with the requirements inherent in the implementation of the common agricultural policy, could be compromised if the Community Courts were entitled to judicially review the lawfulness of the Community measures in question in light of the WTO rules upon the expiry of the time-limit, in January 1999, granted by the DSB within which to implement its decision of 25 September 1997.

51 The expiry of that time-limit does not imply that the Community had exhausted the possibilities under the understanding of finding a solution to the dispute between it and the other parties. In those circumstances, to require the Community Courts, merely on the basis that that time-limit has expired, to review the lawfulness of the Community measures concerned in the light of the WTO rules, could have the effect of undermining the Community's position in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules.

52 It follows from the foregoing considerations that Regulation No 1637/98 and the regulations in issue in the main proceedings adopted to apply it, cannot be interpreted as measures intended to ensure the enforcement within the Community legal order of a particular obligation assumed in the context of the WTO. Neither do those measures expressly refer to specific provisions of the WTO agreements.

53 Second, as the Court held in paragraphs 43 and 46 of its judgment in *Portugal* v *Council*, to accept that the Community Courts have the direct responsibility for ensuring that Community law complies with the WTO rules would deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community's commercial partners enjoy. It is not in dispute that some of the contracting parties, which are amongst the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of the WTO rules.

54 It follows from all of the foregoing that an operator, in circumstances such as those in the main proceedings, cannot plead before a court of a Member State that

Community legislation is incompatible with certain WTO rules, even if the DSB has stated that that legislation is incompatible with those rules.

The second question

55 By its second question, the referring court asks essentially whether Regulations No 404/93, 2362/98, 2806/98, 102/1999 and 608/1999 are compatible with Article 4 of the framework agreement.

56 It should be stated that that article, pursuant to which the contracting parties accord each other most-favoured-nation treatment as laid down by Article I of GATT 1994, adds nothing to the obligations already incumbent on those parties under the WTO rules.

57 As the Commission rightly points out, Article 4 of the framework agreement was added to the framework agreement at a time when the Member States of the Andean Pact were not yet members of the WTO, and that amendment did not alter the scope or nature of the obligations imposed by GATT 1994.

58 In those circumstances, the reasoning set out in reply to the first question as to whether or not the WTO rules may be relied upon before a court of a Member State applies equally to the interpretation of Article 4 of the framework agreement.

Costs

59 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

In circumstances such as those in the main proceedings, an operator may not rely in proceedings before a national court on the fact that Community legislation is incompatible with certain rules of the World Trade Organisation even where the Dispute Settlement Body referred to in Article 2(1) of the Understanding on rules and procedures governing the settlement of disputes, which forms Annex 2 to the Agreement establishing the World Trade Organisation, approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), has declared that legislation to be incompatible with those rules.

[Signatures]