OPINION OF ADVOCATE GENERAL GULMANN
delivered on 8 June 1994 *

Mr President,
Members of the Court,

1. On 13 February 1993 the Council adopted Regulation No 404/93 on the common organization of the market in bananas. [1] The regulation, which came into force on 1 July 1993, lays the foundation for free movement of goods between the Member States and establishes a common import system as regards third countries. A tariff quota is introduced, together with special rules for the allocation of the quota. The German Government thinks that the quota entails a shortage of supplies on the market and that the allocation of the quota accentuates that shortage in a number of Member States and moreover places an unacceptable burden on certain groups of operators.

In an application of 14 May 1993 the Federal Republic of Germany claimed a declaration that Title IV (trade with third countries) and Article 21(2) (discontinuance of the special tariff quota applicable to Germany) were void. The Council contended that the application should be dismissed.

The Netherlands and Belgian Governments intervened in support of the German Government. The British, French, Greek, Italian, Portuguese and Spanish Governments and the Commission intervened in support of the Council. The Italian Government, however, did not submit any observations.

2. The German Government lodged, at the same time as its main application, an application for the adoption of interim measures which was dismissed by the Court by order of 29 June 1993.

3. It was not only the German Government which contested the regulation. Several companies applied under Article 173 of the EEC Treaty for a declaration that the regulation was void or made an application for compensation under Article 178. The Court dismissed the applications for a declaration of invalidity, whilst the applications for compensation were transferred to the Court of First Instance which, in pursuance of Article 47 of the Statute on the Court of Justice of the EEC, stayed the proceedings pending judgment by the Court of Justice in this case. [2]

* Original language: Danish.

1 — OJ 1993 L 47, p. 1.

2 — The cases in question are Case T-516/93 *Pacific Fruit Company*, Case T-517/93 *Léon van Parijs*, Case T-518/93 *Anton Dürbeck*, Case T-518/93 *Comafrica*, and Case T-520/93 *Pacific Fruit Company Italy*.

4. The Verwaltungsgericht Frankfurt am Main has referred to the Court for a preliminary ruling a number of questions concerning the regulation. Such cases include Case C-465/93 *Atlanta and Others* and Case C-466/93 *Atlanta and Others*. The companies challenged the regulation before the Verwaltungsgericht which, having regard to the judgment of the Court in *Zuckerfabrik Süderdithmarschen*, [3] granted provisional measures so that certain of the rules of the regulation regarding trade with third countries were suspended, with the result that in 1993 the companies were able to import limited quantities of bananas outside the tariff quota. [4] The detailed conditions applying to such provisional measures are the subject of the reference in Case C-465/93. In Case C-466/93 the Verwaltungsgericht enquired as to the validity of the regulation since the court has to deal with a number of arguments which are essentially identical with those put forward by the German Government in this case. Finally in Case C-389/93 *Dürbeck* the Verwaltungsgericht has referred to the Court a number of questions on the interpretation *inter alia* of the provisions of the regulation with regard to the right of so-called 'newcomers' to participate in the tariff quota.

5. The Federal Republic of Germany bases its application for a declaration of invalidity on a number of arguments, some of which relate to defects in connection with the origin of the regulation, namely that the Commission did not comply with the principle that its decisions must be adopted collectively, that there should have been a fresh consultation of the Parliament and that the Council did not comply with the requirement for a statement of the grounds on which the regulation was based. It further claims that:

— Articles 42 and 43 of the EEC Treaty are an insufficient basis for the regulation as it pursues objectives of development policy and conflicts with the objectives of the agricultural policy referred to in Article 39 of the Treaty;

— the regulation is contrary to the rules of the Treaty on competition;

— the regulation conflicts with the basic rights of the inviolability of property and freedom to pursue an economic activity and with the principles of non-discrimination and proportionality;

— the regulation conflicts with the Community's obligations under the Lomé Convention and GATT; and

3 — Case 143/88 [1991] ECR 415.

4 — The Verwaltungsgericht made the measures subject to the condition that whilst the case was pending the companies should refrain from using their import licences for 1994 to an extent corresponding to the quantities to which the provisional measures related.

— the Council is not empowered to discontinue the special tariff quota applicable to Germany.

— that reduction of imports and consumption in conjunction with the very unusual rules as to how the tariff quota is allocated between Community operators will place disproportionate burdens on certain groups of operators.

6. An opinion focusing upon the arguments relating to infringement of basic rights and the general principles of law presupposes a precise knowledge not only of the system of trade with third countries introduced by the regulation but also of the conditions under which bananas are produced and marketed and of the systems applicable in the various Member States for the importation of bananas before the organization of the market came into force.

It is not least on these aspects that there is far-reaching disagreement between the parties concerning the facts, the economic assessment of the effects of the new organization of the market and the need for the means employed by the regulation to attain its objectives.

7. Such knowledge is particularly necessary for forming an opinion with regard to the factual basis of some of the Federal Republic's arguments. The Federal Republic has emphatically claimed that:

— the tariff quota introduced by the regulation is fixed too low and will necessarily lead, particularly in Germany, to very considerable reductions of imports and therefore of consumption as compared to imports and consumption prior to the regulation; and

8. These are therefore disagreements with regard to factors on which, as the Court has consistently held, and as will be mentioned later, the Community legislature must be allowed a broad discretion. The assessment of the legislature may be overruled by the Court only if it is based on a manifestly incorrect appreciation of the facts or is the result of manifestly erroneous assessments. However, to stress the importance of this case I must mention here that the German arguments to the effect that the legislature has exceeded even its wide margin of discretion seem to me important.

9. In what follows I shall first discuss the basis of the organization of the market and its content and then express an opinion on the justification for the Federal Republic's arguments, my examination of which will be prefaced by an opinion on those arguments concerning the alleged infringement of fundamental rights and the general legal principles applicable in Community law. That will be an advantage from the point of view of presentation since it will avoid considerable repetition and make it easier for me to give my views on some of the other arguments.

The production and marketing of bananas

10. Bananas are among the most important agricultural products in international trade. They are popular with consumers, partly because they are relatively poor in sugar and fats and contain no cholesterol, whilst containing considerable quantities of vitamins, minerals and fibre. In addition they are, so to speak, naturally packed.

11. Bananas can be grown all the year round. They are produced in tropical and subtropical regions (roughly speaking within a zone of some 30 degrees of latitude from the equator). The best growing conditions are a climate with an average temperature of some 27° Centigrade and annual precipitation of some 200 to 250 centimetres. Bananas cultivated under less than optimal conditions take longer to grow and are smaller.

12. Export bananas are transported when green and are ripened in the country of consumption. Banana production is labour-intensive. Bananas are a fruit requiring painstaking treatment both during their actual production and in particular in packing, transport and ripening. Production, transport and ripening are capital-intensive and have developed to a large extent in such a way that the various stages are completed wholly within a single company.

Supplies to Member States of the Community prior to the organization of the market

13. The Member States' consumption of bananas prior to the organization of the market was covered by:

— first, bananas produced in the Community (hereinafter referred to as 'Community bananas');

— secondly, bananas produced in some of the States with which the Community has signed the Lomé Convention (hereinafter referred to as 'ACP bananas');

— thirdly, bananas produced in other States (hereinafter referred to as 'third-country bananas').

14. Community bananas are produced particularly in the Canary Islands and in the French overseas departments of Guadeloupe and Martinique, and to a lesser extent in Madeira, the Azores, Crete, the Algarve and Lakonia. That production covered roughly 20% of Community consumption.

15. ACP bananas are imported mainly from certain African countries, for example Cameroon and the Côte d'Ivoire and from certain Caribbean islands, for example Jamaica and the Windward Islands. Imports from the ACP States accounted for some 20% of Community consumption.

16. Third country bananas originate mainly in certain Central and South American countries, primarily Costa Rica, Colombia, Ecuador and Panama.

17. Income from banana exports frequently represents for the regions and States concerned an essential part of their total export earnings [5] and is also very important as regards employment and socially. The preamble to the new regulation stresses:

'the social, economic, cultural and environmental importance of banana-growing in the Community regions ... which are regions characterized by insularity, remoteness and structural backwardness, aggravated in some cases by economic dependence on banana growing'.

5 — The following figures summarize the banana-producing countries according to the volume of their production as a percentage of total export earnings (1988):

		%
EC	Guadeloupe	60.0
	Martinique	49.0
	Madeira	33.0
	Canary Islands	20.0
ACP	Dominica	69.3
	Saint Lucia	59.1
	Saint Vincent	42.2
	Somalia	20.0
	Grenada	16.6
	Belize	4.2
	Côte d'Ivoire	4.1
	Surinam	4.0
	Jamaica	2.3
	Cameroon	1.1
Third	Honduras	36.3
	countries Panama	29.0
	Costa Rica	19.7
	Ecuador	13.6
	Colombia	5.2

18. It is not contested in this case, and it is of decisive importance for understanding the problems facing the Community legislature with regard to the adoption of the new organization of the market, that there are typically important differences of price and quality between third country bananas on the one hand and ACP and Community bananas on the other. These are due particularly to differences in climatic and geographical conditions in the countries of production, to differences in the size of holdings (from several thousand hectares in certain Central American countries to a few hectares only in the Caribbean islands), to the conditions of production and to the treatment of the bananas during transport, and so on. There are usually considerable differences in the yield per hectare (for example some 40 tonnes in certain Latin American countries and between 10 and 20 tonnes in ACP countries). Amongst other things this is normally reflected in very considerable differences in selling prices. During the hearing widely varying figures were mentioned, but the trend is the same, namely that third-country bananas are much cheaper (by up to 100%) than ACP bananas, which in turn are somewhat cheaper than Community bananas. [6]

19. Originally there was one American company in particular, United Brands, which was responsible for the production and marketing of Latin American bananas, so that these are also called 'dollar bananas'. Multinational companies handling all stages of production and distribution, at least up to unloading in the countries of import, still predominate in trade in Latin American bananas even though in some of these countries producer organizations have been set up to handle marketing. Because of the costs of transport and ripening Community and ACP bananas are also to a considerable extent marketed by large companies or producer associations.

20. Before the new regulation came into force there was no common market for bananas in the Community. In a number of countries the market was wholly or partially reserved for home production or imports from ACP countries or both. That was the position on the markets in the United Kingdom, Spain, France, Greece and Portugal. I shall refer to these markets as closed markets. The Italian market was originally supplied mainly from Somalia — an ACP country — but in recent years has mainly been supplied with third-country bananas.

The markets in the other countries — the Netherlands, Belgium, Luxembourg, Ireland, Denmark and Germany — were essentially

6 — The German Government states in its application that c. i. f. prices for third-country bananas for the years 1987 to 1992 were on average ECU 450 (1992: 432) per tonne, between ECU 650 and 750 per tonne for ACP and EC bananas (1992: 626 for ACP and 754 for Community bananas), whilst in Spain prices even reached ECU 830 per tonne. The British Government stated in its observations that f. o. b. prices in 1992 for third country bananas were on average ECU 242 per tonne, for ACP bananas ECU 466 per tonne (93% dearer) and for Community bananas ECU 551 per tonne (128% dearer).

supplied with third country bananas. I shall refer to these countries as open markets.

21. The importation of third-country bananas was subject to an import duty, consolidated in GATT, of 20% *ad valorem*. There was however a special duty-free scheme applicable to imports into Germany. That scheme was based on a protocol annexed to the Implementing Convention referred to in Article 136 of the EC Treaty relating to the Association of the Overseas Countries and Territories with the Community. According to that protocol a quota was laid down annually within which Germany might import duty-free. If that quota was not enough to cover German consumption and the overseas countries and territories were not in a position to supply the extra German demand, the Member States concerned declared, in paragraph 6 of the protocol, 'their readiness to agree to a corresponding increase in the German tariff quota'. It is common ground between the parties that the German Government has always been able to obtain that agreement, the Member States concerned having agreed that it was not possible for German operators to obtain the supplies required from the overseas countries and territories.

22. These widely differing schemes for the supply of bananas meant that the consumption and prices of bananas varied considerably from one Member State to another. Thus the average annual consumption in Member States with open markets was slightly more than 14 kg per inhabitant whereas in Member States with closed markets it was slightly less than 9 kg per inhabitant.

23. The preamble to the Council regulation on the common organization of the market in bananas described existing market conditions as follows, and at the same time stated why a common organization of the market was necessary:

'There currently exist within the Member States of the Community producing bananas national market organizations which seek to ensure that producers can dispose of their products on the national market and receive an income in line with the costs of production; these national market organizations impose quantitative restrictions which hamper achievement of a single market for bananas; some of the Member States which do not produce bananas provide preferential outlets for bananas from the ACP States while others have liberal importation rules, which even in one case include a privileged tariff situation; these different arrangements prevent the free movement of bananas within the Community and implementation of common arrangements for trade with third countries; for the purposes of achievement of the single market, a balanced and flexible common organization of the market for the

banana sector must replace the various national arrangements' (second recital).

providing an adequate income for producers and at fair prices for consumers without undermining imports of bananas from other third country suppliers' (third recital).

The regulation on the common organization of the market

25. It is not contested in this case that the Community legislature was entitled as a basic objective of the regulation to take account of the interests of Community and ACP producers. The question is whether the legal basis and the means selected by the Community legislature to secure these aims are lawful.

24. The Community legislature started out from the premise that the common organization of the market, which was to bring about free movement within the Community and a common system of trade with third countries, must be implemented with due consideration for the interests of Community and ACP banana producers.

26. Nor is it disputed that the Community legislature was faced with a difficult task, namely that of ensuring the marketing at reasonable prices of products which cannot compete either as regards price or, in the consumer's view, in quality with products from States which can without difficulty meet any effective demand in the Community.

The basic idea of the legislature as regards taking account in the regulation of the various interests concerned was expressed as follows in the preamble to the regulation:

27. An examination of the regulation shows the means selected by the legislature to attain the aims of the regulation.

'So that the Community can respect Community Preference and its various international obligations, that common organization of the market should permit bananas produced in the Community and those from the ACP States which are traditional suppliers to be disposed of on the Community market

28. The regulation, which was adopted on the basis of Articles 42 and 43 of the Treaty

after consultation with the European Parliament and the Economic and Social Committee and by the required qualified majority, is divided into five titles. Title I provides for the adoption of common quality and marketing standards, [7] and Title II contains rules on producers' organizations within the Community. These rules are to encourage, for example by assistance for establishment, the formation of such organizations, which are intended to carry out essential tasks, *inter alia* in connection with the concentration of supply.

29. Rules on a system of aid for the Community's own production are laid down in Title III.

30. Article 10 first provides that aid may be provided for structural improvements and other arrangements for improving the competitiveness of producers.

31. In addition Article 12 introduces *compensation for any loss of income*. This system of aid is justified in the preamble as follows:

'National market organizations have hitherto enabled national banana producers to obtain from the market an adequate income to cover their production costs, since introduction of the market organization should not place producers in a worse situation than at present, and since it is likely to alter the levels of prices on those markets, provision should be made for compensation to cover the loss of income which may derive from implementation of the new system so as to permit the continuation of Community production at the costs entailed by the specific structural situation for as long as this remains unadjusted by the structural measures implemented' (seventh recital).

Compensation aid is calculated as the difference between:

— the income in certain reference years — 'the flat-rate reference income' — to be determined in accordance with subsequent arrangements for implementation, and

7 — According to the preamble the reasons for these rules are as follows:
'To permit the market to be supplied with products of uniform and satisfactory quality with due regard to local peculiarities and the varieties produced and to ensure the disposal of Community products at profitable prices guaranteeing an adequate income, quality standards for fresh bananas and, if necessary, marketing rules for processed products [based] on bananas should be introduced' (fourth recital).

— an 'average production income' calculated each year from the average price of bananas produced in the Community and marketed, less the average cost of transport and delivery.

Supplementary aid may be granted in certain special conditions.

The aid is fixed by the Commission before 1 March for the previous year but advances may be paid out in certain circumstances. Compensatory aid may be given only for marketing of up to 854 000 tonnes of bananas and is divided between the various production regions in the manner prescribed. [8]

Finally Article 13 provides that a premium shall be granted to producers who cease to grow bananas.

8 — According to Article 12(2) of the regulation the amount is divided as follows:
' 1.420 000 tonnes for the Canary Islands
2.150 000 tonnes for Guadeloupe
3.219 000 tonnes for Martinique
4. 50 000 tonnes for Madeira, the Azores and the Algarve
5. 15 000 tonnes for Crete and Lakonia.'

32. The introduction of a system of aid for producers of ACP bananas has been envisaged. In December 1992 the Commission, on the basis of Article 113 of the Treaty, submitted a proposal for a regulation containing rules relating partly to technical and financial assistance and partly to income support corresponding basically to that implemented for Community producers. [9] The regulation has not yet been adopted. According to information supplied, the outcome of this case is awaited before the proposal is further dealt with by the Council.

33. Title IV of the regulation contains rules for trade with third countries, and, as stated, it is the validity of these rules which is challenged by the German Government.

34. These rules are based, *inter alia*, on a distinction between traditional ACP bananas and non-traditional ACP bananas. The former are bananas imported from ACP States which traditionally export bananas to the Community, when the import comes within the quantity laid down in an annex to

9 — OJ 1992 C 344, p. 9.

the regulation. The total quantity of such imports is 857 700 tonnes. [10]

'in order to ensure satisfactory marketing of bananas produced within the Community and of products originating in the ACP States within the framework of the Lomé Convention Agreements, while maintaining traditional trade patterns as far as possible ...'

35. The trade scheme provides that importation shall be subject to the submission of an import licence which is issued in principle at the request of any party concerned. The issue of the licence is subject to the provision of security for compliance with the import commitment. Importation is thus, at any rate in principle, not restricted as to quantity. On the other hand the trade provisions contain import rules as to the levying of duty.

Article 18(1) of the regulation prescribes as follows:

'A tariff quota of two million tonnes (net weight) shall be opened each year for imports of third-country bananas and non-traditional ACP bananas.

36. Traditional ACP bananas may be imported without payment of duty. A tariff quota is opened for imports of third-country bananas and non-traditional ACP bananas. That is, in accordance with the tenth recital in the preamble:

Within the framework of the tariff quota, imports of third country bananas shall be subject to a levy of ECU 100 per tonne and imports of non-traditional ACP bananas shall be subject to a zero duty.'

10 — The annex lays down the following:

	'Tonnes/net weight
Côte d'Ivoire	155 000
Cameroon	155 000
Surinam	38 000
Somalia	60 000
Jamaica	105 000
Saint Lucia	127 000
Saint Vincent and the Grenadines	82 000
Dominica	71 000
Belize	40 000
Cape Verde	4 800
Grenada	14 000
Madagascar	5 900
	857 000'

In conjunction with that, Article 18(2) prescribes that apart from the quota imports of non-traditional ACP bananas are to be subject to a levy of ECU 750 per tonne and imports of third country bananas to

ECU 850 per tonne. It is stated in the eleventh recital in the preamble that:

'Imports not falling within the tariff quota must be subject to sufficiently high rates of duty to ensure that Community production and traditional ACP quantities are disposed of in acceptable conditions.'

37. The regulation provides two possibilities for an increase in the tariff quota. Article 16(1) states that 'each year a forecast supply balance shall be prepared on production and consumption in the Community and of imports and exports'. According to paragraph 2, the forecast is to be prepared on the basis *inter alia* of available figures concerning quantities of bananas marketed in the Community during the previous year and forecasts of consumption based in particular on recent trends in consumption and the evolution in market prices. That forecast may, according to Article 16(3), be adjusted *during the marketing year* and the quota may be adapted *to take account of exceptional circumstances affecting production or import conditions* which, according to the preamble, may include special climatic conditions. The forecast is also, according to Article 18(1), the basis for *adjusting the tariff quota, which must in certain circumstances take place every year if the forecast points to an increase in Community demand.* According to Article 20 it is for the Commission to draw up the forecast and where appropriate to take the decision to increase the tariff quota, in any case in accordance with the special management committee procedure laid down in Article 27 of the regulation.

38. Article 19 lays down the allocation of the tariff quota between operators. That allocation is justified as follows in the thirteenth recital in the preamble:

'In order to comply with the aims stated above, while taking into account the special features of marketing bananas, a distinction must be made when administering the tariff quota between, on the one hand, operators who have previously marketed third-country bananas and non-traditional ACP bananas and, on the other, operators who have previously marketed bananas produced in the Community while leaving a quantity available for new operators who have recently embarked on commercial activity or are about to embark on commercial activity in this sector.'

Article 19(1) lays down the detailed arrangements for the allocation:

'The tariff quota shall be opened from 1 July 1993 for:

(a) 66.5% to the category of operators who marketed third-country and/or non-traditional ACP bananas;

(b) 30% to the category of operators who marketed Community and/or traditional ACP bananas;

(c) 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.'

Marketing means, according to Article 15(5), placing on the market at all stages, but not including making the product available to the final consumer.

It appears from Article 19(2) that each operator, on the basis of separate calculations for group (a) and group (b), is to obtain import licences on the basis of the average quantities of bananas which he has sold in the three most recent years for which figures are available. It is expressly provided that third country bananas and/or non-traditional ACP bananas imported on the basis of group (b) licences are not to be taken into account to determine the quantities giving an entitlement to group (a) licences. The more detailed and rather complicated rules for calculating operators' shares are laid down in Commission Regulation (EEC) No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community. [11]

39. Title V of the regulation contains 'general provisions', including the discontinuance, already mentioned, of the special tariff quota laid down for Germany. Article 23 provides power to take appropriate measures to meet serious disturbances arising by reason of imports or exports. Article 30 contains authority for specific measures if they are necessary to facilitate the transition from the existing systems to the organization of the market as adopted. Article 32 requires the Commission, no later than the end of the third year after the entry into force of the regulation, to submit a report to the European Parliament and the Council on the operation of the regulation and provides: 'This report shall contain among other things an analysis of the development of Community, of third-country and ACP banana marketing flows since the implementation of

11 — OJ 1993 L 142, p. 6.

these arrangements. The report shall be accompanied where necessary by appropriate proposals'.

40. The distinction between Community bananas and traditional ACP bananas on the one hand and third-country and non-traditional ACP bananas on the other plays a central role in this case. It may be seen from the foregoing that according to the regulation traditional ACP bananas are to a large extent treated as Community bananas, whilst non-traditional ACP bananas are essentially treated as third-country bananas. Since ACP bananas imported into the Community are today in practice only traditional bananas I have thought it justifiable on presentational grounds not to make in every single case the distinction between traditional and non-traditional ACP bananas. I refer to Community/ACP bananas, by which I mean Community and traditional ACP bananas, and I refer to third-country bananas as meaning third-country and non-traditional ACP bananas.

The arguments relating to the infringement of fundamental rights and general principles of law.

41. The German Government has claimed that the rules of the regulation on trade with third countries are void because they infringe the right of property or in any case rights similar to property rights, as well as the right to the free pursuit of one's trade, and because they conflict with the general principles of equal treatment and proportionality.

42. It is common ground that fundamental rights and the principles relied on form an integral part of Community law and that legal instruments drawn up by the Community institutions are void if they do not observe such rights and principles. [12]

43. It is also common ground and incontestable that the rules of the regulation and in particular the introduction of the tariff quota and its allocation amongst the various groups of operators perceptibly affect operators' circumstances and especially existing patterns of trade for operators on hitherto open markets.

44. I do not think there is any need to make a separate examination of whether the con-

12 — See *inter alia* the judgments in Case 5/88 *Wachauf* [1989] ECR 2609 at paragraph 17, in Case 265/87 *Schräder* [1989] ECR 2237 at paragraph 21 and in Joined Cases 103 and 145/77 *Royal Scholten-Honig* [1978] ECR 2037 at paragraph 26.

tested rules of the regulation represent an infringement of each of the rights and principles referred to. The common crux of the arguments is that there is a discriminatory and disproportionate encroachment on the legally protected rights of certain operators, which is not justified by the aims which the regulation seeks to achieve.

45. Certain as it is that the right of property is protected in the Community legal order, it is also clear that that protection is not absolute. The Court has consistently so held in full accordance with the principles of protection of the right of property in the Member States and the European Convention on the Protection of Human Rights.

The same is true as regards the right to pursue one's trade or profession.

Thus the Court declared in its judgment in Case 265/87 *Schräder*, [13] at paragraph 15 that:

'... both the right to property and the freedom to pursue a trade or profession form part of the general principles of Community law. However those principles do not constitute an unfettered prerogative, but must be viewed in the light of the social function of the activities protected thereunder. Consequently the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed' (paragraph 15).

46. The Council and several of the interveners have contended that the interests affected by the regulation are not amongst those which come within the system of protection of fundamental rights. It is a question of the operators' interests in maintaining their market shares and thus also of making the most of the investments they have made in transport and ripening installations. [14]

It must be admitted that it seems doubtful whether such interests are included in the scheme of protection of fundamental rights.

13 — [1989] ECR 2237.

14 — It should be mentioned that in Case C-466/93 *Atlanta and Others*, previously referred to, the court of reference accepted that the contested provisions of the regulation 'deprive the operators dealing with third countries of the benefit of the investments they have made in the banana sector', since 'the withdrawal of quantities devalues the whole of the production apparatus in bananas which they have created over 30 years' and 'the capacities they have built up at all stages of the banana trade by their own investments can no longer be profitably used'.

However, there is, in my view, no ground for the Court to deal this question. Even if these interests were to be protected as fundamental rights they could be subjected to restrictions and the test of the legality of such restrictions would to a considerable extent coincide with and may best be undertaken in the context of the review on the basis of the principles of equal treatment and proportionality. In any event account must be taken, within the scope of that review, of the nature of the interests affected.

47. The general principle of equality is, as has been mentioned, an integral part of Community law and has moreover found specific expression in Article 40(3) of the Treaty. The Court has consistently held that the principle of equality implies that similar situations must not be differently treated unless a difference in treatment is objectively justified. [15]

48. The German Government, supported by the Netherlands Government, claims that the allocation of 30% of the whole tariff quota to operators who marketed Community and ACP bananas during the reference years entails an unjustified difference of treatment of the traditional importers of third-country bananas and that the effects of this different treatment are moreover exacerbated by the limitation of the existing possibilities of importation resulting from the establishment of the tariff quota.

49. Against this the Council has contended *inter alia* that the 30% quota is a necessary and therefore objective means of attaining one of the essential aims of the regulation, namely the marketing at reasonable prices of Community and ACP bananas.

50. Quite possibly it should be accepted that the Council is correct in stating that there is an objective reason for the difference in treatment between the operators which at first sight seems to exist. In this case that question coincides largely with the question whether the charges imposed on one group of operators to the advantage of the other are disproportionate and moreover unnecessary for achieving the objectives of the regulation. This question may best be tested in conjunction of the test applied on the basis of the principle of proportionality.

51. The Court has declared that the principle of proportionality applies also to the Community legislature and that it implies that the legal acts of the Community institutions shall not exceed what is appropriate and necessary for achieving the aim sought and that the legislature must choose the least burdensome of several possible measures. In addi-

15 — See for example the judgments in Joined Cases 124/76 and 20/77 *Moulins de Pont-à-Mousson* [1977] ECR 1795 at paragraph 17 and in Case 106/83 *Sermide* [1984] ECR 4209 at paragraph 28.

tion the burdens must not be disproportionate as compared with the end sought. [16] Advocate General Capotorti rightly stressed that 'the principle of proportionality means that the burdens imposed on the persons concerned must not exceed the steps required in order to meet the public interest involved. If, therefore, a measure imposes on certain categories of persons a burden which is in excess of what is necessary — which must be appraised in the light of the actual economic and social conditions and having regard to the means available — it violates the principle of proportionality'. [17]

52. It is clear that a wide margin of discretion has been accorded to the Community legislature in assessing the means to be used to attain the objectives it seeks. The Court has declared on the subject of its review with regard to the principle of proportionality that:

'in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'. [18]

53. The Court's review of the correctness of the assessments made by the Community legislature as the basis of the measures adopted is limited in a case such as this. The Court has declared:

'...where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question'. [19]

54. As stated, the German Government has claimed that the prejudicial effects are very serious; they specifically affect certain groups and not others and cannot be regarded as a means necessary for achieving the objectives

16 — See for example the judgment in Case C-331/88 *Fedesa* [1990] ECR I-4023 at paragraph 13.

17 — Judgment in Case 114/76 *Bela-Mühle* v *Grows-Farm* [1977] ECR 1211, see p. 1232.

18 — Judgment in Case C-331/88 *Fedesa* [1990] ECR 4023 at paragraph 14. See also the judgment in Joined Cases 279, 280, 285 and 286/84 *Rau* [1987] ECR 1069 at paragraph 34.

19 — Judgment in Joined Cases 267 to 284/88 *Wuidart* [1990] ECR I-435 at paragraph 14. See also judgments in Case 40/72 *Schroeder* v *Germany* [1973] ECR 125 at paragraph 14 and in Joined Cases 9 and 11/71 *Compagnie d'Approvisionnement* v *Commission* [1972] ECR 391 at paragraph 39.

of the regulation and are disproportionate in relation thereto. That is contested by the Council and the governments and the Commission which have intervened in support of the Council.

55. Before expressing a view on the issue it is necessary at this point to discuss the differences which have appeared between the parties as regards the extent of the interference. That involves a discussion on the one hand of the ideas of the parties with regard to the question whether the tariff quota fixed by the regulation at 2 m tonnes was sufficient to cover the consumption in the Community at the time at which the regulation came into force and on the other hand of the effects on trade patterns of the specific rules with regard to the allocation of the tariff quota.

The tariff quota

56. The tariff quota was introduced in the regulation as an administrative instrument for the purpose of attaining the objectives of the regulation and in particular of ensuring that Community and traditional ACP bananas were marketed at reasonable prices for both the consumer and the producer. The very high duty on imports outside the quota undoubtedly gives essential protection against importation of third-country bananas outside the quota.

57. The Council has assumed that a tariff quota of 2 m tonnes together with the Community's own banana production and imports from ACP countries would be sufficient to maintain the current level of consumption of bananas in the Community. That idea is presumably expressed in the third recital in the preamble to the regulation, according to which the objectives of the regulation are to be achieved 'without undermining imports of bananas from other third country suppliers', and in the tenth recital according to which the tariff quota is opened to maintain a satisfactory supply of Community/ACP bananas 'while maintaining traditional trade patterns as far as possible'. The Council confirmed during the oral procedure that the purpose was to maintain current consumption in the Community. The Commission shares that point of view. [20]

The Council has explained that the tariff quota — the level of which is the same as that in the proposal submitted by the Commission in August 1992 — was calculated as the average of the import figures for third-country bananas in 1989 to 1991. The Commission and the Council regard those three

20 — The Commission's press communiqué of 8 April 1992 on the future organization of the market in bananas contains the mention that 'The size of the import quota ... would be set at the present volume of banana imports from the "dollar zone" and could be periodically adjusted. The effect on prices to those consumers mainly buying "dollar zone" bananas would be very limited.'

years as representative and as providing the most correct basis for calculating the imports capable of maintaining consumption at the level recorded when the regulation came into force.

58. The German Government has strongly criticized the amount of the tariff quota, which it thinks will not make it possible to maintain current consumption but on the contrary represents a considerable reduction of current imports and thus of current consumption.

The government refers in this connection to importation and consumption in 1992, which were much higher than in the years the Council has taken as the basis. It claims, moreover, that it must be wrong, in a market which has shown constant and substantial growth over a 10-year period, to take as expected consumption average figures from an earlier 3-year period. The government points out that the final corrected figures from Eurostat on banana consumption for 1992 was some 3.8 million tonnes and claims that the regulation will lead to a shortage on the market of 500 000 tonnes.

59. The Council and the Commission, also taking as their basis the corrected Eurostat figures for 1992, contend that the tariff quota has been fixed at the correct amount. The use of average figures gives the truest picture of expected consumption, partly because the original very high consumption in the new German Länder must be expected to fall and partly because the figures for 1992 are artificially high; operators imported especially large quantities in 1992 in order to put themselves in the best starting position for quota allocations when the new organization of the market came into force. [21]

60. It seems to me that the German Government's contention must to a certain extent be upheld. It cannot be regarded as proved on the basis of the available information that the tariff quota laid down is sufficient to maintain existing consumption.

61. I think it is of particular importance that the trend of consumption in the Community since the middle of the 1980s — in accordance, moreover, with the consumption trends in comparable countries — has been constantly rising. The relevant figures for the

21 — The Council shows in its defence that the quota is correctly calculated even if the figure for 1992 is included. That result is however obtained only if the correspondingly lower figure for 1988 is included as well.

period 1984 to 1991, in thousands of tonnes, have been as follows: 1984, 1 821; 1985, 1 941; 1986, 2 424; 1987, 2 516; 1988, 2 840; 1989, 2 974; 1990, 3 330; 1991, 3 629. [22] The Eurostat figure for 1992 is, as stated, some 3.8 million tonnes. It seems hard to accept, regard being had to this trend, that average figures for 1989 to 1991 should be used, when it is noted that the 1989 figures do not include the consumption figures from the new German Länder.

62. The Council did not have the opportunity to include 1992 consumption in its basis for establishing the size of the quota. However, the Council should have recognized that the method of calculation used — even though the use of average figures may be the correct method in other connections — would not produce the truest result. The constant rise in consumption, which according to information available might continue, indicated in any case that the 1991 figures should be used as a basis for the calculation. That would have meant that the tariff quota, regard being had to the production of Community and ACP bananas, should have been between 200 000 and 300 000 tonnes higher.

63. The German Government has also pointed out that the Council did not take into account the consequences of the expected approximation of prices on the closed and open markets. The government claims that experience, including that on the Italian market, gave reason to expect considerable increases in consumption on the hitherto closed markets. The government has mentioned that an increase in consumption of only 1 kg per person per year on these markets would entail an increased annual consumption of 230 000 tonnes. It is not impossible that the government may be right as regards this fact. On the other hand the trend of consumption after the organization of the market came into force will depend on how the organization affects the previous market mechanisms. It is an open question, *inter alia*, whether the approximation of prices — which presumably will take some time in any case — will lead to greater increases in consumption on the hitherto closed markets than to reductions on the hitherto open markets.

64. The Council has contended that it is not of decisive importance whether the tariff quota was fixed too low. It states that there is an obligation under Article 18(1) to increase the quota if Community demand increases according to the Commission's annual forecast supply balance and that under Article 16(3) it is possible even during the marketing year to increase the quota in special circumstances. The Council refers in this respect to the grounds stated in the

22 — See Annex 1 to the Commission's observations. The figures are worked out on the basis of data from the FAO, the Member States and Eurostat and largely correspond to those given in Annex 1 to the application, the Gutachten der Zentralen Markt-und Preisberichtstelle für Erzeugnisse der Land-, Forst-und Ernährungswirtschaft GmbH.

Court's order on the interim measures requested by the Federal Republic, in which the Court stressed the institutions' obligations in this respect. [23]

65. There are several factors which weaken the significance of this argument.

66. First of all it may be noted that the German Government did in fact ask for an increase in the quota but that despite the circumstances set out above it met with a refusal. [24] In addition it is established that the Commission has not so far undertaken any independent initiatives to increase the quota. [25]

67. In the second place — and this is more important for an evaluation of the Council's argument — it is appropriate to stress the nature of the duty of the institutions in connection with the increase in the quota.

68. In accordance with the rules for revision contained in the regulation the tariff quota is to be evaluated every year on the basis of the Commission's forecasts. That forecast bal-

23 — The Order of the Court, in paragraphs 43, 44 and 45, states as follows in this connection:
'The Council admits that the forecasts which it used as its basis may be shown to be incorrect since it has not sufficient experience in this field. As the Federal Republic of Germany claims, it is true that the Council envisages the possibility of a modification of the quotas laid down in Article 18 only in the event of a considerable change in the current economic situation. It accepts, however, that the Community institutions are required to act if there should be a shortage of the extent alleged by the Federal Republic of Germany.
In that respect it should be pointed out that Article 16(3) of the regulation requires the Community institutions to adjust the tariff quota if that proves necessary during the marketing year, to take account of exceptional circumstances affecting in particular import conditions. In such a case the adjustment is to be effected in accordance with the procedure laid down in Article 27, that is, it is for the Commission to adopt measures in accordance with the opinion of the Management Committee for Bananas. If the measures adopted are not in accordance with the opinion of the Management Committee the Council may take a different decision within one month.
If therefore the Commission were to come to the conclusion, on the basis of reliable objective data that the quota was insufficient to satisfy demand appropriately, and if the Council's earlier estimates were to prove incorrect, the regulation obliges the Commission and if necessary the Council to make the necessary adjustments with the possibility for the Member States to make an application to the Court if those institutions were not to comply with their obligations.'

24 — The German Government has stated that both in October 1993 and in the spring of 1994 it requested an increase in the tariff quota. The first request was not met as the Commission thought that the government had not shown the need for such a step and because the German operators had not made a sufficient effort to buy Community and ACP bananas. No reply had been received to the second request at the time of the hearing.
It is stated that the tariff quota is expected to be increased by 100 000 tonnes in 1994 and by 200 000 tonnes in 1995 by reason of the outcome of the negotiations which put an end to the disagreement within GATT between the EC and some of the banana-exporting countries in Central and South America.

25 — However, by Regulation (EC) No 490/94 (OJ 1994 L 62, p. 10) and Regulation (EC) No 3298/93 (OJ 1993 L 296, p. 48) the Commission has created the possibility for total imports within the quota of 1 070 000 tonnes for the first half of 1994. It is not stated what consequences that will have for the quantity of imports within the quota for the two last quarters of the year.

ance is to be prepared, according to Article 16(2), on the basis of:

'— available figures concerning quantities of bananas marketed in the Community during the previous year, broken down according to their origin;

— forecasts of the production and marketing of Community bananas;

— forecasts of imports of traditional ACP bananas;

— forecasts of consumption based in particular on recent trends in consumption and the evolution in market prices'.

The forecasts are prepared after the entry into force of the market organization, that is, at a time when the conditions existing when the original quota was established are no longer applicable. In addition, it may be difficult to discover actual demand on a market in which the market mechanisms are in any case partially inoperative. [26] The forecast is based on figures which are themselves forecasts and are therefore by their very nature estimates. The forecast will inevitably contain assessments of what are regarded as an appropriate trend of prices seen in the light of the aims of the regulation to ensure marketing of Community and ACP bananas at reasonable prices. The Commission confirmed at the hearing that estimates are included in the preparation of the forecast.

69. It is quite clear according to the wording of Article 18(1) that there is a duty to increase the tariff quota if the forecast shows a rising demand, but it is just as important that that duty applies only if the Commission has found in its forecast that demand is likely to rise.

70. The possibility of increasing the tariff quota in accordance with Article 16(3) in the course of the marketing year in exceptional circumstances (for example cyclones in the Caribbean) has scarcely any significance in connection with this case.

26 — The Commission stated moreover during the oral procedure that it had not been in a position to prepare a forecast for 1994 in pursuance of Article 16 of the regulation because it had come up against fundamental problems and practical difficulties in connection with its preparation.

71. To sum up it may therefore be regarded as established that the tariff quota laid down in the regulation will entail a reduction in existing consumption and in addition in the quantity of bananas which would have been consumed but for the quota, and that this objection to the new organization of the market cannot simply be set aside with a reference to the possibilities of a revision of the tariff quota laid down in the regulation.

The allocation of the tariff quota

72. As mentioned, Article 19 of the regulation provides that the tariff quota shall be so allocated that 66.5% shall go to the operators who marketed third-country and non-traditional ACP bananas, whilst 30% shall go to operators who marketed Community and/or traditional ACP bananas. The remaining 3.5% are to be allocated to so-called 'newcomers'. That means that 1 330 000 tonnes are to be distributed between the traditional dealers in third-country bananas, whereas licences to import 670 000 tonnes of third-country bananas will be distributed between operators who have not previously marketed such bananas.

73. The German Government points out that this is a wholly unusual way of allocating quotas and stresses that the transfer of a 30% share of the quota to dealers in Community/ACP bananas means a massive transfer of market shares from traditional operators in third-country bananas to the traditional operators in Community/ACP bananas. This transfer has especially deleterious effects when seen against the background of the reduction of the existing import possibilities which the tariff quota entails in absolute figures. The government points out that the share of total third-country imports effected by German operators falls from some 1.35 m tonnes to roughly 0.7 m tonnes, that is, some 36% of the total tariff quota, whereas operators in France, the United Kingdom and Spain, who have hitherto imported limited quantities or no third-country bananas at all (France roughly 1%, the United Kingdom some 3.5% and Spain 0% of total third-country imports) will in the future each have an 8 to 10% share of the whole tariff quota. [27]

74. The government stresses the serious consequences which this transfer from open market operators to closed market operators will have, not only for those directly involved but also for other sectors of society (insufficient use of existing port and transport facilities) and for consumers, who will see prices rise by up to 60%. At the same time the government denies that the alloca-

27 — See in this connection the tables in Annex 1 to the reply.

tion of the 30% share to operators other than traditional dealers in third-country bananas is necessary to achieve the objectives of the regulation, whilst stressing that the provisions of the regulation do not really benefit Community/ACP banana producers but rather the undertakings which have traditionally marketed these bananas.

75. The Council does not deny that the 30% share of the quota involves a transfer of resources to traders in Community/ACP bananas but stresses that that is necessary to realize one of the objectives of the regulation, namely to ensure the marketing of Community/ACP bananas, whilst at the same time that part of the quota also helps to promote the integration of the markets. The Spanish Government mentions in that connection that the transfer of a part of the quota to operators other than traditional dealers in third-country bananas helps also to reduce the dominant role which certain non-European companies have played in connection with marketing.

76. The Council and the parties which have intervened in support of the Council also claim that the German Government is greatly exaggerating the loss of market shares which the new organization will entail for the traditional dealers in third-country bananas.

The Council refers in particular to three factors which imply that dealers in third-country bananas should essentially expect to be able to maintain their former market shares. In the first place the possibility of importing outside the quota against payment of duty of ECU 850 per tonne. Secondly, the possibility of purchasing import licences from operators who have a share of the 30% quota, and thirdly the possibility of purchasing Community/ACP bananas which is also open to traditional dealers in third-country bananas.

77. It is surprising that in its defence the Council points to the possibility of massive importation of third-country bananas outside the tariff quota, because in doing so the Council is supposing, contrary to its statements regarding the size of the quota, that there might be an extensive demand which cannot be met within the tariff quota and which would apparently have no consequences for the size of the tariff quota. In this connection the Council is regarding it as established that the traditional dealers in third-country bananas will in fact be able to import 500 000 tonnes over and above their 1 330 000 tonne share of the quota, since the high rate of duty on the 500 000 tonnes will be offset by the relatively low rates of duty on the quantities imported within the tariff quota, so that the total import quantity will be subject to duty at an average of ECU 305 per tonne.

No great weight need be attached to the Council's ideas on this point. It seems untenable to assume that operators will react in the way imagined by the Council. Moreover the Council acknowledged during the oral procedure that the rates of duty applied to imports outside the quota are prohibitive. It therefore appears more correct, as stated by the Commission, to assume that importation outside the tariff quota will take place only in exceptional circumstances and for rather short periods.

78. It should moreover be mentioned that if the Council were right in claiming that considerable imports could be made outside the quota, that would lead in all circumstances to a very substantial increase in prices to the consumer. The effect of that increase on consumption would naturally depend on consumer reaction to price increases. In addition the importation outside the quota expected by the Council will to a considerable extent increase the value of the 30% quota allocated to the traditional dealers in Community/ACP bananas.

79. The possibility for the traditional dealers in third-country bananas to buy licences from those entitled under the 30% quota is expressly provided for in Article 20 of the regulation. That is not in itself surprising. The purpose of the 30% share of the quota is precisely to make it economically possible for operators who have difficulties in competing as regards both price and quality with third-country bananas to continue to market Community and ACP bananas. And the grant of the right to obtain licences to import third-country bananas gives them an economic advantage whether they themselves use the licences for importing or make a profit on the sale of the licences. A considerable trade in these licences has already been noted — according to the Commission's information some 20% of the 30% quota — and it has been stated by the German Government that licences change hands at roughly ECU 450 per tonne.

The Council is therefore correct in contending that the traditional dealers have the opportunity to buy 'market shares' back from those who have received a share of the 30% quota. But again it must not be overlooked that that only confirms that the regulation, by means of the allocation of the quota, transfers the profit potential from the traditional dealers in third-country bananas to the traditional dealers in Community/ACP bananas with the resultant repercussions the level of prices and consumption on the previously open markets. Nor must it be overlooked that the transfer involves considerable advantages for the dealers in Community/ACP bananas, who not only obtain income from the sale of licences but can also earn more on their sales of Community/ACP bananas the higher the prices for third-country bananas rise — *inter alia* as a result of the sale of licences.

80. There is indeed the possibility mentioned by the Council for the traditional dealers in third-country bananas to buy bananas from Community and ACP producers. It is stated that traditional dealers in third-country bananas have managed to obtain 20% of the production of the Canary Islands (some 70 000 tonnes) and 30% of the production of the French overseas departments (some 95 000 tonnes). However, it is probably necessary to agree with the German Government that it will not be easy for the traditional dealers in third-country bananas to gain access in this way to the traditional channels of trade in Community/ACP bananas. By reason of the very considerable stimulus to market Community/ACP bananas arising from the regulation, there will be every possible motive for dealers in those bananas to maintain their business connections with the producers, built up over decades in strongly protected markets. The German Government claims that it has been genuinely impossible for German firms to obtain imports of Community/ACP bananas in spite of persistent efforts. [28]

Finally it must not be overlooked that the reference quantities used as a basis for the allocation of licences will for some years to come be quantities for years during which the traditional dealers in third-country bananas were not trading in Community/ACP bananas. Thus the years 1989 to 1991 served as the basis for the allocation of licences for 1993 and according to Article 5(1) of Regulation No 1442/93, [29] it will be the import quantities for 1990 to 1992 which are used as the basis for the allocation of licences for 1994. It will thus be only in 1997, when licences will be allocated on the basis of the import quantities for 1993 to 1995 that the traditional operators in third-country bananas will be able to participate more or less fully in the 30% quota on the basis of the trade in Community/ACP bananas which they may have embarked upon.

81. In my view it is possible to state on the basis of the foregoing that as regards the allocation of the quota the regulation has brought about, at any rate in the shorter term, a considerable reduction in the quantity of bananas genuinely available for those who until now have dealt in third-country bananas and that in any event profit potential has been transferred by means of the allocation of the tariff quota from one group of operators, namely the traditional dealers in third-country bananas, to another group, namely the traditional dealers in Community/ACP bananas.

28 — The government has produced a letter from the producers' organization in an ACP country stating that it is not possible to comply with an offer to buy as sales are reserved for specified exclusive purchasers. However, in its rejoinder the Council has stated that the major part of the products of the country concerned is at present purchased by a firm which has until now marketed only third-country bananas. In the reference for a preliminary ruling in Case C-465/93 *Atlanta and Others*, the court of reference regarded it as established on the basis of the evidence produced that it was impossible for the plaintiff companies to obtain Community/ACP bananas.

29 — Laying down detailed rules for the application of the arrangements for importing bananas into the Community, OJ 1993 L 142, p. 6.

Assessment

82. The Council and the Commission have rightly stressed that the new organization of the market concerns a field to which unusual circumstances apply and in which there is therefore only limited experience from other organizations of the market on which it is possible to rely. The Community legislature was faced with a complex task in assessing the future effects of the regulation depending upon a series of factors which it was difficult to foresee, including the reactions of operators and consumers.

The Council and the Commission are therefore correct in stating that an appreciation of the means necessary to achieve the purposes of the organization can only be overruled if it appears manifestly erroneous in the light of the information available to the legislature at the time the regulation was adopted. [30]

83. It is however a fact that the regulation uses means — the tariff quota and particularly the special rules for allocating it — which significantly interfere with existing patterns of trade; market shares for operators in certain Member States are reduced and considerable profit potential is transferred to operators in other Member States. It was in my view to be foreseen that the regulation would lead to perceptible disturbances of trade in the markets which had hitherto been open, such as rising prices, falling turnover with the consequent risk of redundancies, under-utilization of installations both for the firms dealing directly with bananas and those transporting (shipping companies, ports and railways) and ripening bananas. [31] On the other hand it is clear that some of these losses are offset to a certain extent by the higher banana prices obtainable as a result of the reduction of supply on the hitherto open markets.

84. It is correct, as emphasized by the Council, that a common market for bananas could not be implemented without far-reaching changes in existing market structures, in any case when it was a basic condition that the new organization of the market was to guarantee the marketing of the Community's own banana production and respect the Community's commitments to the ACP countries. It was a question of creating a common market on the basis on the one hand of markets in which trade was dominated by uncompetitive goods, which was why the markets were protected, and on the

30 — See the judgment in Joined Cases 267 to 285/88 *Wuidart and Others* [1990] ECR I-435 at paragraph 14.

31 — It should moreover be mentioned that in the order for reference in Case C-465/93 the court of reference regarded it as established that the plaintiff companies, at the time of the interim measures, had already had to discontinue one fifth of their wholesale operations and lay off some 200 employees out of a total workforce of some 2 000.

other hand of markets dominated by competitive goods imported without quantitative restrictions.

85. In such a situation it is undoubtedly right that the Court should be cautious in fixing strict limits to the exercise of the legislature's discretion — even in a situation in which it is known that the contested regulation was adopted against the views of a minority of Member States and in which it may be regarded as established that that minority consisted, to some extent, of the Member States whose citizens would have to bear an essential part of the burden linked to the establishment of that common market.

86. However, the German Government claims that the means employed are manifestly illegal because the objectives of the regulation, including in particular ensuring the marketing of Community/ACP bananas at reasonable prices, could be achieved by other means, just as effective, which would not have the damaging effects attached to the means now employed. The German Government refers in particular to the possibility of introducing a system in which prices for Community/ACP bananas would be made competitive by direct aid to the producers. The means for such aid would be provided by the duty levied on third-country bananas. The rate of duty could if necessary be increased so as to ensure that it covered the expenditure occasioned by the aid. The German Government points out that such an organization would in general entail a far lower social cost since in such an organization bananas would not rise in price more than necessary to finance the aid to the producer. The government claims that the solution chosen means price increases and thus increased expenditure for consumers, considerably greater than the expenditure arising from the system which it proposed.

Against that the Council and the Commission have contended essentially that such a system would be disproportionately expensive and burdensome for the Community budget and have moreover pointed to the considerable margin of discretion enjoyed by the Community legislature.

87. In my view it is fairly clear that the efforts of the Council and the Commission in this matter to refute the German Government's arguments regarding aid to producers could have been more convincing. It is still doubtful whether the Council could not have chosen other and less burdensome means both for consumers and trade for attaining the regulation's objectives. However, it seems to me clear that there is no such manifest error in the fundamental choice of means for achieving its purposes as to make it possible for the Court to overrule that choice within the framework of its review of legality.

88. Since an opinion must be given as to whether the means specifically chosen are unlawful because within the scope of the present regulation they are formulated in a more onerous way than is necessary to attain the aims of the regulation, it should be mentioned first that, looked at in isolation, the validity of the regulation cannot be affected on the ground that it leads to increased prices for the consumer in certain Member States. On the one hand that may be regarded as a necessary consequence of the realization of the common market in which it is necessary to offset to a certain extent the hitherto marked differences in price between the open and the closed markets. On the other hand there is in my view no legal protection in Community law against a rise in consumer prices as in this case if such an increase is needed to secure the marketing of the Community's own products.

89. The German Government has claimed that if the establishment of a quota is not itself declared void, at all events the tariff quota specifically fixed should be set aside because it is insufficient to meet demand. As has been said, the quota may be regarded as having been set somewhat too low. However, I do not think that that constitutes such a serious defect as to warrant a declaration by the Court that the rules of the regulation fixing the quota are void.

90. The German Government also claims emphatically that the transfer of the 30% share of the tariff quota from the traditional dealers in third-country bananas to the traditional dealers in Community/ACP bananas is unnecessarily onerous because the marketing of Community/ACP bananas is already largely secured by the establishment of the tariff quota which compels traders to satisfy current demand in the Community by means of Community/ACP bananas.

91. The Council and those intervening on its behalf contend on the contrary that the tariff quota is not sufficient. The competitive situation of Community/ACP bananas as against third-country bananas makes it absolutely necessary to ensure their marketing by the offer of a further incentive consisting in the fact that selling them gives a right to a share of the tariff quota for third-country bananas.

92. The German Government has emphasized in this connection that the compensatory aid for prices envisaged in Title III will *in practice* operate so as to eliminate any risk of Community bananas not being marketable at competitive prices and that the scheme for compensation as it is envisaged may be extended to apply to traditional ACP bananas also. The government remarks that

the compensation involves a guarantee to the producers that the difference between the price the producers received in the reference years and the average price currently received in the year of sale is made up in full. If the producer receives a guarantee by means of compensatory aid, the transfer of the 30% quota in fact merely serves to enrich the importers who have a share of the quota.

93. The Council contends on the contrary that the purpose of compensation is not to be a means for ensuring marketing in the manner referred to by the German Government but simply to cover differences in price if they in fact occur. It states that aid under Article 12(1) of the regulation is only intended to offset 'any loss of income'. The Commission expresses this idea by saying that compensatory aid is seen only as a safety net if the other means provided by the regulation are not sufficiently effective.

The Council observes also that compensatory aid is in any event paid only in the following year and is only regarded as provisional, that is, until the structural arrangements have made Community production more competitive. The aid will therefore, according to the Council, be unable to produce the effects referred to by the German Government.

94. It is hard to follow the Council's arguments to the effect that, technically, compensatory aid is not of such a nature as to help to secure the marketing of Community bananas. The fact that aid is only regarded as temporary does not mean that, as long as it exists, it cannot help the marketing of Community bananas, and the fact that it is in principle paid subsequently is no valid argument either, since the possibility of payment in advance, against a security, is expressly envisaged in Article 12(7) of the regulation. There is, however, one fact which militates against the German Government's claim that the effect of the aid will be that the individual producer will lose interest in the price he can obtain for his bananas: the aid is paid on the basis of *average prices* during the year of sale. The individual producer, to whom other producers' sale prices, and therefore the average price arising in the course of the year, are unknown, will therefore try to obtain the best price possible from purchasers.

95. However, it is not possible at the present time, in my view, to give an opinion as to how right the German Government is in thinking that the compensatory aid, contrary to the intention, will come to operate in such a way that the transfer of the 30% quota is unnecessary and therefore unjustified. If events turn out as mentioned by the German Government, that is, if the compensatory aid

acts in fact as an additional means, apart from the primary means set out in the regulation, of ensuring the marketing of Community bananas, it must be expected that will lead to amendments to the legislation.

96. According to the information available there is no doubt that the allocation of the 30% quota to traders in Community/ACP bananas is an effective means of ensuring the marketing of these bananas. It is probable that there will be keen competition to obtain shares in the sale of these products. New purchasers will come on to the market and the traditional purchasers will attempt to keep their suppliers. There is a considerable incentive to do this. The value of shares in the tariff quota will be considerable, at any rate as long as the quota is kept at a low level. In addition, the 30% quota will help to secure the desired integration of the hitherto separate markets.

97. There is therefore no serious doubt as to the suitability of this means for achieving its aim. The question is whether it is excessive.

98. As has been seen, it is doubtful whether it would not have been possible to ensure the marketing of Community/ACP bananas at reasonable prices by a combination of the tariff quota and the compensatory aid, perhaps in some other form or by recasting the rules for allocating the tariff quota so that they would be less onerous for the traditional dealers in third-country bananas.

99. To sum up, my view is that there are circumstances which might provide a basis for declaring the system introduced void. However, such features are not present to such a manifest and serious extent as to indicate that the Council, in choosing the means to achieve the purposes of the regulation, has overstepped the limits of its discretionary powers. The choices of the means applicable and their consequences for the distribution of the burdens involved in the implementation of the internal market with a guarantee for the marketing of Community and ACP bananas lie within the legislature's margin of discretion and are not based upon manifestly incorrect assessments of the assumptions and effects involved in those choices. The legislature has remained within the limits imposed upon it according to the case-law of the Court regarding establishment of the factual basis of its action and regarding on the one hand the more precise demarcation of the objectives which it is desired to realize within the provisions of the Treaty and on the other hand the choice of the appropriate means. [32]

32 — See Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle and Others* [1981] ECR 3211.

The argument regarding infringement of the Treaty rules on competition

100. The German Government, supported by the Belgian Government, claims that the rules of the regulation regarding the allocation of the tariff quota will have consequences conflicting with the competition rules in the Treaty which the Council, by analogy with Articles 5 and 90 of the Treaty, is required to uphold. The German Government claims that there will be a freezing of the existing division of the market since those who dealt hitherto in Community/ACP bananas will not be exposed to any competition on their traditional markets and will therefore be able to adopt an anti-competitive attitude. According to the German Government competition will be excluded for several reasons. The government states in particular that dealers in Community/ACP bananas will be able to obtain disproportionately high profits because, at the least, Community producers on the basis of the compensatory aid introduced will sell their bananas at dumping prices; that it is not possible for traditional dealers in third-country bananas to obtain supplies from ACP/Community producers; and finally that there is no realistic access to the market for the so-called newcomers since their share in the tariff quota is set too low — 3.5% of the whole quota, corresponding to 70 000 tonnes out of 2 m tonnes.

101. As mentioned by the Council and several of the interveners, it appears from Article 42 of the Treaty that the competition rules of the Treaty apply to production of and trade in agricultural products only to the extent determined by the Council. [33]

The Treaty leaves it to the Council to decide whether and to what extent the competition rules are to apply to the agricultural sector. The Treaty has thus had regard to the special conditions which apply to the agricultural sector and has left to the Council wider powers than in other spheres. Where the objectives of the rules of agriculture and those of competition are not compatible, the Council may give preference to the former. [34]

33 — See in this respect Regulation No 26 of the Council of the EEC applying certain rules of competition to production of and trade in agricultural products, OJ, English Special Edition 1959-1962, p. 129, original reference Journal Officiel 1962 30, p. 993. The purpose of that regulation is not, and could not be, to limit the Council's opportunity, on the occasion of the organization of markets, for choosing the means for such organizations to select the means judged most appropriate for the attainment of objectives of agricultural policy.

34 — See *inter alia* the judgment in Case 139/79 *Maizena* [1980] ECR 3393. Paragraph 23 states:
'The institution of a system of competition which is not distorted is not the only objective referred to in Article 3 of the Treaty which also provides in particular for the adoption of a common agricultural policy. Those responsible for the Treaty, conscious that the simultaneous pursuit of those two objectives could sometimes and in certain circumstances prove difficult, provided in the first paragraph of Article 42 that:
"The provisions of the Chapter relating to rules of competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 43(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39."
That simultaneously recognizes the precedence the agricultural policy has over the aims of the Treaty in relation to competition and the power of the Council to decide how far the rules on competition should apply to the agricultural sector. The Council has a wide discretion in the exercise of that power as it has in the implementation of the whole agricultural policy.'

102. There is therefore no reason to consider whether the organization of the market in fact entails restrictions on competition which in other contexts might be contrary to the competition rules in the Treaty. It need only be said that the rules of the organization of the market on trade with third countries, like the trade rules of other organizations of the markets, to some extent necessarily restrict competition to the detriment of the imported goods. It may moreover be seen from the foregoing discussion of the effects of the rules of the regulation regarding the allocation of the tariff quota that there is no clear answer to the question whether they will lead to a freezing of the previous patterns of trade or whether on the contrary they will help to open up the markets. And finally as regards newcomers the Council is not obliged to allocate to them a given proportion of the quota or indeed any. [35]

103. The German Government claims that the preamble to the regulation does not state the reasons making it necessary to restrict competition in order to achieve the objectives of the regulation, so that the regulation does not comply with the requirements of Article 190 of the Treaty for a statement of the reasons on which it is based.

That argument must be rejected. In so far as the German Government takes the view that there is an insufficient statement of the reasons on which the specific rules for the allocation of the tariff quota as such are based, I must point out that the Court has declared that the requirement of a statement of reasons is satisfied if the statement, however laconic it may be, brings out the principal purpose of the regulation, [36] and when the reasons given explain the essentials of the measure in question. The statement of reasons may therefore be confined to indicating on the one hand the general situation which led to the adoption of the regulation and on the other hand the general objectives which it is intended to achieve. [37]

104. The statement in the preamble of the reasons on which the rules for allocation of the quota are based is laconic. The thirteenth recital on this subject is worded as follows:

'In order to comply with the aims stated above, while taking into account the special features of marketing bananas, a distinction must be made when administering the tariff quota between, on the one hand, operators

35 — In Case C-389/93 *Dürbeck*, mentioned previously, the Court will have the opportunity to decide whether the Commission's rules of implementation as regards arrangements for newcomers comply with the principle of proportionality. As regards the distribution of tariff quotas, see *inter alia* the judgments in Joined Cases 213 to 215/81 *Norddeutsches Vieh- und Fleischkontor Herbert Will* [1982] ECR 3583 and in Case 131/73 *Grosoli* [1973] ECR 1555.

36 — See *inter alia* the judgment in Case 125/77 *Koninklijke Scholten-Honig* [1978] ECR 1991 at paragraph 19.

37 — See *inter alia* the judgment in Case 87/78 *Welding* [1978] ECR 2457 at paragraph 11.

who have previously marketed third-country bananas and non-traditional ACP bananas and, on the other, operators who have previously marketed bananas produced in the Community, ...'

105. Reference is made therefore to the 'aims stated above' and thus also to the objectives mentioned in the third recital regarding the need to ensure the marketing of Community/ACP bananas and reference is also made to the need to make a distinction between dealers in third-country bananas and those in Community/ACP bananas while taking into account the special features of marketing bananas.

In my view that statement must suffice to comply with the requirements which may be made, according to the case-law of the Court, as regards the reasons on which a regulation such as the one at issue is based.

The argument that the regulation conflicts with the objectives of the agricultural policy.

106. The German Government claims that the regulation and in particular the rules on trade with third countries infringe Article 39 of the Treaty which sets out the objectives of the common agricultural policy. The government claims that the regulation pursues objectives which conflict with or are not covered by those set out in Article 39 and that it makes use of methods which are not appropriate to realize those objectives.

107. It may be seen from the first subparagraph of Article 40(3) that a common organization 'may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, aids for the production and marketing of the various products ... and common machinery for stabilizing imports or exports'. The second subparagraph of Article 40(3) states that 'the common organization shall be limited to pursuit of the objectives set out in Article 39', that is:

'(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in par

ticular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilize markets;

(d) to ensure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices'.

108. The Court has emphasized that these objectives are broadly defined and may be difficult to reconcile and has declared that the Community institutions must endeavour to secure a harmonization of any conflicts between those objectives, but has also accepted that it is permissible to allow any one of them temporary priority if that is required by the economic conditions. [38] The Court has recognized that the Council has a broad discretion in connection with the realization of the objectives of Article 39. [39]

109. It must first be noted that that part of the German Government's arguments in which the government claims that the means employed by the regulation are inappropriate to achieve the objectives set out in Article 39 may be disregarded. Those arguments are identical in essentials with those on which I gave my views in relation to the government's arguments that the regulation conflicted with fundamental rights and generally applicable principles of law.

110. The German Government claims that guaranteeing Community production and maintaining producers' income are not amongst the objectives of Article 39 and that the regulation cannot therefore pursue these aims.

111. That idea is based on too narrow an interpretation of the objectives of Article 39 and is also contrary to the Council's practice. It is clearly within the description of the objectives of Article 39 for organizations of the markets to seek to maintain existing Community production, not only to stabilize the markets and to ensure the availability of supplies but also to safeguard employment in the region concerned and thereby ensure a fair standard of living for those concerned. That is confirmed by the enumeration in Article 40(3) of the means which

38 — See *inter alia* the judgment in Case 203/86 *Spain* v *Council* [1988] ECR 4563 at paragraph 10.

39 — See *inter alia* the judgment in Case C-311/90 *Hierl* [1992] ECR I-2061 at paragraph 13.

organizations of the markets may employ including aids for production and stabilization of imports and exports. In the same way it is clear that an organization of the market may have the maintenance of producers' income as an objective. As mentioned, it is expressly stated that it is one of the objectives of the agricultural policy to ensure a fair standard of living for the agricultural community. It seems to me unacceptable and unnecessary from the wording of that provision to understand Article 39(1)(b) in such a way that those objectives may be achieved only by an increase in agricultural productivity.

112. The government further claims that the regulation does not contribute to an increase in agricultural productivity. That must be rejected, if only because there actually are provisions in the regulation which have that purpose (provisions relating to quality standards and producers' organizations). In addition the German Government seems to me wrong in maintaining that the compensatory aid deprives the producers of any interest in improving their productivity. As I have said, the individual producer, quite apart from compensatory aid, will have an interest in obtaining the best possible price for his bananas and thus also in increasing his productivity.

113. As regards the government's argument that the regulation does not contribute to stabilization of the market, it seems to me untenable, if only because the majority of the provisions of the regulation in fact aim at ensuring the Community's own production and regulating imports.

114. Finally it is necessary to consider the government's argument that the regulation does not aim to guarantee supplies and reasonable prices for consumers. The government claims that on these two points the regulation conflicts directly with the objectives set out in Article 39. It is understandable that the government should stress this argument. When the regulation was discussed in relation to the general principles of law, an essential question was whether the regulation pursued other objectives of agricultural policy too energetically at the expense of market supply and consumer prices. That question has caused me certain difficulties, as will have been seen. On the other hand it seems to me relatively clear that the Council cannot rightly be blamed on the basis of Article 39 of the Treaty for attaching more importance to other objectives than to the two

under discussion here. According to the case-law of the Court, the Community legislature is able, where necessary, in its assessment of how best to realize the objectives of agricultural policy, to give temporary priority to certain of those objectives.

The argument regarding lack of legal basis

115. The German Government states that a common organization of the market must, according to the second subparagraph of Article 40(3) of the Treaty, be limited to the pursuit of the objectives set out in Article 39 and that Article 43 of the Treaty does not provide a sufficient legal basis for a regulation which pursues objectives of development policy. The government points to the provisions giving bananas produced in ACP countries a preferential position as regards duty and in particular to the provisions seeking in other ways to guarantee markets for traditional ACP bananas. The objectives of the regulation on these points are not only those of commercial policy but those of development policy. The legal basis should therefore have been, apart from Article 43, also Article 235 or 238. In the government's view the arrangements made are not a mere compliance with the Community's obligations under the Lomé Convention.

116. The Council and those intervening on its behalf refer to the practice of the Court according to which Article 43 is a sufficient legal basis for regulating production of and trade in agricultural products where that contributes to a realization of the objectives set out in Article 39 even though it may pursue certain other objectives where they may be regarded as accessory to the pursuit of the objectives of an agricultural nature. [40] The Council has also contended that the objectives dealt with here must be regarded as being such as could in certain circumstances if necessary be implemented on the basis of Article 113 on commercial policy even though they may also have objectives of development policy, [41] and that the absence of a reference to that legal basis cannot be a reason for a declaration of invalidity since the procedure for adoption under Article 43 satisfies the requirements of Article 113.

117. It would be appropriate for the Court to declare that the legal basis mentioned is sufficient. It is clear that the legal basis for a common organization of the market for an agricultural product is in principle Article 43 and in my view there is no reason to use other legal bases simply because the organization of the market, in its rules on the sys-

40 — See in this connection the judgments in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, in Case 131/87 *Commission* v *Council* [1989] ECR 3743 and in Case C-155/91 *Commission* v *Council* [1993] ECR I-939.

41 — See the judgment in Case 45/86 *Commission* v *Council* [1987] ECR 1493 at paragraph 20.

tem of trade with third countries, includes rules which may be regarded as a compliance with commitments into which the Community has entered in pursuance of international agreements adopted under Article 238 of the Treaty and in accordance with the procedure laid down in that article. In my view it is correct, as emphasized in particular by the United Kingdom Government, to regard the special preferential treatment for traditional ACP bananas as a compliance with the Community's obligations under the Lomé Convention (cf. the banana protocol referred to below).

The argument that the regulation is contrary to the Lomé Convention

118. Before the regulation came into force ACP bananas could be imported into the Community duty-free. According to the regulation ACP bananas are treated as regards customs duty, as has been mentioned, in such a way that traditional bananas (that is, bananas imported up to the stated limit of 857 000 tonnes) are imported duty-free. Non-traditional bananas are imported within the tariff quota duty-free, whilst on importation outside the quota a duty of ECU 750 per tonne is levied. Non-traditional ACP bananas thus receive preference as against third-country bananas since for the latter a duty of ECU 100 per tonne is levied upon import within the tariff quota and a duty of ECU 850 per tonne outside the quota.

119. The German Government, supported by the Netherlands Government, claims that it is contrary to the Lomé Convention to levy duty for non-traditional ACP bananas imported outside the tariff quota. The government refers to Article 168 of the Fourth Lomé Convention, [42] paragraph 1 of which provides that 'products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect', whilst paragraph 2(a) provides that:

'Products originating in the ACP States [most agricultural products, including bananas] shall be imported into the Community, notwithstanding the general arrangements applied in respect of third countries, in accordance with the following provisions:

(i) those products shall be imported free of customs duties for which Community provisions in force at the time of import do not provide, apart from customs

42 — OJ 1991 L 229 p. 3.

duties, for the application of any measure relating to their import;

(ii) for products other than those referred to in point (i), the Community shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products.'

The government claims that the regulation introduces a general duty for non-traditional ACP bananas imported outside the tariff quota and that that is contrary to Article 168(2)(a)(i). Goods which, like non-traditional ACP bananas 'for which Community provisions ... do not provide, apart from customs duties, for the application of any measure relating to their import' must be entitled to importation duty-free. The government states that in this respect the Council cannot describe the tariff quota scheme as anything other than a provision on duty since in connection with the argument as to the infringement of GATT it denies that the scheme may be compared to a quantitative restriction on imports.

120. The Council and those intervening on its behalf contend that the products at issue here come under Article 168(2)(a)(ii), since the tariff quota scheme cannot be compared to a customs provision but must actually be regarded as a measure 'apart from customs duties ... relating to ... import' within the meaning of point (i). The scheme is therefore covered by point (ii) and meets the requirement of that provision that ACP products must be guaranteed 'more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products'.

121. In my opinion the Council's view must be upheld. A tariff quota, particularly with considerable differences in rates of duty for goods imported within or outside the quota — is something different from and more than a general duty. The German Government's interpretation of that provision would prevent the application of tariff quotas as a means for regulating the importation of ACP bananas by giving different treatment to traditional and non-traditional ACP bananas. There seems to be no reason why the Community, to obtain such different treatment, should necessarily resort to quantitative restrictions instead of applying a tariff quota which to a certain extent has effects equivalent to quantitative restrictions.

122. It appears from Protocol 5 on bananas, annexed to the Lomé Convention, that the Community is entitled to introduce such different treatment for non-traditional as compared to traditional ACP bananas. The protocol opens with a statement that:

'The Community and the ACP States agree to the objectives of improving the conditions under which the ACP States' bananas are produced and marketed and of *continuing the advantages enjoyed by traditional suppliers in accordance with the undertakings of Article 1 of this protocol* and agree that appropriate measures shall be taken for their implementation' (my emphasis).

Article 1 then provides that:

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

An Annex LXXIV containing a joint declaration is appended to these provisions. The declaration states that:

'The Contracting Parties agree that Article 1 of Protocol 5 does not prevent the Community from establishing common rules for bananas, in full consultation with the ACP, *as long as no ACP State, traditional supplier to the Community, is placed as regards access to, and advantages in, the Community, in a less favourable situation than in the past or present*' (my emphasis).

123. It was stated during the proceedings that the Community had had full consultation with the ACP States in connection with the adoption of the new organization of the market.

124. In those circumstances my view is that it is not contrary to the Lomé Convention for the organization of the market to draw a distinction between traditional and non-traditional ACP bananas or for non-traditional bananas, with the introduction of the organization of the market, to be less favourably placed as regards duty than hitherto.

The argument that the regulation is a breach of the Community's obligations under GATT

125. The German Government, supported by the Belgian and Netherlands Governments, points out that, as the Court has consistently held, the Community and the Member States are bound by GATT; [43] it claims that legal acts of the Community which conflict with GATT are therefore unlawful and must be declared void. GATT is in fact one of the legal bases on which the Court must test the legality of the Community's legal acts. That is confirmed in the Court's judgments in Case 70/87 *Fediol* [44] and in Case C-69/89 *Nakajima*. [45] The case-law of the Court, according to which GATT does not have direct effect, relates solely to the possibility for citizens, in cases before national courts, to rely on the agreement as a basis for their claims and is accordingly irrelevant in a case brought before the Court by a Member State with a claim for a declaration that a Community legal act is void as conflicting with the Community's obligations under GATT.

126. The Council and those intervening on its behalf contend that there is no infringement of GATT and that in this context GATT may not be relied upon as a basis for the Court's review of legality. They claim in particular that the reasons which led the Court to declare that GATT does not have direct effect must also mean that GATT cannot be relied upon, either, in an application for a declaration of invalidity brought by a Member State. They emphasize the special nature of GATT rules and stress that GATT involves a series of binding rules which, by reason of both the special system for settling disputes and of a series of general and special possibilities for exemption, are enforced rather by way of diplomatic negotiations than by legal means. The Commission has thus stated that GATT is characterized less by an actual right for the parties to claim that the GATT rules should be obeyed than by the possibility of bringing about by negotiations between the contracting parties a complete balance between advantages and disadvantages; any direct effect of the agreement would be foreign to the system.

They claim that it would create serious difficulties for the present attempts to solve within the framework of GATT the problems to which the organization of the market in bananas and more generally the Lomé Convention have given rise and would moreover have consequences which it would be hard to accept if the Court were to agree

43 — Judgments in Joined Cases 21 to 24/72 *International Fruit Company* [1972] ECR 1219, in Case 38/75 *Nederlandse Spoorwegen* [1975] ECR 1439, in Case 266/81 *SIOT* [1983] ECR 731, in Joined Cases 267 to 269/81 *SPI* and *SAMI* [1983] ECR 801, in Joined Cases 290 and 291/81 *Singer/Geigy* [1983] ECR 847, in Case 70/87 *Fediol* [1989] ECR 1781 and in Case C-69/89 *Nakajima* [1991] ECR I-2069.

44 — [1989] ECR 1781.

45 — [1991] ECR I-2069.

with the Federal Republic that the Community's legal acts could be reviewed not only at international level on the basis of the mechanisms laid down in the agreement but also by the Court on the basis of its independent enforcement of the provisions of the agreement.

127. The Court has consistently stressed that the effects of an international agreement in the Community legal order must be determined by reference to the nature and objectives of the agreement in question. That was particularly emphasized in the Court's judgment in Case 104/81 *Kupferberg*, [46] in which the Court stated that the effects in the Community of the provisions of an international agreement cannot be determined without account being taken of the origin in international law of its provisions and that it follows from the principles of international law that the contracting parties may determine what effects the provisions of the agreement are to have in their internal legal order.

128. The binding effect of international agreements must naturally be respected by the contracting parties. But unless a contrary intention may be deduced from the agreement in question there is no requirement for the judicial institutions of the internal legal systems to enforce international commitments. [47] Such legal enforcement is of course possible and will help to secure respect for international obligations, but it will not be in itself an infringement of international law if the contracting parties' legal systems do not contain rules giving the judicial institutions jurisdiction for such enforcement.

129. It is clear that GATT belongs to the majority of international agreements which do not demand a special internal guarantee of respect for their rules. That is confirmed by the fact that it is an exception for GATT to be directly invoked before the judicial institutions in the contracting parties' legal systems. That is the position whether such legal systems are in principle closed to the application of international commitments, unless they have been transposed into national law by the adoption of national rules, or are in principle — as with the Community's legal system — open with regard to the application of international commitments.

46 — [1982] ECR 3641 at paragraph 17. See also the Court's judgment in Case 12/86 *Demirel* [1987] ECR 3719.

47 — The Court expressed this as follows in the *Kupferberg* judgment:
'According to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means' (paragraph 18).

130. Where the question of the effects of an international agreement in the contracting parties' legal systems is not settled in the agreement it is, according to the judgment in the *Kupferberg* case, a matter 'for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community' (paragraph 17).

131. It is thus established that the question of the effects of GATT within the Community legal order is to be determined by the Court. That decision is essential. It has great importance in principle and in practice. To accept the German Government's view would strengthen the impact of GATT in the Community legal order and help to ensure the Community institutions' respect for the agreement even if, where appropriate, the Court were to restrict its review to cover more obvious infringements of GATT. However, such an acceptance might also mean a perceptible change in the possibilities for the competent institutions of the Community to safeguard the Community's interests within the legal framework laid down in GATT. In my view the Court should not come to a decision on the question at issue here without serious consideration of the views expressed by the Council and the Commission.

132. It is moreover natural to take as the point of departure the Court's consistent case-law to the effect that GATT does not have direct effect. [48]

133. The Court has declared both in cases concerning questions relating to the compatibility of Community legal acts with GATT and in cases concerning similar questions relating to national measures that GATT does not confer on citizens of the Community rights which they may invoke before the courts of the Member States. [49]

134. The German Government claims that it does not follow from the fact that GATT has no direct effect that the agreement cannot be used as the basis for a review of legality in an action brought under Article 173 of the Treaty.

135. It is probably correct that it cannot be immediately concluded from the fact that a provision does not have direct effect that it

48 — That case-law has been criticized in academic writings. See for example Hahn and Schuster 'Zum Verstoß von gemeinschaftlichem Sekundärrecht gegen das GATT' in *Europarecht* 1993, p. 261, with supplementary bibliographical references, and in particular Petersmann, 'Applications of GATT by the Court of the EC' in *Common Market Law Review* 1983, p. 397. Kapteyn, 'The "Domestic" Law Effect of Rules of International Law within the European Community System of Law and the Question of the Self-Executing Character of GATT rules' in *The International Lawyer*, 1974, p. 74, claims that better reasons might be stated for the Court's case-law.

49 — The most important judgments in this connection are those in Joined Cases 21 to 24/72 *International Fruit Company* [1972] ECR 1219, in Case 9/73 *Schlüter* [1973] ECR 1135, in Case 266/81 *SIOT* [1983] ECR 731 and in Joined Cases 267 to 269/81 *SPI* and *SAMI* [1983] ECR 801.

may not be relied upon in an application for a declaration of invalidity under Article 173 of the Treaty. That view finds support in the Court's judgment in Case C-69/89 *Nakajima*, [50] in which the Court, in an application by an undertaking for a declaration of invalidity under Article 173, was called upon to decide whether an anti-dumping regulation was unlawful as conflicting with the Community's obligations under GATT, and in which the Council had claimed that the undertaking could not rely upon that argument because the relevant GATT rules did not have direct effect. The Court declared in that connection:

'It should, however, be pointed out that Nakajima is not relying on the direct effect of those provisions in the present case. In making this plea in law, the applicant is in fact questioning, in an incidental manner under Article 184 of the Treaty, the applicability of the new basic regulation by invoking one of the grounds for review of legality referred to in Article 173 of the Treaty, namely that of infringement of the Treaty or of any rule of law relating to its application' (paragraph 28).

136. It is however clear that in *Nakajima* the Court did not accept in general that obligations under GATT might be invoked in an application under Article 173. The Court in fact stressed, as I shall elaborate later, that the disputed Community regulation expressly stated that it had been adopted in order to comply with the GATT rules relied upon by the applicant.

137. It cannot in my view be deduced from the fact that an international agreement is an integral part of the Community legal order that it must necessarily also form part of the legal basis on which the Court will carry out its review of legality under Article 173.

It is possible that an agreement may be invoked in the context of an application under Article 173 of the Treaty in spite of the fact does it does not have direct effect. But the position may also be that the reasons leading to the finding that the agreement does not have direct effect are of such a nature as in addition to prevent the agreement from forming part of the legal basis for the Court's review of legality.

138. That is the position, in my opinion, as far as GATT is concerned. It is therefore necessary to reproduce the reasons on which the Court based its finding that GATT did not have direct effect.

50 — [1991] ECR I-2069.

139. In its judgment in Joined Cases 21 to 24/72 *International Fruit Company* [1972] ECR 1219 the Court started from the finding that it was necessary to examine whether the provisions of GATT 'confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure' and stated that 'for this purpose the spirit, the general scheme and the terms of the General Agreement must be considered'. On that basis the Court gave the following reasons for its finding that GATT did not have direct effect:

'This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements", is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties' (paragraph 21).

'Those measures include, for the settlement of conflicts, written recommendations or proposals which are to be "given sympathetic consideration", investigations possibly followed by recommendations, consultations between or decisions of the *contracting parties*, including that of authorizing certain contracting parties to suspend the application to any others of an obligations or concessions under the General Agreement and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement' (paragraph 25).

'... where by reason of an obligation assumed under the General Agreement or of a concession relating to a benefit, some producers suffer or are threatened with serious damage, Article XIX gives a contracting party power unilaterally to suspend the obligation and to withdraw or modify the concession, either after consulting the contracting parties jointly and failing agreement between the contracting parties concerned, or even, if the matter is urgent and on a temporary basis, without prior consultation' (paragraph 26).

Those paragraphs were repeated in the Court's judgment in Case 9/73 *Schlüter* [1973] ECR 1135 and there are express references to the same reasoning in the judgments in Case 266/81 *SIOT* [1983] ECR 731 and in Joined Cases 267 to 269/81 *SPI* and *SAMI* [1983] ECR 801.

140. It is probably correct to accept that the position is not that the reasons stated by the Court are, in isolation and each by itself, decisive for the result.

141. The rules of GATT, even though their content may to a certain extent be imprecise, are, at least for the most part, sufficiently clear and unconditional to be capable of being in an appropriate case applied by the Court, as to which see the judgment in Case 70/87 *Fediol* [1989] ECR 1781, which I shall discuss later. [51]

142. It is also clear, according to the case-law of the Court, that the absence of reciprocity as regards other contracting parties' recognition of the internal effects of the agreement will not in itself be any bar to the Community's accepting such internal effects, as may be seen from the judgment in the *Kupferberg* case (paragraph 18).

143. Furthermore, it is certain, according to the case-law of the Court, that the existence of a special system for the settlement of disputes within the framework of an international agreement does not by itself prevent the agreement from producing internal effects in the Community legal order, as may be seen for example from the judgment in the *Fediol* case. [52]

144. The decisive factor for the Court was the general assessment of GATT. The various features brought out were evaluated against the background of the 'spirit' and 'general scheme' of the agreement and led, after an assessment of the whole, to a finding that GATT did not have direct effect. It seems to me that it is not justifiable to criticize the Court's reference to the 'flexibility' built into GATT, regard being had to the possibilities for the contracting parties to negotiate exemptions for themselves and by reason of the extensive and to some extent imprecise saving clauses. Nor is there any reason to criticize the Court for stressing the special rules to be found in GATT for settling disputes, in which connection it may be reasonable to have regard to the practice which has developed in respect of that system. In fact the position is that it is to a large extent left

51 — In paragraph 20 of that judgment the Court stated:
'It is also appropriate to note that the Court did indeed hold in the abovementioned judgments of 12 December 1972 *International Fruit Company*, 24 October 1973 *Schlüter* and 16 March 1983 *SPI* and *SAMI*, that a particular feature of GATT is the broad flexibility of its provisions, especially those concerning deviations from general rules, measures which may be taken in cases of exceptional difficulty, and the settling of differences between the contracting parties. That view does not, however, prevent the Court from interpreting and applying the rules of GATT with reference to a given case, in order to establish whether certain specific commercial practices should be considered incompatible with those rules. The GATT provisions have an independent meaning which, for the purposes of their application in specific cases, is to be determined by way of interpretation'.

52 — In paragraph 21 of that judgment the Court declared:
'Lastly the fact that Article XXIII of GATT provides a special procedure for the settlement of disputes between contracting parties is not such as to preclude its interpretation by the Court. As the Court held in the judgment of 26 October 1982 in Case 104/81 *Kupferberg* [1982] ECR 3641, in the context of the joint committees which are set up by free-trade agreements and given responsibility for the administration and proper implementation of those agreements, the mere fact that the contracting parties have established a special institutional framework for consultations and negotiations *inter se* in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement'.

to the contracting parties to solve their disputes by negotiation. [53]

145. In these circumstances it is in my view correct that the Court should find that GATT cannot as matters stand be directly invoked in an application for a declaration of invalidity under Article 173 of the Treaty.

The contrary result might alter the character of the obligations incumbent on the Community within the framework fixed by GATT itself. The Court may have recourse to GATT in its review of legality only if there are special grounds for subjecting the legal acts adopted by the institutions to such a review.

146. As far as I can see, the Court took this view as a basis in its two judgments already referred to, namely *Fediol* and *Nakajima*. As I mentioned, the Court was called upon in both cases to decide upon applications by legal persons, on the basis of GATT rules, for a declaration that Community legal acts

53 — With regard to the GATT system for settling disputes see Pescatore, Davey and Lowenfeld, '*Handbook of GATT Dispute Settlement*', New York/Deventer, 1991.
It may be appropriate to quote the following extract from the introduction by Davey:
'... the dispute settlement system as it currently operates can be summarized as follows: Following the inability of two contracting parties to resolve a dispute through consultations and negotiations, the aggrieved party may request the establishment of a panel to adjudicate the dispute. The request is made to the GATT Council. There is no absolute right to have a panel established, but the 1989 Improvements provide that if a contracting party so requests, a panel will be established at the second meeting of the Council at which the request appears on the Council's agenda, unless the Council decides otherwise ... (p. 66)
A panel report in and of itself has no force. It is only the opinion of the panel members. It must be adopted by the Council on behalf of the contracting parties. Although the issues discussed in the report are not relitigated in the Council, in recent years it has not been unusual for individual contracting parties to express disagreement with specific aspects of a panel report. The meaning of these reservations is unclear, assuming that the Council in fact adopts the report, because the Council traditionally does not act absent consensus. Thus, the reserving party in a sense accepts the report despite the reservations expressed. In any event, the practice of requiring consensus means that the "losing party" (at least an important losing party) may hold up adoption of a panel report interminably while it purports to analyse it and to explore possible negotiated solutions with the prevailing party... (p. 68)
As it has operated over the years, the GATT dispute settlement system has resembled a judicial system in important aspects: neutral decision-makers have determined whether a contracting party has violated the General Agreement and have usually recommended that the violation, if one is found, be terminated. Some critics of the system have argued that it should be made more judicial so as to promote more precise decisions on the merits of disputes and more effective implementation of decisions. At the same time, other critics have argued that the nature and basic philosophy of GATT dictate that the system should be used only to the extent it facilitates negotiated settlements of disputes ... (p. 70)
These two conflicting viewpoints are often referred to as the "legalistic" model, which stresses adjudication, and the "antilegalistic" model, which emphasizes negotiation and consensus. Put simply, the legalistic view is that the General Agreement is a code of conduct and embodies a balance of concessions. If a contracting party violates the code or tips the balance, it is appropriate to penalize such behaviour and put pressure on that party to conform to the code or right the balance, if necessary by allowing the petitioning party to take offsetting countermeasures. On the other hand, the antilegalistic position is that the General Agreement is not a code of conduct *per se*, but more of a commitment by the contracting parties to deal with each other in trade matters so as to work out a mutually acceptable solution to any disagreement. The United States is generally perceived to have supported the legalistic position, while Japan and the EC have been considered supporters of the opposing position. Most developing countries and non-European developed countries have tended to support the legalistic position because they see it as a more effective protector of small-country rights.' (pp. 70 and 71)

were void, [54] and the Court agreed in both cases to undertake the review requested by the applicants on the basis of the GATT rules.

147. It is, however, decisive, that in both judgments the Court based that result on the fact that by reason of references to the relevant GATT rules there were special reasons for undertaking such a review.

148. In the *Fediol* judgment the Court first referred to its case-law concerning that fact that GATT did not have direct effect and then declared:

'Nevertheless, it cannot be inferred from those judgments that citizens may not, in proceedings before the Court, rely on the provisions of GATT in order to obtain a ruling on whether conduct criticized in a complaint lodged under Article 3 of Regulation No 2641/84 constitutes an illicit commercial practice within the meaning of that regulation. *The GATT provisions form part of the rules of international law to which Article 2(1) of that regulation refers*, as is borne out by the second and fourth recitals in its preamble, read together' (paragraph 19, my emphasis).

The Court concluded that:

'*It follows that, since Regulation No 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint* which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them, those same economic agents are entitled to request the Court to exercise its powers of review over the legality of the Commission's decision applying those provisions' (paragraph 22, my emphasis).

149. In the *Nakajima* case the Court first stated that:

'According to the second and third recitals in the preamble to the new basic regulation, it

54 — The origin of the *Fediol* case was an application made to the Commission by a trade organization for the initiation of a procedure concerning an allegedly illicit commercial practice by Argentina. The basis for that application was a Council regulation under which illicit commercial practices were defined as 'any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules.' It was common ground that that was a reference to GATT. The Commission dismissed the application on the ground that there was no illicit commercial practice, whereupon Fediol brought an action before the Court under Article 173 of the Treaty.
In the *Nakajima* case the Court was called upon to decide whether the Council's antidumping regulation was incompatible with the Anti-Dumping Code adopted within the framework of GATT.

was adopted in accordance with existing international obligations, *in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code*' (paragraph 30, my emphasis).

The Court then declared:

'It follows that the new basic regulation, which the applicant has called in question, was adopted *in order to comply with the international obligations of the Community*, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures ...' (paragraph 31, my emphasis).

150. In my view there is no doubt that in the banana regulation the Community legislature did not refer to GATT in such a way that the agreement should be incorporated in the legal basis for the Court's review of legality.

151. My conclusion is therefore that the Council's contention that the Federal Republic cannot rely on GATT in this case is correct. It is therefore unnecessary to consider whether the regulation may involve an infringement of GATT rules.

The argument that the abolition of the tariff quota hitherto applicable to Germany is illegal

152. The regulation on the common organization of the market in bananas provides in Article 21(2) that 'the tariff quota laid down in the Protocol on the tariff quota for imports of bananas annexed to the Implementing Convention on the Association for the Overseas Countries and Territories provided for in Article 136 of the Treaty shall be discontinued'.

153. The German Government claims that the protocol in question is an integral part of the Treaty and that it cannot therefore be repealed by a legal act adopted on the basis of Article 43 of the Treaty but only in accordance with the rules of the Treaty for its own amendment. The government denies that the protocol contains rules providing a legal basis for its own abolition. It claims that the protocol was part of a compromise and may be regarded as a kind of consideration for Germany's acceptance of the fact that under the Treaty particularly favourable conditions were granted to other Member States' former colonies.

154. The Council and the interveners on its behalf refer to the fact that the third subparagraph of paragraph 4 of the protocol states that 'any decision to abolish or amend this quota shall be taken by the Council, acting by a qualified majority on a proposal from the Commission', and claim that that provision contains a sufficient legal basis for the contested provision of Article 21(2).

155. It is common ground that the protocol forms part of the Treaty and that it was considered applicable at the time of the establishment of the organization of the market, even though the implementing convention laid down under Article 136 of the Treaty in relation to the Association for the Overseas Countries and Territories with the Community to which the protocol was annexed is no longer in force.

156. It is therefore also established that the tariff quota can in principle be abolished only in accordance with the rules of the Treaty unless the protocol itself contains other rules on the procedure to be followed for the abolition of the quota.

157. The decisive question in this connection is therefore whether the provision in the third subparagraph of paragraph 4 of the protocol, already quoted, gives such authority.

158. The German Government first claims that the provision, as an exception to the requirement normally applicable as to observance of the procedure for amending the Treaty, must be strictly interpreted and states that that is confirmed by the reasons mentioned above for the existence of the protocol. Furthermore, the special legal authority for abolition, according to its wording, provides for the possibility of abolishing the tariff quota only for a year at a time and not on a permanent basis as the Council has done, and the provision, according to its wording and its place in the protocol, gives authority to abolish quotas, which are laid down in pursuance of the second subparagraph of paragraph 4, that is quotas fixed annually, only when 'imports have decreased in comparison with those for 1956', which was the base year for fixing the quota. The legal basis for abolition may thus not be used for quotas fixed for years where imports did not decrease during the preceding year in comparison with those for 1956.

159. That interpretation cannot be correct, irrespective of whether it is accepted as correct in principle that a legal authority for abolition such as this should be strictly interpreted.

160. To demonstrate what is untenable in the German Government's view, it is necessary to analyse the structure of the protocol.

Paragraphs 1 and 2 of the protocol lay down the quota for the period until the common customs tariff is fully implemented (90% of the quantities imported in 1956 for the period until the end of the second stage and 80% thereof until the end of the third stage). The first subparagraph of paragraph 3 lays down by reference to paragraphs 1 and 2 a rule for increasing the annual quotas for cases in which imports in the preceding year have exceeded 1956 quantities, whilst the second subparagraph lays down a rule for cases in which total imports have fallen in comparison with 1956.

161. Paragraph 4 of the protocol then provides as follows:

'As soon as the common customs tariff applies in its entirety, the quota shall be 75% of the imports for 1956. This quota shall be increased as provided in the first subparagraph of paragraph 3.

If imports have decreased in comparison with those for 1956, the annual quota provided for above shall not exceed 75% of the imports for each preceding year.

Any decision to abolish or amend this quota shall be taken by the Council, acting by a qualified majority on a proposal from the Commission.'

It may be seen that there is to a certain extent a parallel between the system of the situations referred to in paragraphs 1 and 2 and that of the system referred to in paragraph 4 and that the reason for the distinction between the three periods lies in the differences between the guaranteed minimum quantities of the tariff quota.

Moreover it is important in connection with this case that the provision with regard to the abolition of the quota applies only during the period governed by paragraph 4, that is, the period after the common customs tariff has been implemented in its entirety. The possibility thus introduced of abolishing the quota is therefore linked to the implementation of the common customs tariff.

162. There seems therefore to be no ground for thinking that the opportunity for abolition may be linked only to the situation dealt

with in the second subparagraph of paragraph 4 (when imports have decreased in comparison with 1956) and not to that dealt with in the first subparagraph.

163. On the contrary it is necessary to agree with the Council that such an interpretation of the provision would have presupposed that the opportunity for abolition would have been expressly linked to the second subparagraph of which it would have formed the second part.

The words 'this quota' in the third subparagraph can only be understood as referring to quotas fixed after the final implementation of the customs tariff, whether according to the first or the second subparagraph of paragraph 4.

164. There is no reason to attach importance to the fact that the abolition in pursuance of the third subparagraph of paragraph 4 was effected by a general provision which remains in force until it is repealed, with the consequence that the decision on abolition is not adopted every year.

Arguments with regard to defects in the origin of the regulation

(a) *Failure to comply with the principle of collegiality as regards the Commission's participation in the decision-making procedure*

165. The German Government points out that Article 43 of the Treaty requires the Council's adoption of decisions to be based on proposals from the Commission and that according to the first paragraph of Article 149 of the Treaty [55] the Council may amend a Commission proposal only when it acts by unanimity. The Government claims that the first paragraph of Article 149 was infringed because the Council adopted the contested regulation by a qualified majority on the basis of a proposal which had been amended otherwise than in the prescribed manner as compared with the Commission's initial proposal. The member of the Commission who took part in the Council's negotiations was not empowered to make the necessary amendments on the Commission's behalf.

The government has stated in its application that there were factors giving grounds for the belief that the Commission's proposal

55 — See now Article 189a(1) of the EC Treaty.

was amended by the member of the Commission with responsibility for agriculture and by the President of the Commission in disregard of the principle of collegiality and that that belief was strengthened by the information supplied by the Council in its defence with regard to the circumstances relating to the relevant negotiations. The government states that it emerges from the information given by the Council that the content of the regulation ultimately adopted was the result of a compromise by the Presidency for which, after lengthy negotiations in December 1992, a sufficient majority was obtained in the Council and that the relevant member of the Commission had subsequently accepted that proposal on behalf of the Commission so that the compromise could thus be adopted by a qualified majority. The government also refers to the fact that during the oral procedure in connection with the application for the adoption of interim measures the Council stated that the compromise was the result of a long night meeting and claims that it necessarily follows from that information that the Commission could not have had knowledge of the compromise when it gave its mandate to the Commission member concerned in connection with the relevant negotiations in the Council and that the member cannot therefore have been duly authorized.

166. The Council regards that argument as unfounded. It refers basically to the Commission's arguments and contends that the Council was entitled to assume that the member of the Commission taking part in the Council's negotiations is empowered to amend the Commission's proposal on the Commission's behalf when he makes such amendments.

167. The Commission also contends that that argument is groundless. The Council states that the relevant member of the Commission was properly authorized, with due respect for the principle of collegiality, to amend the original Commission proposal. The Commission also states that the relevant meeting of the Council, extending over several days in December 1992, dealt with several important proposals and that the proposal for the banana regulation was only one of several for which a sufficient agreement was obtained in the framework of a package deal.

The Commission thinks that the German Government's argument may be rejected if only on the ground that the Commission has stated that its proposal was duly amended and that there are no circumstances which can provide any reason for doubt on the matter.

168. For the sake of good order, however, the Commission states that it had been dealing with the 'banana affair' since 1991 and in submitting its proposal to the Council it was aware that for it to be adopted it would probably be necessary to amend it in certain

respects once the Council had discussed it. The Commission then states as follows:

'— It was on that basis that the college of Commissioners asked the Member with responsibility for agriculture (at the time Mr MacSharry) to conduct negotiations on the "bananas" issue at the meeting of the Council of 14 to 17 December 1992 in the context of a global compromise. In such a situation, which is by no means unusual, the relevant Member of the Commission remains in close touch with the college in order to seek specific instructions if necessary. That is the only way to achieve a compromise and final decision in such difficult negotiations and is what happens in all the agricultural marathons. The Commission is surprised that the applicant — the Government of a Member State — now seems to wish to cast doubt on a practice established for thirty years.

— Following the meeting of the Council of 14 to 17 December 1992, the said Member of the Commission informed the college of the results of the meeting of the Council, and in particular of the "bananas" compromise; the college did not express any objection, either as regards the procedure or the result of the negotiations.

— Finally, it should be emphasized that that compromise of 17 December 1992 — despite its importance — was only political in nature and the formal decision (the only valid decision in law) was only reached, by a qualified majority, when the Council met on 14 February 1993. The college thus had sufficient time available for a fresh examination of the file and to give the new Member of the Commission with responsibility for agriculture (Mr Steichen) special instructions on the matter or, if need be, to call into question certain parts of the political compromise; the Commission did not, however, (either in its previous or new composition after 1 January 1993) see any reason to re-open the file.

— After the formal decision of the Council on 14 February 1993, the college of Commissioners was again informed of the results (corresponding to the political compromise of December) and took note thereof without making any objections.'

169. I think there can be no doubt that the German Government's argument must be rejected.

The government has not been able to point to any specific factor indicating that rules applicable, including the collegiality principle, to the Commission's participation in the Community legislative process have not been

observed. That is, I think, sufficient reason for rejecting the government's argument.

170. The principle of collegiality is moreover, in my opinion, observed when the Commission has taken a decision as to the amendments to its original proposal which may be effected if appropriate during the negotiations in the Council. The member of the Commission who represents the Commission at the Council negotiations can amend the existing Commission proposal only if the amendments in question lie within the framework marked out by the Commission in its decision. If the amendments do not lie within the framework of that decision the question of the amendment must be referred to the Commission.

(b) *Absence of any reference in the regulation adopted to the Commission's final proposal*

171. The German Government points out that the preamble to the regulation refers only to the Commission's original proposal of August 1992 as published in the *Official Journal* and hence not to the Commission's final proposal. The government claims that the regulation therefore offends against Article 190 of the Treaty according to which regulations of the Council shall 'refer to any proposals or opinions which were required to be obtained pursuant to this Treaty'.

172. That argument should be rejected. The German Government is calling in question on this point the legality of a practice applied for many years past, which no-one has hitherto had occasion to criticize and which, in my view, gives no real ground for criticism.

It must be obvious that it cannot be deduced from the wording of Article 190 — the fact that the expression 'proposals' is in the plural — that there must necessarily be a reference both to the original Commission proposal and to any subsequent amended proposal. The interests to be safeguarded by the requirement in Article 190 are in my view quite sufficiently taken into account by a reference to the first of the proposals submitted by the Commission — particularly when, as is the Commission's practice and as was the position here, it is the one which is published in the Official Journal. [56]

56 — The Court rejected a somewhat similar argument in its judgment in Case C-62/88 *Greece* v *Council* [1990] ECR I-1527, in which it stated that 'the very terms of that provision [Article 190] show that, although it requires a reference to the Commission's proposal in measures which may be adopted only on a proposal from the Commission, it does not thereby impose the obligation to indicate whether or not the measure in question is in conformity with that proposal' (paragraph 29).

(c) *Failure to consult the European Parliament again*

173. The German Government points out that the proposal finally adopted differs in several respects from the proposal on which the European Parliament gave its opinion and claims, with the support of the Netherlands and Belgian Governments, that the amendments are so substantial that they could only have been adopted if Parliament had once again been consulted on the proposal.

174. The Council and those intervening on its behalf contend that the amendments are not so substantial that Parliament should have been consulted again.

175. The Court has laid down in its case-law the criteria which are decisive as regards the need for a fresh consultation of Parliament and has declared most recently in its judgment in Joined Cases C-13 and C-16/92 *Driessen* [57] that Parliament must be consulted afresh:

'each time the text finally adopted, considered as a whole, differs in its actual substance from that on which the Parliament has already been consulted, except in cases in which the amendments correspond in essentials to the wishes expressed by Parliament itself ...' (paragraph 23).

The amendments in question must thus be assessed in the light of the proposal as a whole and must concern the 'actual substance' of the text.

176. It is moreover legitimate in my opinion, as stated by the Council, in case of doubt as to the substantial nature of the amendment, to have regard to whether or not the objection has been raised by the Parliament itself.

177. The German Government refers to the following three amendments which it regards as so significant that they should have led to Parliament's being consulted afresh.

57 — [1993] ECR I-4751.

178. The first concerns the rules in the original proposal regarding the possibilities for importing third-country and non-traditional ACP bananas. That proposal provided in Article 17 that imports of these products 'shall be subject to a basic quota of two million tonnes and an additional quota which shall be fixed each year on the basis of the forecast supply balance'. The proposal provided that an *ad valorem* duty of 20% of the value of the goods, consolidated in GATT, should be levied upon importation. That proposal, which therefore involved actual quantitative restrictions and an *ad valorem* duty, was amended to the tariff quota previously described, with a rate of duty of ECU 0 or 100 per tonne within the quota and ECU 750 or 850 per tonne outside the quota.

179. The German Government points out in particular that the amendment changing the *ad valorem* duty into a duty on quantity is an essential one, both because the duty on quantity leads in reality to a higher duty even within the tariff quota and because the amendment might be contrary to the Community's commitments under GATT.

180. The amendments referred to are also important in my view, but it would be wrong to assume that, seen against the regulation as a whole, they may be said to affect its substance. The quantitative restriction originally suggested, like the provisions of the proposal eventually adopted regarding the tariff quota, were intended to allow the Community to control importation. The change in the import arrangements from being an actual quantitative restriction to being a tariff quota will hardly have essential significance, as will have been clear from the discussion of the practical effects of the tariff quota. It is moreover not disputed that the change in the basis for the calculation of duty (within the tariff quota) will in practice lead to minor increases in the burden of duty but they cannot be said to affect the actual substance of the proposal.

181. The second of the contested amendments concerns the rules for allocating the quota. The original quota referred in the preamble to the need to 'ensure that bananas produced within the Community and ... the quantities traditionally imported from ... ACP States ... can be marketed in the Community' (tenth recital). For that purpose so-called partnership arrangements were set up by the regulation. According to Article 17(3) of the proposal they covered 30% of the total volume of the basic quota and any additional quota laid down and were to be administered according to rules laid down in Articles 19, 20 and 21. The main rule was in Article 19(1), according to which the 30% quota was 'open to any importer established in the Community who undertakes to mar-

ket there a specific quantity of Community and/or traditional ACP bananas'. It was provided in Article 19(2) of the proposal that:

'Importers who during 1989 to 1991 marketed on their own account a minimum quantity of Community or traditional ACP bananas shall receive on application an import licence as provided for in Article 20(1)(1) for a quantity not exceeding the average quantity which they marketed during that period.'

The proposal eventually adopted changes those partnership arrangements into a system in which the right to receive a share of the 30% quota does not depend upon an the obligation to import given quantities of Community/ACP bananas but upon having marketed those bananas during the three preceding years.

182. According to the German Government the rules finally adopted increase the advantages given to traditional dealers in Community/ACP bananas since it is made more difficult for the traditional dealers in third-country bananas to obtain a share of the quota.

183. There is no doubt that that constitutes an important alteration, but it cannot be doubted either that it does not affect the substance of the regulation.

The amended rule has the same purpose as the original rule and it may be assumed that the rule originally proposed would in practice not have had very different effects from those which the rule finally adopted will have.

184. The third of the amendments at issue concerns the rules for the so-called newcomers' share of the quota. The original proposal reserved 5% of the 70% quota opened for dealers in third-country bananas for new operators marketing bananas for the first time in the year in question. In addition the 30% quota was also in principle open to such operators. The proposal finally adopted, as mentioned, opens a special 3.5% quota for newcomers.

185. The German Government claims that the proposal eventually adopted makes considerably worse the newcomers' opportunity to break into the market and that such opportunities are essential to ensure effective competition on the market. The amendments

are therefore so essential that they should have led to fresh consultation of the European Parliament.

186. The amendments are not unimportant. Newcomers' rights are important for the working of the market. But in my opinion it is clear that the amendments did not require the proposal to be laid again before Parliament. The deterioration in the newcomers' situation entailed by the proposal is after all of restricted extent. Even according to the proposal finally adopted newcomers have received a minor share of the whole quota and they do after all still have an opportunity to purchase Community/ACP bananas if they can find suppliers and thus eventually receive a share of the 30% quota.

187. I do not therefore consider that the Parliament ought to have been consulted again.

Conclusion

188. In view of the foregoing considerations I propose that the Court should:

— find in favour of the Council,

— order the Federal Republic of Germany to pay the Council's costs, and

— order the interveners to bear their own costs.