JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

3 February 2005 *

In Case T-139/01,

Comafrica SpA, established in Genoa (Italy),

Dole Fresh Fruit Europe Ltd & Co., established in Hamburg (Germany),

represented by B. O'Connor, Solicitor, and P. Bastos-Martin, Barrister,

applicants,

supported by

Simba SpA, established in Milan (Italy), represented by S. Carbone and F. Munari, lawyers,

intervener,

* Language of the case: English.

Commission of the European Communities, represented initially by L. Visaggio, M. Niejahr and K. Fitch, and subsequently by L. Visaggio and K. Fitch, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Kingdom of Spain, represented initially by R. Silva de Lapuerta, and subsequently by L. Fraguas Gadea, acting as Agents, with an address for service in Luxembourg,

intervener,

ACTION, first, for annulment of Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6), and of Commission Regulation (EC) No 1121/2001 of 7 June 2001 fixing the adjustment coefficients to be applied to each traditional operator's reference quantity under the tariff quotas for imports of bananas (OJ 2001 L 153, p. 12), and, second, an action for compensation for damage allegedly caused to the applicants by the adoption of Regulations No 896/2001 and No 1121/2001,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 18 November 2003,

gives the following

Judgment

Law

1 A common organisation of the market in bananas ('the bananas COM') was established by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1). That regulation introduced, as from 1 July 1993, a common import system to replace the various national systems which had previously operated.

2 Title IV of Regulation No 404/93, comprising Articles 15 to 20, deals with trade with third countries.

3 Following proceedings brought by the Republic of Ecuador and the United States of America against the Community pursuant to the dispute settlement system of the World Trade Organisation (WTO), the Council adopted Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2).

4 Article 1 of Regulation No 216/2001 replaced Articles 16 to 20 of Regulation No 404/93 as amended by Council Regulation (EC) No 1637/98 of 20 July 1998 (OJ 1998 L 210, p. 28). Pursuant to the combined provisions of the second paragraph of Article 2 of Regulation No 216/2001 and Article 1 of Commission Regulation (EC) No 395/2001 of 27 February 2001 fixing certain indicative quantities and individual ceilings for the issuing of Community import licences for bananas for the second quarter of 2001 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 2001 L 58, p. 11), Article 1 of Regulation No 216/2001 applies with effect from 1 July 2001.

5 The first paragraph of Article 17 of Regulation No 404/93, as amended by Regulation No 216/2001, provides that '[t]o the extent necessary, importation of bananas into the Community shall be subject to submission of an import licence, to be issued by Member States to any interested parties irrespective of their place of establishment in the Community and without prejudice to specific provisions adopted for the application of Articles 18 and 19'.

6 Article 18 of Regulation No 404/93, as amended by Regulation No 216/2001, provides:

'1. Each year from 1 January the following tariff quotas shall be opened:

(a) a tariff quota of 2 200 000 tonnes net weight, called "quota A";

(b) an additional tariff quota of 353 000 tonnes net weight, called "quota B";

(c) an autonomous tariff quota of 850 000 tonnes net weight, called "quota C".

These tariff quotas shall be open for imports of products originating in all third countries.

The Commission may, on the basis of an agreement with [WTO] contracting parties with a substantial interest in the supply of bananas, allocate tariff quotas "A" and "B" among supplier countries.

2. Imports under tariff quotas "A" and "B" shall be subject to a customs duty of EUR 75 per tonne.

3. Imports under tariff quota "C" shall be subject to a customs duty of EUR 300 per tonne

...

4. A tariff preference of EUR 300 per tonne shall apply to imports originating in ACP countries both under and outside the tariff quotas.

...'

7 Article 19 of Regulation No 404/93, as amended by Regulation No 216/2001, provides:

'1. The tariff quotas may be managed in accordance with the method based on taking account of traditional trade flows ("traditional/newcomers") and/or other methods.

2. The method adopted shall take account as appropriate of the need to maintain the equilibrium of supply to the Community market.'

8 Under Article 20(a) of Regulation No 404/93 as amended, the Commission is empowered to adopt, pursuant to the procedure prescribed by Article 27 of that regulation, 'rules on the management of the tariff quotas referred to in Article 18'.

9 Those management rules are defined by Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6; 'the 2001 regime'). Regulation No 896/2001 entered into force, pursuant to Article 32 thereof, on the day following its publication in the *Official Journal of the European Communities*, 9 May 2001, but was only applicable with effect from 1 July 2001.

10 The rules laid down in Regulation No 896/2001 replace those initially set out in Commission Regulation (EEC) No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6; 'the 1993 regime'), adopted pursuant to Regulation No 404/93 and which remained in force until 31 December 1998. The 1993 regime was then replaced by Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32; 'the 1999 regime'), which entered into force on 1 January 1999.

11 Under the 1993 regime, the import licences were divided into three categories of operator (A, B and C). Categories A and B were themselves subdivided according to one of three different economic activities carried out by the operators, namely, the purchase of green bananas, or direct imports (category A), as owners, the release for free circulation of green bananas, or secondary imports (category B) and, as owners, the ripening of green bananas and their marketing (category C) (see Article 3(1) of

Regulation No 1442/93). That was implemented, at least as regards operators under categories A and B, by reference to the three-year period preceding the year for which the tariff quota was opened (see Article 4(1) of Regulation No 1442/93).

12 That system of categorisation was abolished by the 1999 regime, which was based essentially on a distinction between 'traditional operators' and 'non-traditional operators' (see Article 2 of Regulation No 2362/98). Under that regime, for each year, traditional operators obtained a reference quantity fixed on the basis of the quantity of bananas they had in fact imported during the reference period. Pursuant to Article 4(2) of Regulation No 2362/98, for imports made in 1999, the reference period covered 1994, 1995 and 1996.

13 The 2001 regime introduced a new system for categorising import licences based essentially on a distinction between 'traditional operators' and 'non-traditional operators', the former being subdivided into 'traditional operators A/B' and 'traditional operators C'.

14 Article 2 of Regulation No 896/2001 thus provides, in its initial version, that 83% of the tariff quotas referred to in Article 18(1) of Regulation No 404/93 are to be made available to 'traditional operators as defined in Article 3(1)', with the remaining 17% being made available to 'non-traditional operators as defined in Article 6'.

15 Title II of Regulation No 896/2001, comprising Articles 3 to 21, concerns the 'management of tariff quotas'.

16 Articles 3 to 5 of that regulation, in its initial version, provided:

'Article 3

For the purposes of this Regulation:

1. "traditional operators" means economic agents, whether natural persons or entities having legal personality, individual agents or groups, established in the Community during the period for determining their reference quantities, who have, for their own account, purchased a minimum quantity of bananas originating in third countries from the producers or, where applicable, produced, consigned and sold such products in the Community.

   Operations as defined in the previous subparagraph shall hereinafter be called "primary imports".

   ...

2. "traditional operators A/B" means traditional operators who have carried out the minimum quantity of primary imports of "third-country bananas" and/or "non-traditional ACP" bananas in accordance with the definitions in Article 16 of Regulation [No 404/93], as amended by Regulation ... No 1637/98 ...;

3. "traditional operators C" means traditional operators who have carried out the minimum quantity of primary imports of "traditional ACP bananas" in accordance with the definitions in the abovementioned Article 16, as amended by Regulation ... No 1637/98.

Article 4

1. The reference quantity for each traditional operator A/B who submits a written application no later than 11 May 2001 shall be established on the basis of the average of primary imports of third-country bananas and/or non-traditional ACP bananas during 1994, 1995 and 1996 taken into account for 1998 for the purposes of administering the tariff quota for imports of third-country bananas and non-traditional ACP bananas, in accordance with the provisions of Article 19(2) of Regulation ... No 404/93 applicable in 1998 to the category of operators referred to in paragraph 1(a) of that article.

2. The reference quantity for each traditional operator C who submits a written application no later than 11 May 2001 shall be established on the basis of the average of primary imports of traditional ACP bananas during 1994, 1995 and 1996 carried out for 1998 as traditional quantities of ACP bananas.

3. Operators resulting from a merger of other traditional operators, each with their own rights under this Regulation, shall enjoy the same rights as those former operators.

Article 5

1. The Member States shall notify the Commission of the sum of the reference quantities referred to in Article 4(1) and (2) no later than 15 May 2001.

2. Using the information received under paragraph 1, and in light of the total quantities available under tariff quotas A/B and C, the Commission shall, where appropriate, set a single adjustment coefficient to be applied to each operator's reference quantity.

3. Where paragraph 2 applies, the competent authorities shall notify each operator of their reference quantity as adjusted by the adjustment coefficient not later than 7 June 2001.

...'

17 Articles 6 to 12 of Regulation No 896/2001 deal with non-traditional operators.

18 The rules for the issue of import licences are set out in Articles 13 to 21 of Regulation No 896/2001.

19 Under Article 13(1) of that regulation, 'the quantities of the tariff quotas A and B provided for in Article 18(1)(a) and (b) of Regulation ... No 404/93 are to be added together' and 'applications under quotas A and B shall be dealt with together'. Article 13(2) of the same regulation precludes traditional operators A/B from submitting import licence applications other than under tariff quota A/B, while traditional operators C are similarly limited to applying only under tariff quota C. It also provides that those various traditional operators 'may submit licence applications under the other tariff quota if they are registered as non-traditional operators for that quota'.

20 Under Article 15(1) of Regulation No 896/2001:

'For each quarter, applications for import licences shall be submitted to the competent authorities of the Member State listed in the Annex to this Regulation during the first seven days of the month preceding the quarter for which the licences are being issued.

Applications for import licences shall be submitted to the competent authorities of the Member State which established the reference quantity, in the case of traditional operators, and of the Member State in which the operators are registered, in the case of non-traditional operators.'

21 Under Article 16 of Regulation No 896/2001, '[t]he competent authorities shall notify the Commission of the quantities covered by licence applications within two working days of the end of the application period', identifying, for each of the tariff quotas A/B and C, the quantities requested by the traditional operators A/B and C and by the non-traditional operators respectively.

22 Article 22, the sole provision of Title III of Regulation No 896/2001, deals with imports occurring outside the tariff quotas.

23 Title V of Regulation No 896/2001, comprising Articles 28 to 30, sets out certain 'transitional arrangements'.

24 Under Article 28(1) of that regulation, the available tariff quota A/B for the second half of 2001 is set at a total of 1 137 159 tonnes. Article 28(2) of the same regulation provides that, for the same period, 'the reference quantity for each traditional operator established in accordance with Article 4 and after the application of Article 5(2) shall be multiplied by the coefficient 0.4454 in the case of traditional operators A/B and by the coefficient 0.5992 in the case of traditional operators C'.

25 Recitals 3 and 4 of Regulation No 896/2001 read as follows:

'(3) Article 19 of Regulation ... No 404/93 provides that the tariff quotas may be managed in accordance with the method based on taking account of traditional trade flows ("traditional/newcomers") and/or other methods. To implement the new arrangements from the second half of 2001, it is advisable to grant access to the tariff quotas to traditional operators who have undertaken on their own account the purchase of fresh products from producers in third countries, or their production, as well as their dispatch to and unloading in the customs territory of the Community, during a reference period. For the purposes of this Regulation, these activities are called "primary imports".

(4) A single definition of traditional operators should be adopted for all tariff quotas, and their reference quantities should be determined according to the same rules, but separately depending on whether these operators have supplied the Community market with bananas originating in non-ACP third countries and non-traditional imports from ACP States or with traditional ACP bananas during the reference period, within the meaning of the definitions in Article 16 of Regulation ... No 404/93 applicable before the amendment introduced by Regulation ... No 216/2001.'

26 Recital 5 of Regulation No 896/2001 justifies the choice of 1994, 1995 and 1996 as the 'reference period' in the following terms:

'The reference period to be used for defining categories of operators and determining the reference quantities of traditional operators should be the three-year period 1994 to 1996. The three-year period 1994 to 1996 is the most recent for which the Commission has sufficiently reliable data on primary imports. Using that period can also resolve a dispute which has been going on for a number of years with certain of the Community's trading partners. In the light of the available data established for the purpose of administering the quotas opened in 1998, traditional operators need not be registered.'

27 After the relevant national authorities of the Member States had notified the Commission of the total reference quantities requested by the traditional operators in accordance with Article 4 of Regulation No 896/2001, the Commission adopted Commission Regulation (EC) No 1121/2001 of 7 June 2001 fixing the adjustment coefficients to be applied to each traditional operator's reference quantity under the tariff quotas for imports of bananas (OJ 2001 L 153, p. 12). As the total reference quantities for all traditional operators A/B was 1 964 154 tonnes (see recital 2 of

Regulation No 1121/2001), the Commission set, in accordance with Article 1(1) of Regulation No 1121/2001, the adjustment coefficient provided for by Article 5(2) of Regulation No 896/2001 for each traditional operator A/B at '1.07883'. For each traditional operator C, the Commission set the adjustment coefficient at '0.97286'.

28 Article 1(2) of Regulation No 1121/2001 provides that '[f]or the second half of 2001, the reference quantity for each traditional operator established in accordance with Article 4 of Regulation ... No 896/2001 shall, following the application of paragraph 1, be adjusted by the coefficient laid down in Article 28(2) of [the latter regulation]'.

Background to the dispute

29 On 4 October 2000, the Commission submitted a communication to the Council on the application of the 'first come, first served' method for the Community banana regime and the implications of a 'tariff only system' (COM(2000) 621 final), in which it advocated the adoption of an open market allocation system for licences to import bananas from third countries. This proposal was initially considered by the Council, on 9 October 2000, as providing 'a basis for settling the banana dispute, which ... can and must be resolved rapidly'. The Council called on the 'competent bodies' to 'examine the technical aspects of the communication, taking particular account of the concerns expressed by some delegations' and called on the European Parliament to adopt a position on the Commission's proposal (Council Press Release No 12012/00 concerning the 2294th Council meeting, pp. 12 and 13).

30 Whilst the technical aspects of that communication were being considered by both the relevant national authorities and the members of the Banana Management Committee, the Commission entered into negotiations with the trade representative of the United States of America with a view to resolving the ongoing dispute between that country and the European Community over the banana COM.

31 On 7 February 2001, shortly after the adoption by the Council of Regulation No 216/2001, the Commission forwarded a communication to the European Parliament entitled 'Special framework of assistance for traditional ACP suppliers of bananas (Council Regulation (EC) No 856/1999) — Biennial report from the Commission 2000' (COM(2001) 67 final). In Section 4 of that communication, under the heading 'Amending the EU regime following the WTO rulings', the Commission states:

'Following detailed discussions with interested parties the Commission put forward a proposal to the Council to amend Regulation [No] 404/93 in November 1999. This proposal included a transitional tariff quota system, with three quotas being established, prior to the introduction of a tariff-only system by 2006 at the latest. During discussions with third parties it became evident that a system of quota management with licence distribution based on traditional trade flows with a historical reference period was the preferred option.

After months of intensive discussions it seemed that a tariff quota system either based upon licences allocated on historical performance or auctioning would be difficult to achieve, and that the discussions on historical reference periods were at an impasse. Thus the Commission proposed in its Communication to the Council in July that the Commission should conclude its examination of the first come, first served (FCFS) method of quota management. This was accepted by the Council and

in October 2000, following its assessment of the FCFS method, the Commission presented a further Communication to the Council indicating that it considered the FCFS method a viable option.

...

The Communication was reviewed in the General Affairs Council of 9 October 2000 in Luxembourg. A formal Council position is expected once the European Parliament has expressed its opinion. An ACP-EU Joint Parliamentary Assembly resolution on the reform of the EU banana regime was made during its session in Brussels from 9 to 12 October.'

32 On 11 April 2001, the Commission and the United States of America concluded 'an understanding on bananas' ('the US-EU Agreement').

33 The US-EU Agreement provides for the implementation by the Community, by 1 January 2006 at the latest, of a 'tariff-only regime' for imports of bananas. It states that, during the 'interim period', the Community will implement an import regime based on 'historical licensing' and provides for two transitional phases in that regard.

34 During Phase I, which came into effect on 1 July 2001, the Community is required to establish a combined tariff quota made up of 2 200 000 tonnes ('quota A') and a separate tariff quota of 353 000 tonnes ('quota B'). Those tariff quotas are managed as a single quota, in the total amount of 2 553 000 tonnes. Bananas imported under the A and B quotas are subject to a tariff of EUR 75 per tonne. The Community is also required to set a combined tariff quota C of 850 000 tonnes. Eighty-three per cent of the tariff quota A/B is open to traditional operators based on 'each qualified

"traditional" operator's 1994-96 average annual final reference quantity ("reference quantity") for the "A/B" quotas'. Qualified 'traditional' operators are 'defined according to the licences allocated under Article 19(1)(a) of Regulation No 404/93 and Article 3(1)(a) of Regulation No 1442/93 for "Category A, activity (a)"'. Furthermore, 'importers [do] not have to produce new evidence'. The remaining 17% of the A/B quota licences are to be allocated to a new 'non-traditional' operator category. The Agreement prohibits the use of C quota licences to import bananas under the A/B quota, and vice versa.

35 During Phase II, applicable with effect from 2002, the provisions of Phase I, in particular, will continue to apply but the 'B' element of the combined 'A/B' quota is to be increased by 100 000 tonnes, thus bringing the total available annual quota to 2 653 000 tonnes.

36 On 30 April 2001, the Commission entered into an agreement with the Republic of Ecuador, essentially in the same terms as the US-EU Agreement, bringing to an end the banana dispute between that country and the Community.

Facts and procedure

37 Comafrica SpA and Dole Fresh Fruit Europe Ltd & Co. ('the applicants') are companies registered in Italy and Germany respectively. They are members of the Dole group of companies (Dole group), which is headed by the Dole Food Company

Corp., established in California (United States of America). The Dole group is engaged worldwide in the business of producing, processing, distributing and marketing, among other things, fresh fruit and vegetables, including bananas.

38 The applicants are registered as traditional operators A/B in Italy and Germany, pursuant to Article 3 of Regulation No 896/2001.

39 On 6 June 2001, the Bundesanstalt für Landwirtschaft und Ernährung (Federal Agriculture and Food Authority), the relevant national authority for the Federal Republic of Germany, informed Dole Fresh Fruit Europe Ltd & Co. ('Dole') of its share of the A/B tariff quota for traditional operators for the second half of 2001, as calculated in accordance with Regulations No 896/2001 and No 1121/2001 ('the contested regulations').

40 On 8 June 2001, the Ministerio del commercio con l'estero (Ministry of External Trade), the relevant national authority for the Italian Republic, informed Comafrica SpA ('Comafrica') of its share of the aforesaid A/B tariff quota for the second half of 2001, as calculated in accordance with the contested regulations.

41 By application lodged at the Court Registry on 19 June 2001, the applicants brought the present action.

42 By separate document lodged at the Registry on 21 June 2001, the applicants applied for interim relief in the form of an order suspending the contested regulations in so far as they affect them and, alternatively, a suspension with effect *erga omnes*.

43 By order of 12 September 2001 in Case T-139/01 R *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-2415, the President of the Court of First Instance dismissed that application and reserved the costs.

44 By a document lodged at the Registry of the Court on 5 October 2001, the Kingdom of Spain applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission. The Commission and the applicants lodged their observations in respect of that application on 18 and 22 October 2001 respectively.

45 By a document lodged at the Registry of the Court on 25 October 2001, Simba SpA ('Simba') applied for leave to intervene in the present proceedings in support of the form of order sought by the applicants. The applicants and the Commission lodged their observations in respect of that application on 9 and 23 November 2001 respectively.

46 By letter lodged at the Registry of the Court on 22 October 2001, the applicants applied for confidential treatment of certain parts of their application vis-à-vis the Kingdom of Spain. By letter lodged at the Registry on 9 November 2001, they made the same application in respect of Simba.

47 By order of the Fifth Chamber of 27 February 2002 (Case T-139/01 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2002] ECR II-799), the Court granted the Kingdom of Spain permission to intervene in support of the form of order sought by the Commission. It also granted Simba permission to intervene in support of the form of order sought by the applicants. As Simba's application to intervene was not lodged until after the expiry of the period referred to in Article 116(6) of the Rules of Procedure, Simba was permitted to submit its observations at the oral hearing, on the basis of the Report for the Hearing to be sent to it. Lastly, the Court acceded to the application for confidential treatment vis-à-vis the Kingdom of Spain.

48 The Kingdom of Spain lodged its statement in intervention on 21 March 2002, in response to which the applicants and the Commission submitted their observations on 5 June 2002.

49 Upon reading the Report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the main parties to reply in writing to certain questions, which they did within the prescribed time-limit.

50 The parties presented oral argument and replied to the questions of the Court at the hearing on 18 November 2003.

Forms of order sought

51 The applicants claim that the Court should:

— declare the action admissible;

— annul the contested regulations in so far as they affect them or, in the alternative, annul those regulations *erga omnes*;

— order the Commission to pay them compensation for the damage suffered following the adoption of the contested regulations;

— order the Commission to pay the costs.

52 The Commission contends that the Court should:

— dismiss the claim for annulment as inadmissible or, in the alternative, as unfounded;

— dismiss the claim for compensation as unfounded;

— order the applicants to pay the costs.

53 The Kingdom of Spain contends that the Court should:

— dismiss the claim for annulment as inadmissible or, in the alternative, as unfounded;

— dismiss the claim for compensation as unfounded;

— order the applicants to pay the costs.

54 Simba claims that the Court should:

— annul the contested regulations;

— order the Commission to pay the costs.

Admissibility of the claim for annulment

Arguments of the parties

Regulation No 896/2001

55 The applicants submit in the first place that they are individually concerned by Regulation No 896/2001.

56 First, they assert that that regulation should be regarded as a bundle of individual decisions.

57 They point out in that regard that the group of operators defined by Article 4(1) of Regulation No 896/2001, of which they are a part, constitutes a 'fixed and closed class'. That provision only applies to those traditional operators with reference quantities under category A(a) for the period 1994 to 1996 'as taken into account for 1998'.

58 The applicants maintain that when the Commission adopted Regulation No 896/2001, it knew the names and total number of the operators belonging to that group as well as their individual reference quantities for 1994 to 1996 since they had been registered in 1998. The Commission therefore knew 'which operators would be entitled to licences and the level of that entitlement'. The applicants assert that the effect of that regulation was to fix directly the final reference quantity of each of those operators because Article 4(1) of that regulation provides that that quantity corresponds to the reference quantity based on the primary imports made in 1994 to 1996 and taken into account for 1998 and that neither the Commission nor the relevant authorities of the Member States are permitted to amend or correct those figures. The applicants put forward the same arguments in support of their claim that the operators knew their final reference quantities which would be allocated to them once Regulation No 896/2001 was adopted.

59 According to the applicants, the fact that an adjustment coefficient may subsequently be applied is irrelevant in that this 'does not alter the basic premiss that each individual reference quantity was fixed in 1998'. The Commission cannot rely either on the fact that it could not foresee in advance which operators would submit a written application. The Commission confuses the individual nature of the rights granted by Regulation No 896/2001 with the choice belonging to the beneficiary as to whether or not to exercise those rights.

60 Lastly, the applicants submit that the Commission cannot base an argument on the judgment in Case C-73/97 P *France* v *Comafrica and Others* [1999] ECR I-185, since the case giving rise to that judgment did not concern a challenge to an implementing regulation of the Commission, such as Regulation No 896/2001, but to a regulation setting the standard reduction coefficient for 1994. They add that, contrary to the situation in that case, Regulation No 896/2001 does not in any way authorise the Commission or the relevant national authorities subsequently to change the operators' individual reference quantity.

61 Secondly, the applicants submit that Regulation No 896/2001 contains specific provisions which clearly show that it was not drafted in abstract terms and that it expressly took account of 'individual traditional operators' who 'have been specifically identified'.

62 Thirdly, the applicants submit that they are two of the 'four selected US operators' mentioned in a document submitted by the Commission in the course of the negotiations resulting in the US-EU Agreement, appearing in Annex 7 to the application, which 'determines the total reference quantities of four operators in the regulation'. They claim that that agreement was 'implemented into EC law' by Regulation No 896/2001 and that the purpose of those two measures was to ensure that the 'four selected US operators' could continue to supply a certain quantity of bananas to the Community by granting them a certain number of import licences. The US trade representative negotiated the settlement of the dispute relating to the bananas COM with the intention of 'protecting' those four operators. The applicants insist that the US-EU Agreement constitutes a negotiated settlement between the United States of America and the Community.

63 Fourthly, the applicants allege that they are distinguishable from all other persons affected by Regulation No 896/2001. In support of that assertion they allege that:

— they are traditional operators, not non-traditional ones;

— they belong to that 'small group' of traditional operators which were allocated category A(a) reference quantities in 1998 as opposed to those operators which were allocated category A(b) or A(c) reference quantities in 1998;

— Regulation No 896/2001 is specifically designed to exclude those operators who were holders of category A(b) or A(c) reference quantities in 1998 and 'limit the number of entitled operators to the small group of category A(a) operators'.

64 The applicants claim in the second place that they are directly concerned by Regulation No 896/2001 in that there is no act of any intermediate authority involved in the determination of their rights.

65 They point out in that regard that there is a key distinction between that regulation and the regulations at issue in the cases giving rise to the judgments in *France* v *Comafrica and Others*, cited above, and the judgment in Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, in that the latter regulations contained all the provisions to make it possible to check whether the operators' applications for reference quantities contained any errors and, if necessary, to correct those errors. They state that such errors could be corrected at any stage of the procedure up to the setting of the adjustment coefficient and that, when those regulations were published, the applicants for import licences were therefore unsure whether the reference quantity figures sought would be subsequently changed. On the other hand, the applicants claim that when Regulation No 896/2001 was adopted and/or published, all the applicants knew to what reference quantity they were entitled, without any possibility of subsequent alteration by the Commission or the relevant national authorities, 'even if they suspected, knew or ought to have known those figures to be inaccurate'.

66 The applicants add that the present case may also be distinguished from that giving rise to the judgment in Case C-354/87 *Weddel* v *Commission* [1990] ECR I-3847). They explain that in that case, the Member States set the final reference quantity, whereas, in the present case, the reference quantity was already set by Regulation No

896/2001 itself, leaving only an adjustment coefficient to be applied in the event that the sum of the reference quantities applied for was not equal to the total available quota.

67 The Commission and the Kingdom of Spain contend in the first place that the applicants are not individually concerned by Regulation No 896/2001.

68 Firstly, they point out that that regulation is a legislative act of general application and cannot be regarded as a bundle of individual decisions. It lays down general rules applying to all operators seeking to obtain a reference quantity for the importation of bananas in 2001. Moreover, it applies to objectively determined situations and entails legal effects for categories of persons considered in the abstract.

69 The Commission challenges the applicants' claim that Regulation No 896/2001 applies to a 'fixed and closed class' of operators, whose names and details are known to the Commission. It points out that it is settled case-law that the general applicability and therefore the legislative nature of a measure are not called into question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, as long as it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, paragraph 100). However, Regulation No 896/2001 applies to the applicants and to all traditional operators 'by virtue of the fact that they have applied for a reference quantity with the intention of ensuring that the tariff quota is not exceeded'.

70 The Commission adds that, when adopting the regulation, it did not know precisely the category of the operators who would apply for a reference quantity under the 2001 regime. It points out in that regard that some of the operators who had sought a reference quantity for 1998 had, in the meantime, ceased to trade or had merged with other operators and that it had no means of knowing who their successors were. Similarly, some operators may have opted to register as non-traditional category A/B operators, rather than traditional operators under that category. The Commission also states that Article 4 of Regulation No 896/2001 does not automatically allocate a reference quantity to each traditional operator who had received a reference quantity in 1998 since operators were required to submit a written application to that end by 11 May 2001. It submits that it could not predict the effect that Regulation No 896/2001 would have on individual operators since the reference quantity to be allocated to each of them depended on the overall level of applications. Thus, it notes that the reference quantities applied for by traditional category A/B operators amounted to 1 964 000 tonnes whereas, if all the traditional A/B operators who were entitled to apply had done so, that figure would have been 1 971 000 tonnes.

71 Secondly, the Commission submits that the applicants do not specify which provisions of Regulation No 896/2001 clearly show that it was not drafted in abstract terms. In any event, that regulation contains no provision which could either expressly or impliedly identify the applicants or any other specific operator or entail their being treated differently from any other traditional operator.

72 Thirdly, the Commission denies that the US-EU Agreement was negotiated specifically to protect the position of 'four selected [US] operators', including the applicants. It acknowledges that the 2001 regime was adopted partly to reflect the 'agreement entered into' with the United States of America, but points out that it is clear that it was intended above all to enforce the provisions of Regulation No 404/93, and, ultimately, Article 33 EC. It states that it is not able to confirm whether the US trade representative negotiated the settlement of the dispute over the bananas COM with the aim of achieving a particular outcome favourable to the applicants. In any event, the position adopted by a third country in the course of negotiations has no bearing on the question whether an applicant is individually

concerned by a regulation. It further stresses that the negotiations between the Community and the United States of America were 'political negotiations in the public international law sphere' and that the applicants were not in any way involved in them.

73 Fourthly, the Commission and the Kingdom of Spain contend that the applicants have not produced other evidence to show that they are affected by Regulation No 896/2001 by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons.

74 Fifthly, the Commission observes that, contrary to what the applicants imply in their reply, it does not place any reliance on the judgment in *France* v *Comafrica and Others* in order to support its assertion that the latter are not individually concerned by Regulation No 896/2001.

75 The Commission contends in the second place that the applicants are not directly concerned by Regulation No 896/2001 since their legal position, so far as concerns their reference quantity, may be defined at the earliest only once all the applications for the allocation of reference quantities under Article 4(1) of Regulation No 896/2001 have been submitted and processed and an adjustment coefficient established.

Regulation No 1121/2001

76 The applicants claim that they are directly and individually concerned by Regulation No 1121/2001. They consider that they satisfy the criteria for admissibility defined by the Court in its judgments in *Weddel* v *Commission* and *France* v *Comafrica and Others*.

77 They explain in this regard that:

— the adjustment coefficient referred to by that regulation is calculated using two variables: the total reference quantity and the total available quota;

— the total reference quantity is the sum of the individual reference quantities of each of the traditional operators;

— the Commission was aware of those individual reference quantities before setting the adjustment coefficient;

— the publication of the adjustment coefficient enabled each operator directly to know its final reference quantity and its entitlement to import licences since it knew, before that coefficient was set, the reference quantity for 1998 and that quantity could not be changed.

78 They assert that, unlike the 1993 and 1999 regimes, the 2001 regime does not provide any system for checking and correcting the information supplied. They add that 'the adjustment coefficient was only applicable to those operators who had applied for licences on the basis of their reference quantity'. In their view, 'it was a wholly closed group' and it involved 'the application of whatever applicable coefficient was applied to known operators and known reference quantities'.

79 The Commission and the Kingdom of Spain submit that the action for annulment, in so far as it is directed against Regulation No 1121/2001, must be held inadmissible in view of the judgments in *France* v *Comafrica and Others* and *Comafrica and Dole Fresh Fruit Europe* v *Commission*.

80 The Commission accepts that the 1993 and 1999 regimes, at issue in the cases which gave rise to the judgments cited above, differ from the 2001 regime but it considers that the reasoning which prompted the Community Court to find the applications in those cases inadmissible also apply in the present case. It observes in that regard that 'the procedure for determining the coefficient and its effect on operators are basically the same in the 2001 regime as in the earlier regimes'. It explains that, in each regime, the reduction/adjustment coefficient is fixed by dividing the amount of the total available quota by the sum of the reference quantities for which valid applications have been made, and is applied by the relevant authorities in the Member States to the reference quantity for each operator as calculated by those authorities. Those same authorities then notify each operator of the reference quantity established at the end of the financial year.

81 Referring to paragraph 106 of the judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, the Commission submits that the purpose and legal effect of the adoption of the adjustment coefficient was not to decide the outcome of the individual applications lodged with the relevant national authorities but to address the objective factual situation of an excess of the total Community reference quantity over the tariff quota. In its judgment in *Weddel* v *Commission*, whilst the Court acknowledged that the contested regulation consisted of a bundle of individual decisions, it was because, by adopting that regulation, the Commission had in fact decided on the treatment to be given to the individual operators' applications, unlike in the present case.

82 The Commission adds that, in its order in Case C-351/99 P *Eridania and Others* v *Council* [2001] ECR I-5007, paragraphs 53 to 55, the Court confirmed that the

judgment in *Weddel* v *Commission* only dealt with certain specific situations in which individual rights were granted. However, in the present case, according to the Commission, the allocation of reference quantities to the applicants does not confer on them any right to import bananas but merely limits the volume of bananas that they could import under tariff quotas. It points out that conversion of the adjusted reference quantity into import licences and use of them require that an application for import licences be submitted.

83 The Commission further observes that when it set the adjustment coefficient in question it did not have data on the individual reference quantities in fact claimed by each operator in 2001, since the Member States were only required to communicate the sum of those quantities. It could not therefore know exactly what effect setting the adjustment coefficient would have on the individual operators.

84 Lastly, the Commission contends that, should it become apparent that the data on which the reference quantities for 2001 are based are flawed, despite their already having been the subject of extensive checking previously, the Member States would be obliged to make appropriate corrections thereto. It concludes from this that, 'while major changes to the "provisional" reference quantity of an operator may be less likely than in previous years, the fact remains that simple application of the adjustment coefficient to the reference quantity applied for will not inevitably permit an operator to calculate its final reference quantity for 2001'.

Findings of the Court

85 The fourth paragraph of Article 230 EC provides that any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The nature of the contested regulations

86 The applicants call into question the legislative nature of the contested regulations and submit that they should be regarded as a bundle of individual decisions.

87 It should be noted in this connection that, according to settled case-law, the criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the act in question (see the orders of the Court of Justice in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 28, and in Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 33). A measure is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in general and in the abstract (see Case T-482/93 *Weber* v *Commission* [1996] ECR II-609, paragraph 55, and the case-law there cited).

88 In the present case, as regards, first, Regulation No 896/2001, it cannot be denied that this is a legislative measure of general application (orders of the Court of First Instance in Case T-178/01 *Di Lenardo* v *Commission*, not published in the ECR, paragraph 47, and Case T-179/01 *Dilexport* v *Commission*, not published in the ECR, paragraph 47). The rules it contains are stated in general terms, they apply to objectively determined situations and they produce legal effects with respect to categories of persons envisaged in general and in the abstract.

89 It should also be noted that, according to Article 1, the purpose of that regulation is to lay down 'detailed rules for applying the arrangements for importing bananas under the tariff quotas provided for in Article 18(1) of Regulation [No 404/93, as amended by Regulation No 216/2001], and also outside those quotas'. It was adopted by the Commission on the basis of Article 20 of Regulation No 404/93, as

amended by Regulation No 216/2001. That article confers on the Commission the power to adopt detailed rules for applying Title IV of that regulation, including rules on the management of the tariff quotas referred to in Article 18.

90 Article 2 of Regulation No 896/2001 provides that 83% of those tariff quotas are to be made available to traditional operators and 17% to non-traditional operators. Those two categories of operator are defined on the basis of purely objective criteria set out in Articles 3 and 6 of that regulation, and are not in any way based on assessments linked to the specific position of each operator (see, to that effect, the orders in *Di Lenardo* v *Commission*, paragraph 46, and *Dilexport* v *Commission*, paragraph 46). The same applies in respect of the definitions of 'traditional operator A/B' and 'traditional operator C' in Article 3 of Regulation No 896/2001, which takes account of the minimum quantity of primary imports of third-country bananas and/or non-traditional ACP bananas, in the first case, or of traditional ACP bananas, in the second case, in accordance with the definitions in Article 16 of Regulation No 404/93, as amended by Regulation No 1637/98.

91 Regulation No 896/2001 defines the rules for admission to those various categories of tariff quota on the basis of general and abstract information, without any regard for the situation of the individual operators such as the applicants. Essentially, it lays down in general and abstract terms the way in which the reference quantity for traditional operators and the annual allocation to non-traditional operators are to be determined, together with the registration procedure for the latter category of operators, and sets out the rules for issuing import licences.

92 Lastly, Regulation No 896/2001 sets out, again in general and abstract terms, the rules applicable to imports of bananas outside the tariff quotas.

93 The applicants' argument to the effect that the regulation contains specific provisions which show that it was not drafted in abstract terms and that it expressly took account of 'each of the traditional operators who have been expressly identified' is therefore wholly unfounded. It should further be noted that the applicants make no attempt to identify the particular provisions to which they thus refer.

94 Assuming that the applicants rely on Article 4(1) of Regulation No 896/2001 in this regard, it should be noted that that provision is obviously a measure of general application. It sets out in general and abstract terms the way in which the reference quantity for traditional operators A/B is determined by stipulating, first, that the person concerned must submit a written application to that effect by 11 May 2001 at the latest and, second, that that quantity is to be calculated using 'the average of primary imports of third-country bananas and/or non-traditional ACP bananas during 1994, 1995 and 1996 taken into account for 1998 for the purposes of administering the tariff quota for imports of third-country bananas and non-traditional ACP bananas, in accordance with the provisions of Article 19(2) of Regulation ... No 404/93 applicable in 1998 to the category of operators referred to in paragraph 1(a) of that article'. Those criteria apply without distinction to all traditional operators A/B, who are defined in general and abstract terms and on the basis of purely objective data in Article 3 of Regulation No 896/2001 (see paragraph 90 above). It is therefore undeniably a measure which applies to an objectively defined situation and entails legal effects in respect of categories of persons defined in general and abstract terms. It concerns not only the applicants but also every other economic agent in a similar situation.

95 That conclusion cannot be undermined by the applicants' argument that when the Commission adopted Regulation No 896/2001, it knew the names and total number of operators covered by Article 4(1) of that regulation. In the first place, that argument is unfounded. When that regulation was adopted, the Commission did not, and could not know, with certainty, which operators would submit applications for allocation of a reference quantity within the time-limit expiring on 11 May 2001. In particular it could not assume that all traditional operators A/B with a category A (a) reference quantity for 1998 would apply for a reference quantity under the 2001

regime. Moreover, as the Commission rightly points out, some operators who had obtained a reference quantity for 1998 might have subsequently ceased trading or merged with other operators. In the second place, the applicants' argument is any way irrelevant. Even if it were shown that the persons to whom Article 4(1) of Regulation No 896/2001 applies were identifiable when it was adopted, its legislative scope cannot be questioned given that, as stated at paragraph 94 above, that provision refers only to objective situations of fact or law (see, to that effect, the orders in *CNPAAP* v *Council*, paragraph 35, and Case T-113/99 *Galileo and Galileo International* v *Council* [2000] ECR II-4141, paragraph 47, confirmed by the order in Case C-96/01 P *Galileo and Galileo International* v *Council* [2002] ECR I-4025).

96 Nor are the applicants entitled to claim that Article 4(1) of Regulation No 896/2001 had the effect of directly fixing the final reference quantity for each of the traditional operators A/B and of enabling them, and the Commission, to know that reference quantity from the time that regulation was adopted. At that stage, the reference quantity referred to by that provision could only be provisional in that, if there were to be a discrepancy between the total reference quantities requested by the traditional operators A/B and the available tariff quota quantities, that reference quantity would be subject to an adjustment coefficient set by the Commission (see Article 5(2) of Regulation No 896/2001). However, when Regulation No 896/2001 was adopted, neither the Commission nor the traditional operators A/B could foresee that there would be such a discrepancy or, a fortiori, its extent given that, as noted at paragraph 95 above, those operators had until 11 May 2001 to submit their applications for a reference quantity and there were no grounds for assuming that they would all do so. In the present case, as the Commission stated without contradiction by the applicants, the sum of the reference quantities sought by the traditional operators A/B within that time-limit was lower than it would have been had all the traditional operators A/B entitled to make such an application in fact done so.

97 Secondly, the applicants dispute the legislative nature of Regulation No 1121/2001, relying, essentially, on the principles laid down by the Court of Justice in *Weddel* v *Commission* and *France* v *Comafrica and Others*.

98 First, they insist that that regulation only applies to a fixed and closed class of legal persons to which they belong.

99 It is true that Regulation No 1121/2001 in fact applies only to operators who submitted a written application to the relevant national authorities in the past, that is, by 11 May 2001 at the latest; any application made after that date cannot be taken into account. Moreover, Regulation No 1121/2001 applies only to operators who satisfy a number of procedural and substantive conditions.

100 However, it is settled case-law that the general scope of a measure is not called in question by the fact that it is possible to determine the number or even the identity of the persons to whom it applies at a given moment with a greater or lesser decree of precision as long as it is established that it is applied by virtue of an objective legal or factual situation defined by the measure in relation to the objective of the latter (Case C-209/94 P *Buralux and Others* v *Council* [1996] ECR I-615, paragraph 24, and the order in Case T-183/94 *Cantina cooperativa fra produttori vitivinicoli di Torre di Mosto and Others* v *Commission* [1995] ECR II-1941, paragraph 48).

101 That is indeed the case here. Regulation No 1121/2001 seeks in general terms to ensure the proper implementation of the rules for the management of the tariff quota regime set up by Regulation No 896/2001. That regime is based on a division of the tariff quotas between two categories of operator, namely traditional and non-traditional operators and on separate management rules for A and B tariff quotas, on the one hand, and for the C tariff quota on the other. The purpose of Regulation No

1121/2001 is to make an overall adjustment of the reference quantities sought by the traditional operators A/B and by the traditional operator C to the available quantities of the A/B and C tariff quotas. Thus, in respect of traditional operators A/B, Article 1(1) of that regulation sets an adjustment coefficient of 1.07883 to be applied to their individual reference quantity because the sum of the reference quantities applied for under Article 4(1) of Regulation No 896/2001 turned out to be lower than the available quantities of the tariff quotas.

102 Second, the applicants emphasise the differences between the 1993 and 1999 regimes, on the one hand, and the 2001 regime on the other. More particularly, they submit that, unlike the two other regimes, the 2001 regime provides no means by which the Commission or the relevant national authorities can check and, if necessary, correct the reference quantity sought by each operator.

103 It should be noted in this connection that the 1993 and 1999 regimes do in fact differ from the 2001 regime as regards the determination of the reference quantity for the category A operators (in the 1993 regime) or traditional operators (in the 1999 and 2001 regimes). As was explained in paragraph 103 of the judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, under the 1993 and 1999 regimes, the Commission and the relevant national authorities actively carried out checks and, where necessary, corrected the operators' individual reference quantities so as to eliminate cases of double counting. By contrast, in the case of the 2001 regime, the reference quantities of the traditional operators A/B are fixed on the basis of historical data relating to primary imports, already checked and, where necessary, corrected under the preceding regimes. Accordingly, neither Article 4(1) of Regulation No 896/2001 nor any other provision of that regulation makes express provision for the Commission or the relevant national authorities to carry out further verification or correction of those data. Of course, an operator could not legitimately base an application for the allocation of a reference quantity on manifestly erroneous or fraudulent data. If evidence of such error or fraud were found, the Commission or the relevant national authorities would have to make the necessary corrections, even in the absence of any express provision to that effect in Regulation No 896/2001. In the present case, it appears however that no new

correction was in fact made in respect of data relating to traditional operators A/B. The only example that the Commission could give on that subject in response to a written question from the Court is not convincing, as it concerns a case in which it had decided to correct the total amount notified to it by the French authorities, in accordance with Article 5(1) of Regulation No 896/2001, following the discovery not of a fraudulent or exaggerated declaration by an operator or an incidence of double counting, but an error of interpretation on the part of those authorities of Article 4(1) of the same regulation.

104 However, it cannot be inferred from the abovementioned differences between the 1993 and 1999 regimes, on the one hand, and the 2001 regime, on the other, that Regulation No 1121/2001 should be regarded as a bundle of individual decisions concerning each of the traditional operators A/B, including the applicants.

105 As already stated at paragraph 101 above, Regulation No 1121/2001 was adopted in the light, not of the specific situation of traditional operators A/B, but of an objective factual situation, namely the fact that the sum of the reference quantities notified globally to the Commission by the Member States pursuant to Article 5(1) of Regulation No 896/2001 was less than the available amount of the tariff quotas. In other words, the adjustment coefficient of 1.07883 set by Regulation No 1121/2001 is the result of a simple mathematical calculation and not of an assessment of the individual situation of each traditional operator A/B. It applies equally to all traditional operators A/B who had applied for a reference quantity before 11 May 2001. The purpose and legal effect of the adoption of Regulation No 1121/2001 are not therefore to decide on the treatment of the individual applications lodged by operators with the national competent authorities (see, to that effect, the judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, paragraph 106).

106 It must be concluded from the foregoing that the contested regulations are legislative in nature and of general application.

The applicants' standing to bring an action

107 It should be noted that a measure of general application such as a regulation may, in certain circumstances, be of individual concern to certain natural or legal persons and thus in the nature of a decision in their regard (see, in particular, Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13; Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 19; and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 36). This is so where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision (see, in particular, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; Case C-452/98 *Nederlandse Antillen* v *Council* [2001] ECR I-8973, paragraph 60; and *Unión de Pequeños Agricultores* v *Council*, paragraph 36).

108 In the present case, as regards, first, Regulation No 896/2001, it has been found at paragraphs 88 to 92 and 94 above that the rules it contains, in particular in Article 4 (1), are set out in general terms, apply to objectively defined situations and entail legal effects in respect of categories of persons defined in general and abstract terms. That regulation concerns the applicants only in their objective capacity as traditional operators A/B, on the same basis as every other operator in that category.

109 That conclusion is not undermined by the applicants' argument based on the table in Annex 7 to the application. That table shows, for the years 1989 to 1996, the total amount of the reference quantities for category A(a) operators, that is, the primary importers, the total amount of the reference quantities for 'four selected operators' and the percentage arising from the relationship between the second and first amounts. The Commission does not dispute that 'the four selected operators' are the applicants and two undertakings belonging to the Chiquita group. However, even if shown to be true, the fact that the overall data for those operators were examined by

the Commission and the US trade representative during the negotiations to resolve the dispute over the bananas COM does not in any way imply that Regulation No 896/2001 was adopted so as to bring about a particular result in favour of those operators and, in particular, to ensure that they were allocated a certain number of import licences, as the applicants allege. Similarly, the mere fact that the Commission possessed information about the primary imports made, inter alia, by the applicants does not suffice either to distinguish them for the purposes of Regulation No 896/2001 from every other operator concerned by that regulation.

110 It is necessary to distinguish between two situations. First, where, as in the present case, the legislature examines market information and data in order to ensure that the market situation is correctly taken into account in the provisions and objectives of the measure it intends to adopt, and, second, where the legislature adopts a measure so as to bring about a specific result in favour of particular persons, which is not the situation in the present case.

111 The applicants cannot rely either on the fact that they belong to the traditional operators' category, as opposed to that of non-traditional operators, and to the 'small group' of operators with category A(a) reference quantities in 1998, in order to claim that they are distinct from all other operators concerned by Regulation No 896/2001 (see paragraph 63 above).

112 As is apparent from paragraphs 13 and 90 above, it is precisely on the primary distinction between traditional operators and non-traditional operators that the system for allocating tariff quotas introduced by Regulation No 896/2001 is based. Those two categories of operator are categories of person defined in general and abstract terms (see paragraph 90 above). The objective quality of the applicants as traditional operators does not therefore distinguish them for the purposes of Regulation No 896/2001.

113 The same conclusion applies in respect of the applicants' argument that they belong to the 'small group of operators' with category A(a) reference quantities in 1998. Whilst it is true that, under Regulation No 896/2001, only the primary importers may be treated as traditional operators and that the latter's reference quantity is fixed on the basis of the average of primary imports made from 1994 to 1996 and taken into account in 1998, it remains the case that those are general and abstract criteria (see paragraphs 90 and 94 above). The evidence put forward by the applicants does not therefore distinguish them.

114 Second, as regards Regulation No 1121/2001, it suffices to find that the applicants neither show nor allege that they are affected by that regulation by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.

115 It follows from the foregoing considerations that the contested regulations are measures of general application and that the applicants are not affected by them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually. The applicants cannot therefore be regarded as individually concerned by the contested regulations. Since they do not satisfy one of the conditions for admissibility under the fourth paragraph of Article 230 EC, it is not necessary to consider whether the contested regulations directly concern them.

116 It follows that, in so far as it seeks the annulment of the contested regulations, the action must be dismissed as inadmissible.

The claim for compensation

Arguments of the parties

117 The applicants submit that, by providing in Regulation No 896/2001 that the reference quantity for traditional operators A/B is to be established on the basis of the average of primary imports of third-country bananas and/or non-traditional ACP bananas during 1994, 1995 and 1996 taken into account in 1998 for the purposes of managing the tariff quota for imports of third-country bananas and non-traditional ACP bananas and, in the light of the total of the reference quantities thus determined, Regulation No 1121/2001, the Commission acted unlawfully with harmful consequences. They consider that the conditions for the Community to incur non-contractual liability are met.

118 First, the applicants submit, primarily, that the contested regulations are not legislative measures involving economic policy choices and that, by adopting them, the Commission was guilty of an 'administrative failure'.

119 They allege that the data relating to primary imports of bananas between 1994 and 1996, taken into account for 1998, are seriously defective. In many cases, the quantities declared at the time by the operators were fraudulently inflated by them or were counted twice. In their application, they consider that the average margin of error ('overclaims in relation to licences used') for 1994, 1995 and 1996 is 23.98%. In their reply, they reduce that margin to 13.6%.

120 The applicants submit that the Commission knew that those data were inaccurate and that it in fact admitted an average margin of error of about 11% in the course of the interim proceedings. They criticise the fact that the Commission nevertheless decided to use those data in the contested regulations, and without making provision for itself or for the Member States to verify them and, if necessary, correct them. According to the applicants there is no legal or practical impediment to such verification or correction. In so doing, the Commission failed to carry out its duty 'to determine the adjustment coefficient in accordance with the law' and has not lawfully managed the bananas COM.

121 The applicants consider that the Commission cannot rely on the fact that the 1994 to 1996 reference period was the last period for which it possessed sufficiently verified data on primary imports. They submit that the margin of error for 1994 was particularly high and that, if the Commission had chosen the three-year period 1995 to 1997, the average margin of error would have been smaller. They dispute the Commission's assertion that the years 1994 to 1996 were the most recent years for which data on primary imports were available, claiming that such data were also available for 1997 and 1998, even if they had not yet been verified by the Commission and the relevant national authorities. Lastly, they consider that the Commission cannot derive support from the findings of the Court of First Instance in paragraph 149 of its judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission.*

122 Should the Court find that the contested regulations are legislative measures involving economic policy choices, the applicants submit, in the alternative, that the Commission has committed a sufficiently serious breach of a superior rule of Community law for the protection of individuals. They allege, more particularly, an infringement of the principle of good administration or of 'the principle according to which the application of Community law ought to be certain and foreseeable' (see the judgment of the Court of Justice in Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091). According to the applicants 'an institution shall not adopt an act in reliance on facts which it knows, or manifestly ought to have known, to be wrong, particularly when such act will affect the rights of individuals'.

123 Second, the applicants claim to have suffered damage by reason of the adoption of the contested regulations consisting, first, in the loss of the right to import certain quantities of bananas.

124 Thus, in their application, they consider that in 2001 they lost the right to import the following quantities of bananas: [...] [1] tonnes in the case of Comafrica and [...] tonnes in the case of Dole. They arrive at those figures on the basis of the following calculations:

— the overall available tariff quota for 2001 was 2 553 000 tonnes;

— the available tariff quota for traditional operators A/B was 83% of that quantity, or 2 118 990 tonnes;

— during the reference period 1994 to 1996, import licences were used in respect of 1 590 050 tonnes;

— the adjustment coefficient should therefore have been set at 1.3327;

— the average of the imports made by Comafrica in the reference period was [...] tonnes;

1 — Confidential data omitted.

— by applying the adjustment coefficient of 1.3327 to that quantity, Comafrica was entitled to submit an application for licences in respect of [...] tonnes;

— by applying the adjustment coefficient of 1.07883 laid down by Regulation No 1121/2001 to the abovementioned quantity of [...] tonnes, Comafrica was entitled to submit an application for licences in respect of [...] tonnes only;

— the average of the imports made by Dole during the reference period was [...] tonnes;

— by applying the adjustment coefficient of 1.3327 to that quantity, Dole was entitled to submit an application for licences in respect of [...] tonnes;

— by applying the adjustment coefficient of 1.07883 laid down by Regulation No 1121/2001 to the abovementioned quantity of [...] tonnes, Dole was entitled to submit an application for licences in respect of [...] tonnes only.

125 In their reply, the applicants admit that their estimate of the number of overclaims, as stated in the application, does not take account of imports into Austria, Finland and Sweden (see paragraph 133 below). They allege that the Commission admits 'an [average] overclaim level of 11.24%' for the years 1994 to 1996 and suggests that that percentage serve as a basis for calculating their loss. Moreover, they refer to the data and information on the loss contained in their application for interim measures, and propose to update them.

126 In their observations on the statement in intervention of the Kingdom of Spain, the applicants suggest updating the data and information contained in their application. Lastly, in their reply to one of the written questions which the Court had put to them (see paragraph 49 above), the applicants recognise that they forgot to take into account, in their calculation of that first head of damage, the provisions of Article 28 (2) of Regulation No 896/2001 and adjust the figures in their application as a result.

127 Second, the applicants claim a 'loss of the future entitlement in respect of lost volumes'.

128 Third, they submit that the use of unlawful reference quantities also led to a reduction of their market share.

129 Lastly, the applicants seek an order that interest be added to such compensation as they may receive.

130 Thirdly, in respect of causation, they submit that, in the absence of the unlawful measures adopted by the Commission under Regulations No 896/2001 and No 1121/2001, they could have obtained higher reference quantities and, as a result, a greater entitlement to import licences.

131 The Commission rejects those claims.

132 First, it submits that it cannot be criticised for any unlawful conduct. It emphasises that it has a wide margin of discretion in relation to the common agricultural policy and can therefore only be held to be non-contractually liable as a result of a sufficiently serious breach of a rule of law intended to confer rights on individuals.

133 The Commission denies that the average margin of error is 23.98% for the three-year period and is greater than 50% for 1994. It notes, more particularly, that the figures put forward by the applicants for 1994 do not take account of the imports to Austria, Finland and Sweden which, at the time, were not members of the Community.

134 The Commission, referring to Article 19(1) of Regulation No 404/93, as amended by Regulation No 216/2001, states that the tariff quotas could be administered by applying the method based on taking into account traditional trade flows, which it elected to do. It explains that it thus decided to have regard to the historical data available and that the best data available were necessarily those which had already been notified and verified for the purpose of allocating reference quantities in earlier years. The years 1994 to 1996 were the most recent for which such data were available, 1998 being the last year in which the 1993 regime was applicable and in respect of which data on primary imports had been used. The Commission insists that those data had been carefully examined and corrected and emphasises that the figures given by it 'in relation to the possible level of inaccuracies in the 1994-96 figures' had already been accepted by the Court of First Instance in its judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*. It further states that use of the data for the years 1994 to 1996 allowed the new and essentially transitional system to be established rapidly and that it was considered appropriate to retain a three-year reference period, as before, since that levelled out fluctuations in the banana market from one year to the next.

135 The Commission challenges the substance of the applicants' claim that data on primary imports were also available for 1997 and 1998. It states that, by fax of 24 May 2000, it requested all Member States to provide it with data for quantities traded by primary importers in 1997 and 1998 or, where appropriate, to let it know if such data were unavailable. Seven Member States did not reply. With regard to the remainder of the Member States, the situation was as follows:

— the Hellenic Republic and the Republic of Finland provided overall figures on primary imports without breaking them down by operator;

— the Republic of Austria provided details on the overall level of imports only;

— the other Member States, with the exception of the Italian Republic, replied that data provided by their operators for 1997 were never verified by the competent authorities, while the 1998 data were never collected;

— no data for 1997 were available for the Portuguese Republic;

— only the Italian Republic was able to provide data, albeit incomplete, for 1997 and 1998, pointing out that this was a simple transmission of raw data by the Italian operators which had not been verified by the relevant authorities.

136 As for the complaint that the Commission did not reserve for itself the possibility of verifying the accuracy of the data notified, the Commission points out that the system for establishing reference quantities provided for by Regulation No 896/2001 does not depend on applications based on new data, but on data for the period from 1994 to 1996. Those data had already been thoroughly checked by the Member States and the Commission, as the Court of First Instance found in its judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*. It states that whilst it is true that those data were not perfect, in that judgment, the Court nevertheless found that the reasons put forward justifying those imperfections were valid and accepted that use of that data was not manifestly inappropriate.

137 As regards the criticisms levelled by the applicants against Regulation No 1121/2001, the Commission contends that they are based on the erroneous hypothesis that Regulation No 896/2001 is unlawful.

138 Second, as regards the loss alleged, the Commission submits, first, that the applicants' claim that their market share has decreased is vague in the extreme and should therefore be dismissed as inadmissible. As for the damage in the form of the loss of entitlement to import certain quantities of bananas, it argues that 'the reference quantities only provide for an opportunity to apply for import licences'. In that regard, it points out that the amounts for which the applicants claim that they should have had a reference quantity, as well as those for which under Regulation No 1121/2001 they have obtained such a quantity, are significantly higher than the amounts that they in fact imported from 1994 to 1996. Conversely, the applicants were not prevented from importing certain quantities of bananas as a result of the fact that they had not been allocated a sufficiently large reference quantity because they could have acquired additional import entitlements from third parties. The Commission concludes that the applicants have not provided an adequate basis for assessing the damage they allegedly suffered and, more generally, they have not sufficiently substantiated their claim for damages.

139 The Kingdom of Spain submits that no unlawful conduct can be attributed to the Commission in the present case. It refers, more particularly, to the findings made by the Court in paragraphs 149 and 150 of its judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*.

140 Furthermore, it considers that the applicants have not adduced evidence to establish the existence and extent of the loss which they claim to have suffered or the existence of a causal link between the Commission's allegedly unlawful conduct and that loss.

Findings of the Court

141 According to settled case-law, in order for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC a number of conditions must be satisfied: the alleged conduct of the institutions must be unlawful, there must be actual damage and there must be a causal link between the alleged conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20). If any one of those conditions is not satisfied, the action for damages must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

142 In the present case, it is necessary to consider the claim for compensation in the light of the first of those conditions, concerning the existence of unlawful conduct. On that point, the case-law requires that there be a sufficiently serious breach of a

rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). As regards the requirement that the breach be sufficiently serious, the decisive test for finding that it is fulfilled is whether the Community institution concerned manifestly and seriously disregarded the limits on its discretion. Where that institution has only a considerably reduced discretion, or even none, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, paragraph 134, and Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission* [2004] ECR II-521, paragraph 71).

143 The unlawful conduct alleged in the present case is, essentially, that, in Regulation No 896/2001, the Commission, for the purposes of establishing the reference quantity of the traditional operators A/B, used the average of the primary imports of bananas from third countries and/or non-traditional ACP bananas by those importers in the years 1994 to 1996 and taken into account during 1998 even though it knew that those data were incorrect, and failed to lay down a mechanism for checking and correcting those data. In so doing, the Commission is said to be guilty variously of an 'administrative failing' or of an infringement of the principle of sound administration or of 'the principle that the application of Community legislation must be certain and foreseeable'.

144 Having regard to the criteria laid down in the case-law cited at paragraph 142 above, it is necessary to determine whether the infringement is sufficiently serious or not. It is therefore necessary to examine each of the contested regulations in turn.

145 First, in the case of Regulation No 896/2001 it is undeniable that this was adopted by the Commission in the exercise of a broad discretion (see, to that effect, Case

C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 89, and Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraphs 57 and 71).

146 That regulation is based on Article 20 of Regulation No 404/93, as amended by Regulation No 216/2001, and that article confers on the Commission the power to adopt, inter alia, rules for the management of the tariff quotas. Article 19 of that regulation allows a broad discretion to the Commission as to the method to be applied for carrying out such management (see, to that effect, *Di Lenardo and Dilexport*, paragraph 57). Article 19(1) provides that such management 'may be ... in accordance with the method based on taking account of traditional trade flows ("traditionals/newcomers") and/or other methods'. The only restriction on that broad discretion is contained in Article 19(2), which states that '[t]he method adopted shall take account as appropriate of the need to maintain the equilibrium of supply to the Community market'.

147 In the exercise of the broad discretion thus conferred on it, the Commission decided, when adopting Regulation No 896/2001, to implement from 1 July 2001 and on a transitional basis until 1 January 2006 at the latest, a method of allocating import licences based, to a large extent, on historical data and on a distinction between 'traditional operators' and 'non-traditional operators', the former defined as carrying out primary imports of bananas.

148 It should be stated, first, that there is no basis for criticising the Commission's choice in adopting that method as opposed to any of the other methods which had previously been considered, and, in particular, that based on the 'first come, first served' rule. It must be emphasised in this regard that the adoption of Regulation No 896/2001 occurred at the end of complex and delicate international negotiations, in the course of which widely opposing points of view were expressed and had to be

reconciled. The Commission had to take account not only of the interests of the Community producers, but also of its obligations towards the ACP States and the Community's international obligations within the WTO.

149 Next, the choice for the method of allocating licences adopted by the Commission, of the years 1994 to 1996 as the reference period for the definition of categories of operator and the determination of the reference quantities for the traditional operators does not appear to be manifestly inappropriate.

150 First, it cannot be denied that the choice of an earlier period would not have been appropriate in the light, more particularly, of the fact that the common system for the import of bananas introduced by Regulation No 404/93 only came into force on 1 July 1993. Before that date, the importation of bananas into the Community was subject to legal regimes which varied, sometimes markedly, from one Member State to another.

151 Second, as is stated in recital 5 of Regulation No 896/2001, the most reliable historical data on primary imports in the Commission's possession when it adopted Regulation No 896/2001 were those for the years 1994 to 1996. Such data were used in the 1993 regime, which laid down a system of allocating import licences based in particular on a subdivision of the A and B categories according to three different economic activities, including primary imports (activity 'a') (see paragraph 11 above). Moreover, at the time those data were the subject of detailed verification and, where necessary, correction, both by the relevant national authorities and by the Commission. In the case of the latter, it should be noted that, in paragraph 146 of the judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, the Court

of First Instance found that the Commission '[had] exercised considerable diligence and care in checking and correcting discrepancies in the figures sent by the competent national authorities and in eliminating double counting'.

152 It is true that those checks did not enable all cases of double counting to be eliminated, for the reasons set out in paragraph 147 of the judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*. A margin of error therefore persisted, in particular in respect of the data on primary imports. The parties thus agree that, in the years 1994 to 1996, the quantities of bananas imported under category A(a) licences were lower than the reference quantities declared by the operators in question and that the average margin of error was therefore of the order of 11%. However, in spite of those shortcomings, the data in question give a good general overview of the situation on the banana market in the Community in the period in question.

153 Third, the Commission cannot be criticised for having included 1994 in the reference period, in spite of the fact that it was particularly affected by the discrepancies criticised by the applicants. First, it could not have used the years 1995 to 1997 as the reference period because, in spite of its efforts to that effect, it had not been able to obtain from the Member States reliable and complete data on primary imports in 1997. That is clearly shown by the evidence submitted by the Commission in support of its assertions and set out at paragraph 135 above. In their reply, the applicants expressly acknowledge that the data on primary imports for 1997 and 1998 had not been checked either by the relevant national authorities or by the Commission. Second, it would not have been appropriate merely to choose a two-year period such as the years 1995 and 1996. As the Commission rightly pointed out, taking a three-year period gives a more representative view of the banana market since the fluctuations on that market are reduced from one year to the next. It must be added that under the 1993 and 1999 regimes, the allocation of

import licences was already made on the basis of the quantities of bananas sold (1993 regime) or in fact imported (1999 regime) during a three-year reference period.

154 Fourth, the 2001 regime is meant to be a transitional regime and the fact that available data already carefully checked in the past were taken into account enabled it to be implemented rapidly.

155 Fifth, the choice of the years 1994 to 1996 as the reference period was made in the context of complex and delicate international negotiations and is one of the factors likely to resolve the dispute over bananas lasting for several years between the Community, on the one hand, and the United States of America and the Republic of Ecuador on the other.

156 Lastly, as regards the applicants' criticisms of the lack of a mechanism for checking and correcting the reference quantities of the traditional operators in Regulation No 896/2001, it suffices to note that, in principle, such a mechanism was not justified under the 2001 regime, since the data on which those quantities were based had already been the subject of detailed checks and, where necessary, corrections in the past (see paragraph 151 above). A large margin of error did indeed exist but that was inevitable and should be accepted for the reasons set out at paragraphs 149 to 155 above. Moreover, it is doubtful, given the time which elapsed since the start of the reference period and the absence of any duty on the part of the operators and the Member States to retain the supporting documentation relating to imports of bananas made during the years 1994 to 1996, that new checks would have been possible or at least that they would have enabled a substantial number of further discrepancies in the notified figures to be detected. In any event, as already found at paragraph 103 above, if the data appeared to be manifestly incorrect or fraudulent,

the Commission or the relevant national authorities were bound, even in the absence of any express provision to that effect in Regulation No 896/2001, to make the necessary corrections.

157 It follows from all of the foregoing considerations that the Commission has not manifestly and seriously infringed the limits placed on its discretion by adopting Regulation No 896/2001. It follows that it cannot be criticised in that respect for any unlawful conduct such as to cause the Community to incur non-contractual liability.

158 Second, in the case of Regulation No 1121/2001, it will be noted that this was adopted in the light of Article 4(1) and (2) and Article 5(1) and (2) of Regulation No 896/2001. The Commission is required in accordance with Article 5(2) of Regulation No 896/2001, to set an adjustment coefficient if there is a discrepancy between the sum of the reference quantities referred to in Article 4(1) and (2) of the same regulation that each Member State notified to it and the available quantities of the tariff quotas. It does not therefore have any discretion as to the appropriateness of fixing the adjustment coefficient or as to the choice of the quantities to be taken into account in that respect. Consequently, in the case of the adoption of Regulation No 1121/2001, a mere infringement of Community law may suffice in any event to found the Community's non-contractual liability.

159 The unlawful conduct which the applicants allege against the Commission in relation to Regulation No 1121/2001 is based on the premiss that Regulation No 896/2001 is unlawful in that it provides for the taking into account, for the purposes of establishing the reference quantity for traditional operators A/B, of data relating to primary imports made by those operators in the years 1994 to 1996 without providing for any mechanism for checking and correcting those data. In the light of the considerations set out in paragraphs 145 to 157 above, the Commission did not

act unlawfully in adopting Regulation No 896/2001. It follows that the Commission cannot be criticised in respect of Regulation No 1121/2001 for any unlawful conduct such as to cause the Community to incur non-contractual liability.

160 In the light of all the foregoing considerations, the claim for compensation must be rejected as unfounded without the need to consider the other conditions for founding non-contractual liability on the part of the Community.

161 For the sake of completeness it should be noted, however, that the applicants do not satisfactorily demonstrate the existence and extent of the damage they allege.

162 Firstly, in the case of the damage consisting of the loss of the right to import certain quantities of bananas in 2001, there are several objections both to the position they adopt to demonstrate the existence of that loss and to the way in which they calculate it.

163 First, the applicants submit that, whilst the reference quantity of the traditional operators A/B was established on the basis of accurate data, the adjustment coefficient to be applied to that reference quantity was set not at 1.07883 but at 1.3327. They claim to have lost 'entitlements to import' bananas amounting to the difference between the quantity obtained by applying to their respective reference quantity, namely the average primary imports of bananas which they carried out during the years 1994 to 1996, the coefficient of 1.3327, and that obtained by applying the coefficient of 1.07883 to the same reference quantity.

164 Even if the figures and calculations put forward by the applicants were accurate, the fact that they obtained an individual reference quantity lower than that which they could have claimed if a higher adjustment coefficient had been applied does not necessarily mean that they suffered a corresponding loss. It must be remembered that the reference quantity is not in itself an entitlement to import bananas but merely a reference basis for subsequent operations, that is, in particular, the application for and the allocation of import licences. An operator will not necessarily apply for import licences for the full amount of the reference quantity which has been allocated to it. As the Commission rightly points out, it must also have a sufficient quantity of bananas to be imported under those licences and reasonable prospects of selling them in the Community. In the present case, the applicants gave no indication to that effect. A more detailed demonstration of the existence of that loss was required, particularly in view of the fact that for the relevant period (the second half of 2001) the adjustment coefficient set by Regulation No 1121/2001 was positive. In other words, the individual reference quantity allocated to the applicants was in fact greater than the primary imports they had made during the reference period. By taking account of the adjustment coefficient which they claim should be applied, their individual reference quantity is markedly greater still.

165 It should further be noted that Article 14(2) of Regulation No 896/2001 states that '[f]or the first three quarters of the year, it may be decided that applications for licences submitted by a given operator may not in total exceed a set percentage of the reference quantity fixed under Article 5 or the annual allocation fixed under Article 9(3)'.

166 Second, the applicants demonstrate a total lack of seriousness and rigour in their calculation of the loss of entitlement to import certain quantities of bananas in 2001. Thus, in their reply, they admitted that they had failed to take account of the imports

into Austria, Finland and Sweden in 1994 and that they had, therefore, greatly overestimated the average margin of error referred to in their application. That therefore fell from 30.4% to 13.6%. In their reply, they propose at the same time to use, in calculating their loss, 'the rate of 11.24%' accepted by the Commission in the course of the interim proceedings and to update the data and information contained in their application for interim measures. Next, in their reply to one of the written questions put to them by the Court of First Instance (see paragraph 49 above), the applicants admitted that they had failed to take account in their calculation of the provisions of Article 28(2) of Regulation No 896/2001 and that the figures referred to in the application concern the whole of 2001 whereas Regulation No 896/2001 only applied from the second half of that year. They therefore apply the coefficient of 0.4454 laid down by that provision to the quantities of bananas which, in their application, they alleged not to be able to import and thus arrive at [...] tonnes for Comafrica and [...] tonnes for Dole. In addition to the fact that, once again, that is a substantial reduction of their claim, the applicants base their new calculation on data for the year 1994 which, in their reply, they had however admitted to be greatly overstated. In other words, in addition to the fact that it is impossible to determine with certainty what is the final basis of calculation proposed by the applicants, it is in any event founded on inaccurate figures.

167 Second, as regards the second and third heads of alleged loss, consisting of 'the loss of the future entitlement in respect of lost volumes' and of the reduction of their market shares, the applicants plead them in extremely vague terms, without setting out clearly the evidence which would enable an assessment to be made of their nature and extent and without specifying the criteria on the basis of which they should be calculated.

168 It follows that it has not been demonstrated that the second condition for the Community to incur extra-contractual liability has been satisfied. For that reason also the claim for compensation must be rejected as unfounded.

The request for measures of inquiry

169 The applicants ask that the Court, by way of measures of inquiry, order the Commission:

— to confirm that the four operators referred to in Annex 7 to the application include the applicants;

— to provide information on the use of import licences in the years 1994 to 1996, on the figures for the imports in fact made and on the method by which it arrived at its own estimate of the level of overclaims.

170 The Commission opposes that request.

171 The Court finds that there is no need to accede to the applicants' request for measures of inquiry since the evidence in the file and the explanations tendered at the hearing are sufficient to enable it to give judgment in the present case.

172 In the light of all the foregoing considerations, the action must be dismissed in its entirety.

Costs

173 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful and the Commission has asked for costs to be awarded against them, they will be ordered to pay the Commission's costs, including those relating to the interim proceedings, as well as bearing their own.

174 The Kingdom of Spain shall bear its own costs, in accordance with the first paragraph of Article 87(4) of the Rules of Procedure.

175 Simba shall bear its own costs, in accordance with the third paragraph of Article 87 (4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses as inadmissible the claim for annulment;

2. Dismisses as unfounded the claim for compensation;

3. Orders the applicants to bear their own costs and those incurred by the Commission in the main proceedings and in the interim proceedings;

4. Orders the intervening parties to bear their own costs.

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 3 February 2005.

H. Jung P. Lindh

Registrar President