OPINION OF ADVOCATE GENERAL LÉGER

delivered on 24 October 2002 [1]

1. This appeal is brought by T. Port GmbH & Co. KG against the judgment of the Court of First Instance of the European Communities in Case T-1/99 *T. Port* v *Commission*. [2] By that judgment the Court dismissed the appellant's application for compensation for the loss it allegedly suffered as a result of the introduction of the export licence system by Regulation (EC) No 478/95. [3]

I — Legislative background

2. The legislative background to the case can be summarised as follows. [4]

3. Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas [5] instituted a common system of trade with third countries. The first paragraph of Article 17 of that regulation provides that any importation of bananas into the Community is to be subject to the submission of an import licence issued by the Member States.

4. Originally Article 18(1) of Regulation No 404/93 provided for a tariff quota of 2 million tonnes (net weight) to be opened each year for imports of third-country bananas from non-ACP States [6] and non-traditional imports of bananas from ACP States. [7] Under that quota, imports of third-country bananas were subject to a levy of ECU 100 per tonne and non-traditional ACP bananas to a zero duty.

1 — Original language: French.

2 — [2001] ECR II-465, 'the judgment under appeal'.

3 — Commission Regulation 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).

4 — See judgment under appeal (paragraphs 1 to 26).

5 — OJ 1993 L 47, p. 1.

6 — Hereinafter referred to as 'third-country bananas'.

7 — Hereinafter referred to as 'non-traditional ACP bananas'.

5. Article 19(1) of Regulation No 404/93 subdivided the tariff quota opened as follows: 66.5% to the category of operators who had marketed third-country and/or non-traditional ACP bananas (category A), 30% to the category of operators who had marketed Community and/or traditional ACP bananas (category B) and 3.5% to the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (category C).

6. That system was reappraised in the context of the General Agreement on Tariffs and Trade (GATT).

7. In March 1994 the European Community reached an agreement, known as the Framework Agreement on Bananas, [8] with several Latin American countries, namely the Republics of Colombia, Costa Rica, Nicaragua and Venezuela. That agreement set the basic overall tariff quota at 2 100 000 tonnes for 1994 and at 2 200 000 tonnes for 1995 and subsequent years and laid down the percentages of the quota allocated to Colombia, Costa Rica, Nicaragua and Venezuela.

8. Point 6 of the Framework Agreement provides that those countries 'may deliver special export certificates for up to 70% of their quota' and that those certificates 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'. In addition, point 7 of the Framework Agreement fixes the in-quota customs duty at ECU 75 per tonne.

9. On 22 December 1994 the Council approved the Framework Agreement on behalf of the Community. [9] On 1 March 1995 the Commission adopted Regulation (EC) No 478/95, which contains the measures necessary for implementation of that agreement. Article 3(2) of that regulation provides that for goods originating in Colombia, Costa Rica or Nicaragua, the application for an import licence of Category A or C must be accompanied by an export licence issued by the competent authorities of those countries.

10. On 10 March 1998 the Court of Justice partially annulled Decision 94/800 on the grounds that by exempting Category B operators from the export-licence system

8 — Hereinafter referred to as 'the Framework Agreement'.

9 — 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).

that decision infringed the principle of non-discrimination laid down in Article 40(3) of the EC Treaty (now, after amendment, Article 34(2) EC).[10] The Court of Justice also declared Regulation No 478/95 invalid on the same grounds.[11]

II — Procedure before the Court of First Instance

11. By application lodged at the Registry of the Court of First Instance on 4 January 1999 the appellant brought an action for damages on the basis of Article 178 and the second paragraph of Article 215 of the EC Treaty (now Article 235 EC and the second paragraph of Article 288 EC).

12. As a Category A operator it sought compensation for loss which it allegedly suffered as a result of the obligation imposed by Regulation No 478/95 to purchase export licences in order to import and market bananas originating in Costa Rica.

13. The appellant claimed that the Court of First Instance should order the Community to pay it, on the one hand, the sum of DEM 828 337.10 in respect of the price of the export licences which it was required to purchase and, on the other hand, the sum of DEM 126 356.80 in respect of the cost of borrowing money in order to purchase those licences.

III — The judgment under appeal

14. In the judgment under appeal, the Court of First Instance dismissed the application on the following grounds:

'42 The Community's non-contractual liability under the second paragraph of Article 215 of the EC Treaty depends on the coincidence of a set of conditions as regards the unlawfulness of the acts alleged against the Community institutions, the fact of damage and a causal link between the conduct of the institution and the wrongful act complained of....

10 — Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 72.

11 — Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023.

43 In the present case, the conditions relating to actual damage and to a causal link may appropriately be considered together.

...

55 According to settled case-law, it is for the party seeking to establish the Community's liability to adduce conclusive proof as to the existence or extent of the damage he alleges....

56 In this instance, the damage alleged has two components. First, it consists of the costs of the applicant's purchase of licences to export bananas from Costa Rica. Second, it consists of the bank interest paid on the sums drawn on a line of credit made available to the applicant by its bank.

57 With regard to the first head of damage, the applicant has produced a certified statement of its auditor in which the latter declares that "from 1996 to 1998, [it] disbursed DEM 828 337.10 on purchasing export licences for bananas from Costa Rica". It is clear from its pleadings and from what it said at the hearing that in the applicant's view the expenditure mentioned in that certified statement in itself constitutes the loss it has suffered and that there is no point in considering what effect that expenditure actually had on the profitability of the corresponding commercial transactions. The applicant submits that it is not, therefore, incumbent on it to supply any further particulars or evidence.

58 That approach cannot be accepted, for several reasons.

59 In the first place, there is nothing in the certified statement referred to which makes it possible to determine whether the sum really corresponds to the cost of purchasing export licences.

60 In the second place, even on the assumption that that sum is unarguably genuine, it has by no means been established that the applicant itself actually used all the export licences corresponding to that sum in order to

import bananas into the Community. That evidence is indispensable since, as the Commission has pointed out and the applicant has not denied, the export licences held by one operator could, in practice, be sold to another operator, or indeed be exchanged for import licences.

61 The two certified statements of the auditor, annexed to the reply, are not in this regard conclusive. They simply state that in 1996, 1997 and 1998 respectively the applicant paid DEM 767 225.38, DEM 489 029.36 and DEM 1 419.11 by way of "import duties on imports of bananas from Costa Rica". In the absence of any information regarding the quantities of bananas to which those total amounts relate, or the quantities to which the abovementioned amount of DEM 828 337.10 relates, or the parameters used by the auditor in arriving at those sums, it cannot be established with the requisite certainty that the quantities of bananas imported from Costa Rica into the Community by the applicant between 1996 and 1998 correspond to the quantities of bananas in respect of which it purchased export licences in that country. In addition, and in any event, the possibility remains that some of the import duty paid by the applicant relates to bananas imported into the Community under Category B import licences which did not require the production of an export licence. It may be noted in this connection that it is stated in one of the certified statements referred to above that the applicant purchased "additional licences for imports of bananas from Costa Rica", without specifying the category to which the licences related.

62 The applicant ought to have taken all the greater care to communicate information on those various points because, both in its defence and in its rejoinder, the Commission expressly drew the applicant's attention to the fact that such information was essential if the existence and extent of the damage alleged were to be established. Notwithstanding those observations, the applicant — as it acknowledged at the hearing in response to a question put by the Court of First Instance — has deliberately chosen not to supply the information.

63 In the third place, even if the applicant did use on its own account all the export licences it had acquired, its method of determining loss, which is to claim that the loss is equal to the expense incurred, cannot be accepted.

64 First, it is not inconceivable that, as the Commission has claimed, the cost of purchasing the export licences has been partly, or indeed wholly, passed on by the applicant in its sale prices. That suggestion is all the more plausible because the quantities of bananas the importation of which into the Community depended on the issuing of an export licence represented a substantial proportion of the tariff quota.

65 The applicant has not put forward anything to suggest that it was not possible to pass on the cost, nor has it even denied having done so in this case. It has merely objected that that argument was raised by the Commission for the first time at the hearing and cannot therefore be taken into consideration by the Court. That objection cannot be upheld, since the Commission expressly pointed out in its pleadings the need for information concerning the cost factors linked to the export licence regime and concerning the circumstances in which the bananas were imported. Since the applicant has deliberately chosen to adopt an especially restrictive approach with regard to the furnishing of evidence, it is not reasonable for it to complain that the Commission expressed some of its criticisms in greater detail at the hearing.

66 Second, the Commission's submission that the disadvantage constituted by the obligation on the part of Category A and C operators to acquire export licences was offset, at least in part, by the two other accompanying measures laid down in the Framework Agreement, namely the increase of 200 000 tonnes in tariff quota and the reduction of ECU 25 per tonne in the customs duty applicable to imports of third-country bananas within that quota, would not seem to be groundless. It is true that those measures benefited Category B operators too, since part of the tariff quota was reserved for them also. However, they benefited to a lesser extent only, since their share was limited to 30%, the other 70% being allocated to Category A and C operators.

67 It follows that the mere fact, assuming it to have been proved, that an operator has borne additional costs connected with its business dealings does not necessarily imply that it suffered a corresponding loss. In this instance, by deliberately confining itself to basing its application on the single fact that it had incurred certain costs, the applicant has therefore not adduced sufficient proof of having actually sustained loss.'

15. In paragraphs 68 to 74 of the judgment under appeal the Court of First Instance considered the appellant's application as regards the second component of the loss complained of (namely the cost of borrowing money to purchase the export licences concerned). It held that the evidence adduced by the appellant in that connection was not conclusive.

16. In addition, in paragraphs 76 to 80 of the judgment under appeal the Court of First Instance held that the appellant had not provided evidence to show that there was any causal link between the unlawful behaviour of which it accuses the Commission and the damage complained of.

17. The Court of First Instance therefore dismissed the application for compensation.

IV — The appeal

18. By application lodged at the Registry of the Court of Justice on 19 March 2001, the appellant brought this appeal. It is applying to this Court for the judgment under appeal to be set aside in part and for an order that the Community should pay it the sum of DEM 828 337.10.

19. In support of its appeal, the appellant puts forward five pleas in law:

— error of law in the definition of 'loss';

— breach of the principle *compensatio lucri cum damno*;

— breach of the obligation to state adequate reasons;

— error of law in the assessment of its arguments with regard to the use of export licences; and

— error of law in the consideration of the causal link between the unlawful conduct of the institutions and the loss suffered.

20. I shall consider those various pleas in the order in which they are listed. The first two pleas will be considered together since

they both relate to the reasoning contained in paragraphs 63 to 67 of the judgment under appeal.

A — *The first two pleas*

21. Under its first plea, [12] the appellant maintains that the Court of First Instance committed an error of law holding that the appellant could have passed on the price of the export licences in the sale price of the bananas. In the appellant's view the question of passing on the loss is irrelevant as regards determining the extent of the loss. The Court of First Instance should have held that the loss corresponded to the price of the contested export licences.

22. Under its second plea, [13] the appellant criticises the Court of First Instance for holding that some of the measures in the Framework Agreement (namely, the increase in the tariff quota and the reduction in the customs duties) offset the disadvantages of the obligation to purchase export licences. According to the appellant, the principle *compensatio lucri cum damno* only applies where the advantage created results from the same breach of the law as the loss. In the present case the increase in quota and the reduction in customs duties do not constitute a breach of the law.

23. It should be pointed out that, according to established case-law, [14] the Court of Justice will reject from the outset complaints directed against grounds of a judgment of the Court of First Instance which are subsidiary or included only for the sake of completeness. The Court of Justice considers that where the operative part of the judgment of the Court of First Instance is based on other grounds, put forward as the main grounds, such complaints cannot lead to the judgment under appeal being set aside and are therefore inoperative.

24. In the present case the first two pleas seek to challenge grounds which are subsidiary in relation to those set out in paragraphs 59 to 62 of the judgment under appeal.

25. In paragraphs 58 to 67 of the judgment under appeal, the Court of First Instance considered the appellant's arguments with

12 — Appeal (paragraph 3).

13 — Ibid. (paragraph 4).

14 — See in particular, Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraphs 25 and 26; Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965, paragraph 31; Case C-326/91 P *De Compte* v *Parliament* [1994] ECR I-2091, paragraph 94; Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, paragraph 23; Case C-264/95 P *Commission* v *UIC* [1997] ECR I-1287, paragraphs 48 to 51; Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 23; and order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraphs 47 to 49, order of 12 December 1996 in Case C-49/96 P *Progoulis* v *Commission* [1996] ECR I-6803, paragraph 27 and order of 18 October 2001 in Case C-241/00 P *Kish Glass* v *Commission* [2001] ECR I-7759, paragraph 42.

regard to the first component of the alleged loss, namely the sum of DEM 828 337.10. It put forward two sets of considerations in that regard.

26. The first set of considerations relates to the value of the evidence adduced by the appellant. The Court of First Instance held in paragraphs 59 to 62 that the appellant had not proved that its loss was genuine on the grounds that (1) the certified statements made by its auditor were not conclusive and (2) it was not established that the appellant had used the export licences on its own account.

27. The second set of considerations relates to the definition of 'loss'. In paragraphs 63 to 67 of the judgment under appeal, the Court of First Instance held that 'even on the assumption that [the sum of DEM 828 337.10] is unarguably genuine' [15] and 'even if the applicant did use on its own account all the export licences it had acquired', [16] the loss cannot be equivalent to the price of those licences. It held that the appellant could have passed on the price of the licences in the sales price of the bananas and that some of the measures in the Framework Agreement had offset the disadvantage of the obligation to buy the contested licences.

28. It is clear from that information that the grounds relating to the definition of 'loss' (paragraphs 63 to 67 of the judgment under appeal) are subsidiary in relation to the grounds relating to the evidence adduced by the appellant (paragraphs 59 to 62 of the judgment under appeal). The Court of First Instance made that assessment on the basis of the view, which it expressly rejected, that the appellant had adequately established that its loss was genuine.

29. In those circumstances, I think that the first two pleas are of no consequence. They cannot entail the judgment under appeal being set aside because, for this to be done, the appellant must in any event show that the grounds relating to its evidence (paragraphs 59 to 62 of the judgment under appeal) are incorrect.

30. I therefore propose that this Court reject the first two pleas.

B — *The third plea*

31. Under its third plea, [17] the appellant claims that the judgment under appeal contains insufficient reasons. It contends

15 — Judgment under appeal (paragraph 60).

16 — Ibid. (paragraph 63).

17 — Appeal (paragraph 5).

that in paragraph 59 of the judgment the Court discounted the first certified statement from the appellant's auditor without explaining how that evidence was insufficient to establish that the appellant's loss was genuine.

32. It should be pointed out that, in order to prove its loss, the appellant had produced three certified statements before the Court of First Instance. The first certified statement appeared as an annex to the application and read 'from 1996 to 1998 [the appellant had] disbursed DEM 828 337.10 on purchasing export licences for bananas from Costa Rica'. [18] The two other certified statements appeared as annexes to the reply and stated that in 1996, 1997 and 1998 respectively the appellant paid DEM 767 225.38, DEM 489 029.36 and DEM 1 419.11 by way of 'import duties on imports of bananas from Costa Rica'. [19]

33. Contrary to what the appellant contends, the Court of First Instance did give the reasons why those three certified statements did not provide proof of the alleged loss.

34. In paragraph 61 of the judgment under appeal the Court of First Instance held that '[i]n the absence of any information regarding the quantities of bananas to which [the] total amounts [of DEM 767 225.38, DEM 489 029.36 and DEM 1 419.11] relate, *or the quantities to which the abovementioned amount of DEM 828 337.10 relates*, or the parameters used by the auditor in arriving at those sums, it cannot be established with the requisite certainty that the quantities of bananas imported from Costa Rica into the Community by the applicant between 1996 and 1998 correspond to the quantities of bananas in respect of which it purchased export licences in that country'. [20]

35. In paragraph 62 of the judgment under appeal it added that '[t]he applicant ought to have taken all the greater care to communicate information on those various points because... the Commission expressly drew the applicant's attention to the fact that such information was essential if the existence and extent of the damage alleged were to be established. Notwithstanding those observations, the applicant — as it acknowledged at the hearing in response to a question put by the Court of First Instance — has deliberately chosen not to supply the information'.

36. The Court of First Instance did therefore give the reasons for which the first certified statement produced by the appellant did not have adequate probative value. In the view of the Court it was not

18 — See judgment under appeal (paragraphs 45 and 57).

19 — Ibid. (paragraphs 45 and 61).

20 — Emphasis added.

sufficient to state the amount of the costs incurred in purchasing the export licences. It was necessary in addition to give details of the parameters which entered into the calculation of those costs, in particular the quantities of bananas to which they related.

37. Consequently, I consider that the Court of First Instance complied with the formal requirement to state its reasons. I therefore consider that this Court should reject the third plea.

C — *The fourth plea*

38. The fourth plea [21] is directed against paragraph 60 of the judgment under appeal. The appellant criticises the Court of First Instance for holding that it was by no means established that the appellant itself actually used all the export licences corresponding to the sum certified by its auditor (DEM 828 337.10).

39. The appellant contends that the Court of First Instance incorrectly assessed its arguments. In its submission, the payment of import duties, as certified by the auditor, proved that it had actually used the export licences and made the contested imports into the Community. In that connection, the appellant submits a table indicating for the years 1996, 1997 and 1998 the quantities of bananas imported and the costs of purchasing the export licences. It states that the quantities of bananas imported may be deducted from the amount of import duties paid on the basis of a customs duty of ECU 75 or DEM 146.69 per tonne and that the price of the licences was DEM 96.61 per tonne.

40. It should be pointed out that it is settled case-law that the Court of Justice has no jurisdiction to find the facts or, as a rule, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. [22] That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law amenable to review by the Court of Justice. [23]

41. In the present case, the plea is specifically directed to challenging the assessment

21 — Appeal (paragraph 6).

22 — See for example, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66; Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 54 and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 24.

23 — See in particular Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 42 and 43; *Blackspur DIY and Others* v *Council and Commission*, cited above, paragraph 29; Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 26; Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraphs 45 to 47 and order of 6 October 1997 in Case C-55/97 P *AIUFASS and AKT* v *Commission* [1997] ECR I-5383, paragraph 25 and order of 16 October 1997 in Case C-140/96 P *Dimitriadis* v *Court of Auditors* [1997] ECR I-5635, paragraph 35.

by the Court of First Instance of the evidence produced by the appellant. The appellant claims, contrary to what was held by the Court of First Instance, that the certified statements produced at first instance contained all the evidence needed in order to show that it did actually use the contested licences. However, the appellant has neither established, nor even argued, that the Court of First Instance distorted the clear sense of the evidence produced before it.

42. In those circumstances, the fourth plea is manifestly inadmissible.

D — *The fifth plea*

43. Under its last plea,[24] the appellant contends that the Court of First Instance committed an error of law in its consideration of the causal link between the unlawful behaviour of the institutions and the loss suffered. The appellant argues that, contrary to what the Court of First Instance held in paragraphs 76 to 80 of the judgment under appeal, the fact that it imported bananas originating in Costa Rica under the Framework Agreement was in itself sufficient to establish the existence of such a link.

24 — Appeal (paragraph 7).

44. It should be pointed out that, according to settled case-law, the Community's non-contractual liability is dependent on the coincidence of a series of conditions as regards the unlawfulness of the acts alleged against the institutions, the fact of the damage complained of and the existence of a causal link between the conduct of the institution concerned and the damage complained of.[25] It is also settled case-law that those conditions are cumulative so that if one of them is not satisfied the Community cannot incur liability.[26]

45. In the present case we have already found that none of the four pleas seeking to establish the existence of the loss suffered by the appellant could be upheld.

46. In those circumstances, the fifth plea is inoperative.[27] It cannot entail the judgment under appeal being set aside since, even assuming it were well founded, the operative part of the judgment would in any event be based on other grounds relating to the absence of loss by the appellant.

25 — See for example Case 26/81 *Oleifici Mediterranei* v *European Economic Community* [1982] ECR 3057, paragraph 16 and Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraph 42.

26 — See for example Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 17 to 19, 53 and 54.

27 — See *Dorsch Consult* v *Council and Commission*, cited above, paragraphs 52 to 54.

V — Conclusion

47. For the reasons set out above, I propose that the Court should dismiss the appeal and order the appellant to pay the costs at first instance and on appeal.