JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

10 February 2004 *

In Joined Cases T-64/01 and T-65/01,

Afrikanische Frucht-Compagnie GmbH, established in Hamburg (Germany),

Internationale Fruchtimport Gesellschaft Weichert & Co., established in Hamburg,

represented by G. Schohe, lawyer, with an address for service in Luxembourg,

applicants,

v

Council of the European Union, represented by S. Marquardt and J.-P. Hix, acting as Agents,

* Language of the case: German.

and

Commission of the European Communities, represented by G. Braun and M. Niejahr, acting as Agents, with an address for service in Luxembourg,

defendants,

APPLICATION for compensation for the loss allegedly suffered by the applicants in the determination of their reference quantities for 1999,

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

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

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2003,

gives the following

Judgment

Legal framework

Regulation (EEC) No 404/93

1 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), implemented, in Title IV, with effect from 1 July 1993, a common arrangement for trade with third countries in place of the various national arrangements. A distinction was drawn between 'Community bananas' harvested in the European Community, 'third-country bananas' originating from third countries other than the African, Caribbean and Pacific (ACP) States, 'traditional ACP bananas' and 'non-traditional ACP bananas'. Traditional ACP bananas and non-traditional ACP bananas corresponded respectively to the quantities of bananas exported by the ACP countries which did not exceed or which exceeded the quantities traditionally exported by each of those States, as laid down in the Annex to Regulation No 404/93.

2 The original version of Article 18(1) of Regulation No 404/93 provided for an annual tariff quota of two million tonnes (net weight) for imports of third-country bananas and non-traditional ACP bananas. Within the framework of the

tariff quota, imports of third-country bananas were subject to a duty of ECU 100 per tonne and imports of non-traditional ACP bananas were subject to a zero duty. The original version of Article 18(2) of that regulation provided that imports of non-traditional ACP bananas and imports of third-country bananas imported apart from the tariff quota were subject to duties of ECU 750 per tonne and ECU 850 per tonne, respectively.

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

Regulation (EEC) No 1442/93

4 For the implementation of Regulation No 404/93, the Commission adopted Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6, 'the 1993 regime'). That arrangement remained in effect until 31 December 1998 (see paragraph 24 below).

5 Article 3(1) of Regulation No 1442/93 defined as Category A or B 'operators' for the purposes of Articles 18 and 19 of Regulation No 404/93, economic

agents who had engaged in one or more of the following activities on their own account:

'(a) the purchase of green third-country and/or ACP bananas from the producers, or where applicable, the production, consignment and sale of such products in the Community;

(b) as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community; the risks of spoilage or loss of the product being equated with the risk taken on by the owner;

(c) as owners, the ripening of green bananas and their marketing within the Community'.

6 Operators carrying out activities (a) and (b) described in the preceding paragraph are referred to, in what follows, as 'primary importers' and 'secondary importers' respectively.

7 Article 4(1) of Regulation No 1442/93 provided:

'The competent authorities of the Member States shall draw up separate lists of operators in Categories A and B and the quantities which each operator has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described in Article 3(1) ...'

8 Under Article 5(1) of Regulation No 1442/93, each year the competent authorities were to establish for each Category A and Category B operator registered with them, the average quantities marketed during the three years prior to the year preceding that for which the tariff quota was opened, broken down by the economic activity carried out by the operator in accordance with Article 3(1) of that regulation.

9 Article 5(2) of Regulation No 1442/93 provided that the quantities marketed were to be multiplied by weighting coefficients depending on the economic activity as referred to in Article 3(1) of that regulation as follows:

— activity (a): 57 %,

— activity (b): 15 %,

— activity (c): 28 %.

10 Article 6 of Regulation No 1442/93 provided:

'Depending on the annual tariff quota and the total reference quantities of operators as referred to in Article 5, the Commission shall fix, where appropriate,

a single reduction coefficient for each category of operators to be applied to operators' reference quantities to determine the quantity to be allocated to each.

The Member States shall determine the quantities for each operator in Categories A and/or B registered with them and shall notify the latter thereof ...'

Transitional measures following the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Community

11 In 1994 and 1995, the Commission adopted transitional measures in order to facilitate the transition from the arrangements existing in the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (hereinafter 'the new Member States') prior to their accession to the Community to those resulting from the application of the common organisation of the market in bananas. It thus adopted the following regulations:

— Commission Regulation (EC) No 3303/94 of 21 December 1994 introducing transitional measures for imports of bananas into Austria, Finland and Sweden in the first quarter of 1995 (OJ 1994 L 341, p. 46);

— Commission Regulation (EC) No 479/95 of 1 March 1995 introducing transitional measures for the application of the tariff quota arrangements for the import of bananas as a result of the accession of Austria, Finland and Sweden for the second quarter of 1995 (OJ 1995 L 49, p. 18);

— Commission Regulation (EC) No 1219/95 of 30 May 1995 adopting transitional measures for the application of the tariff quota arrangements for imports of bananas for the third quarter of 1995 as a result of the accession of Austria, Finland and Sweden (OJ 1995 L 120, p. 20);

— Commission Regulation (EC) No 1924/95 of 3 August 1995 laying down transitional measures for the application of the tariff quota arrangements for imports of bananas as a result of the accession of Austria, Finland and Sweden (OJ 1995 L 185, p. 24).

12 Article 3(1) of Regulation No 479/95 provided:

'The Community operators who have marketed in the new Member States during the three years of the reference period 1991, 1992 and 1993 bananas originating in third countries other than the [ACP] States, the ACP States and bananas harvested in the Community, shall request their registration with the competent authorities of the Member States by 15 March 1995 at the latest ...'

13 Article 4(1) of Regulation No 3303/94 and Article 1(1) of Regulations Nos 479/95 and 1219/95 provided that for the first, second and third quarters of 1995 respectively the competent authorities of the new Member States were to authorise the operators established on their territory who had imported bananas in 1991 and/or 1992 and/or 1993 to import bananas originating in third countries up to a limit of certain fixed quotas.

14 The third and fourth subparagraphs of Article 4(1) of Regulation No 3303/94 and the third and fourth subparagraphs of Article 1(1) of Regulations Nos 479/95 and 1219/95 provided:

'Each operator's authorisation to import may not cover a quantity greater than [30 %, 27 % and 25 % respectively] of the average of the annual quantities imported by him in the years 1991, 1992 and 1993.

This authorisation shall not predetermine the reference quantity to be allocated to the operator in question for 1995 pursuant to Article 6 of [Regulation No 1442/93].'

15 Article 1 of Regulation No 1924/95 provided for the opening of a tariff quota of 353 000 tonnes (net weight), additional to the tariff quota provided for in Article 18 of Regulation No 404/93, for 1995 for imports into the new Member States of bananas from third countries and of non-traditional ACP bananas. The quantities already imported into those three Member States in accordance with Regulations Nos 3304/94, 479/95 and 1219/95 were to be set against that additional quantity.

16 Article 2 of Regulation 1924/95 provided:

'For the fourth quarter of 1995, import licences shall be issued with a view to the release for free circulation in [the new Member States] of bananas from third countries and non-traditional ACP bananas, up to the amount of:

(a) 91 500 tonnes by the competent authorities of the Member States to operators who have marketed the bananas referred to above in [the new

Member States] during the reference period 1991, 1992 and 1993 and are registered in accordance with Article 3 of Regulation ... No 479/95;

(b) 2 500 tonnes to operators established in [the new Member States] and who there satisfy the requirements of Article 3(5) of Regulation ... No 1442/93 and are registered pursuant to Article 4.'

17 Under Article 3 of Regulation 1924/95:

'1. In accordance with Article 2(a) above, operators may request, for the fourth quarter of 1995, one or more import licences in respect of a total quantity determined on the basis of the annual average quantity of bananas marketed, within the meaning of Article 3(1) of Regulation ... No 1442/93, in the new Member States during the years 1991, 1992 and 1993, multiplied by the weighting coefficients fixed in Article 5(2) of that regulation and following application, where necessary, of the reduction coefficient set by the Commission pursuant to paragraph 3.

...

3. Where the aggregate of the quantities determined for the operators concerned pursuant to paragraph 1 exceeds 91 500 tonnes, the Commission shall fix a standard reduction coefficient to be applied to the quantity determined for each operator.'

18 Article 6 of Regulation No 1924/95 provided:

'On the determination of reference quantities in respect of any period that includes 1995, the rights of all operators who have supplied the new Member States, for the whole of 1995, shall be determined in accordance with Articles 3 and 5 of Regulation ... No 1442/93.'

Regulation (EC) No 1637/98

19 Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation No 404/93 (OJ 1998 L 210 p. 28) introduced changes to the common organisation of the market in bananas, with effect from 1 January 1999. In particular, it introduced new provisions to replace Articles 16 to 20 of Title IV of Regulation No 404/93.

20 Article 16 of Regulation No 404/93, as amended by Regulation No 1637/98, provided:

'...

For the purposes of [the provisions of Title IV of Regulation No 404/93]:

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

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

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

21 Article 18(1) of Regulation No 404/93, as amended by Regulation No 1637/98, provided that a tariff quota of 2 200 000 tonnes (net weight) was to be opened each year for imports of third State and non-traditional ACP bananas. Under that tariff quota, imports of third State bananas were subject to a duty of ECU 75 per tonne, while imports of non-traditional ACP bananas were free of duty.

22 Article 18(2) of that regulation, as amended by Regulation No 1637/98, provided that an additional tariff quota of 353 000 tonnes (net weight) was to be opened each year for imports of third-country and of non-traditional ACP bananas. Imports of third State bananas under that tariff quota were subject to a duty of ECU 75 per tonne, while imports of non-traditional ACP bananas were free of duty.

23 Article 19(1) of Regulation No 404/93, as amended by Regulation No 1637/98, provided:

'The tariff quotas indicated in Article 18(1) and (2) and imports of traditional ACP bananas shall be managed in accordance with the method based on taking account of traditional trade flows ("traditionals/newcomers").

The Commission shall adopt the implementing arrangements required under the procedures set out in Article 27.

Where necessary, other suitable methods may be adopted.'

Regulation (EC) No 2362/98

24 On 28 October 1998, the Commission adopted Regulation (EC) No 2362/98 laying down detailed rules for the implementation of Regulation No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32, hereinafter 'the 1999 regime'). Under Article 31 of Regulation No 2362/98, Regulation No 1442/93 was repealed with effect from 1 January 1999.

25 Under the 1999 regime, the distribution of the tariff quota amongst the three different categories of operators (A, B or C) and the subdivision of the Category A and B operators according to their functions were abolished. That regime distinguished between 'traditionals' and 'newcomers'.

26 Thus Article 2 of Regulation No 2362/98 provided, *inter alia,* that the tariff quotas and the traditional ACP quantities, the former established under Article 18(1) and (2) and the latter under Article 16 of Regulation No 404/93, as amended by Regulation No 1637/98, were to be made available as follows:

— 92 % to 'traditional operators' as defined in Article 3;

— 8 % to 'newcomers' as defined in Article 7.

27 Article 3 of Regulation No 2362/98 provided:

'For the purposes of this Regulation, "traditional operators" shall mean economic agents established in the European Community during the period for determining their reference quantities, and also at the time of their registration under Article 5 below, who have actually imported a minimum quantity of third-country and/or ACP-country bananas on their own account for subsequent marketing in the Community during a set reference period.

...'

28 Article 4 of Regulation No 2362/98 read as follows:

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

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

29 Article 5 of Regulation No 2362/98 provided:

'...

2. For the purposes of determining their reference quantity, each operator shall send to the competent authority by 1 July each year:

(a) a figure for the total quantity of bananas from the origins listed in Annex I actually imported during each of the years making up the reference period;

(b) the supporting documents detailed in paragraph 3.

3. Actual imports shall be attested by both of the following:

(a) by presenting copies of the import licences used; by the holder ... in order to release the relevant quantities for free circulation; and

(b) by presenting proof of payment of the customs duties due on the day on which customs import formalities were completed. The payment shall be made either direct to the competent authorities or via a customs agent or representative.

Operators furnishing proof of payment of customs duties, either direct to the competent authorities or via a customs agent or representative, for the release into free circulation of a given quantity of bananas without being the holder or transferee holder of the relevant import licence used for this purpose ... shall be deemed to have actually imported the said quantity provided that they have registered in a Member State under Regulation ... No 1442/93 and/or that they fulfil the requirements of this Regulation for registration as a traditional operator. Customs agents or representatives may not call for the application of this subparagraph.

4. For operators established in [the new Member States], proof of the quantities released into free circulation in those ... States ... in 1994, and in 1995 up to the third quarter thereof, shall be furnished by presenting copies of the relevant customs documents and import permits issued by the competent authorities and duly used.'

Facts and procedure

30 The applicants are undertakings established in Hamburg (Germany) which import and market third-country bananas in *inter alia* the new Member States. They were mainly primary importers and, to a lesser extent, secondary importers.

31 By applications lodged at the Registry of the Court of First Instance on 20 March 2001 and registered as Cases T-64/01 and T-65/01, the applicants brought these actions for damages.

32 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure in the two cases. By way of measures of organisation of procedure, the applicants were asked to reply to certain questions at the hearing.

33 By order of 28 April 2003 of the President of the Fifth Chamber of the Court of First Instance, after the views of the parties had been heard, Cases T-64/01 and T-65/01 were joined for the purposes of the oral procedure and judgment on account of the connection between them, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

34 The parties presented oral argument and replied to questions put by the Court at the hearing on 6 May 2003.

Forms of order sought

35 In Case T-64/01, the applicant claims that the Court should:

— declare the action admissible;

— order the Council and the Commission to pay it the sum of EUR 1 358 228 together with interest thereon at the rate of 3.75 % per annum as from the date of this judgment and also interest by way of compensation for the monetary devaluation which has occurred since 1 January 1999;

— declare that the Council and the Commission are required to compensate it for all further damage suffered or to be suffered by it as a result of the adoption of Regulations Nos 1637/98 and 2362/98;

— order the parties to inform the Court of First Instance, within such period as it shall determine, of those amounts under the third head of claim in respect of which they have reached agreement or, in the absence of such an agreement, to lodge their quantified claims within the same period;

— reserve its decision as to costs.

36 In Case T-65/01, the applicant claims that the Court should:

— declare the action admissible;

— order the Council and the Commission to pay it the sum of EUR 3 604 232 together with interest thereon at the rate of 2.9 % per annum as from the date of judgment in this case and interest to offset the inflation which has occurred since 1 January 1999;

— declare that the Council and the Commission are required to compensate it for all further damage suffered or to be suffered by it as a result of the adoption of Regulations Nos 1637/98 and 2362/98;

— order the parties to inform the Court of First Instance, within such period as it shall determine, of those amounts under the third head of claim in respect of which they have reached agreement or, in the absence of such an agreement, to lodge their quantified claims within the same period;

— reserve its decision as to costs.

37 In both cases, the Council contends that the Court should:

— dismiss the actions as inadmissible in so far as they are directed against the Council;

— dismiss the actions as unfounded;

— order the applicants to pay the costs.

38 In both cases, the Commission contends that the Court should:

— dismiss the actions as unfounded;

— order the applicants to pay the costs.

Admissibility

39 Although it has not raised a formal plea of inadmissibility under Article 114(1) of the Rules of Procedure, the Council challenges the admissibility of the applications in so far as they are directed against it. It observes that, with the exception of the plea alleging unlawful delegation of its powers to the Commission, the applicants challenge only measures attributable to the Commission and, more specifically, certain provisions of Regulation No 2362/98. It states that, according to the case-law, only the institutions of the Community, which must be distinguished from the Community as such, may be defendants to a direct action (Case T-572/93 *Odigitria* v *Council and Commission* [1995] ECR II-2025, paragraph 22; and order in Case T-201/99 *Royal Olympic Cruises and Others* v *Council and Commission* [2000] II-4005, paragraph 20).

40 The applicants contend that the plea of inadmissibility of the actions resulting from the inadmissibility of their applications is unfounded. They submit that the actions have been brought against the Community pursuant to the second paragraph of Article 288 EC and that, in this case, the Community is represented not only by the Commission but also by the Council. By Regulation No 1637/98, the Council empowered the Commission to adopt Regulation No 2362/98, which is at the root of the alleged loss.

41 In response to those arguments, it is sufficient to note that, by their fifth, sixth and seventh pleas, the applicants expressly challenge the legality of certain aspects of Regulation No 1637/98, which was adopted by the Council.

42 It follows that the Council's plea of inadmissibility based on the inadmissibility of the applications must be rejected.

Substance

43 The applicants base their action principally on the liability of the Community for an unlawful act and, in the alternative, on its liability for a lawful act.

44 It is appropriate, before adjudicating on the various pleas put forward by the applicants in support of their actions, in so far as they are based on the Community's liability for an unlawful act, to set out some preliminary considerations. In their written pleadings, the applicants state on a number of occasions that these actions concern the determination of their reference quantity for 1999, claiming that the 1999 regime had three 'unusual features' which gave operators in the new Member States an advantage over operators in other Member States. Since their criticisms of those three 'particularities' are to be found in several of their arguments and are contested by the Commission, the Court finds it appropriate to begin by considering whether they are founded.

Preliminary considerations

Arguments of the parties

45 The applicants claim that three 'unusual features' of the 1999 regime gave operators in the new Member States an advantage over operators in other Member States.

46 First of all, they criticise the fact that the years 1994 to 1996 were chosen in Article 4(2) of Regulation No 2362/98 as the reference period for the imports to be effected in 1999. Under the 1993 regime, the reference period would have been 1995 to 1997.

47 Second, the applicants state that the 'provisional' quantities of third-country bananas which operators in the new Member States were authorised to import during the first three quarters of 1995 were higher than those which they would have been able to import if, as from 1 January 1995, the tariff quota had been adapted to 'increased need (2 200 000 tonnes + 353 000 tonnes)' and had been distributed among all operators in accordance with Articles 3 and 5 of Regulation No 1442/93. They state that the operators in the new Member States 'have never had to apply those additional quantities to the quantities obtained for subsequent periods or to offset those quantities in some other manner' and that, accordingly, for 1995 they obtained definitively 'quantities higher than those to which they would normally have been entitled under the organisation of the markets'. They infer therefrom that the reference quantities for 1999 were determined on the basis of overly high quantities as regards operators in the new Member States and the year 1995.

48 The applicants rely on the following arguments to demonstrate the existence of those 'additional quantities':

— during the first three quarters of 1995, 90 %, i.e. 1 980 000 tonnes, of the tariff quota of 2 200 000 tonnes had already been used, representing more than 75 % of that tariff quota plus the additional quantity of 353 000 tonnes (2 553 000 tonnes), i.e. 1 914 750 tonnes;

— for those same quarters, the operators in the new Member States obtained, pursuant to Regulations Nos 3303/94, 479/95 and 1219/95, permission to import 'provisional' quantities of third-country bananas, representing up to 82 %, and not just 75 %, of the average annual quantities which they had imported in 1991, 1992 and 1993.

49 In order to demonstrate that operators in the new Member States were able to keep as definitive those 'additional provisional' quantities which had been allocated to them for 1995 and use them for the purposes of determining their reference quantity for 1999, the applicants make the following three points:

— it follows from the sixth and ninth recitals of Regulation No 1924/95 that the Commission took the view that it was not appropriate, at the end of 1995, to distribute the tariff quota of 2 200 000 tonnes plus the additional quantity of 353 000 tonnes amongst all the operators on the basis of the criteria laid down in Articles 3 and 5 of Regulation No 1442/93;

— in order to calculate the 'quantity available for all operators for the fourth quarter [of 1995]', the Commission took full account of those 'provisional' quantities;

— the quantity obtained by deducting from the additional quantity of 353 000 tonnes the total of the 'provisional' quantities (258 671 tonnes) and the quantity allocated to the new operators in the new Member States for the fourth quarter of 1995 (2 500 tonnes) is roughly equal to the quantity

provided for by the Commission in Article 2(a) of Regulation 1924/95 for traditional operators for imports of third-country bananas and non-traditional ACP bananas during the same quarter.

50 Third, the applicants refer to the wording of Article 6 of Regulation No 1924/95 and submit that the reference quantities for 1999 should have been determined according to the allocation formula set out in Articles 3 and 5 of Regulation No 1442/93 and not according to the 'actual importer' criterion referred to in Articles 3 and 5 of Regulation No 2362/98. Relying on a reading of paragraph 3 in conjunction with paragraph 4 of Article 5 of Regulation No 2362/98, they maintain that the application of that criterion had the consequence that the reference quantities for 1999 were reserved to operators in the new Member States, since they were determined on the basis of banana imports into those States in 1994 and the first three quarters of 1995. Whether or not those imports were genuine was determined solely on the basis of presentation of the appropriate customs documents and proof of payment of customs duties, that is to say, evidence which only those operators were capable of submitting, in light of the choice of reference period. Had the reference quantities for 1999 been determined according to the allocation formula set out in Articles 3 and 5 of Regulation No 1442/93, the operators in the new Member States whose activity was limited to payment of customs duties would have at most been regarded as secondary importers and, accordingly, would have obtained only 15 % of the quotas. Conversely, operators who, like the applicants, had made supplies would have been considered primary importers and would therefore have been allocated 57 % of those quotas.

51 First of all, the Commission explains its reasons for choosing the years 1994 to 1996 as the reference period.

52 It states that it was the quantities which were exported to the Community in those years by the countries which were the principal third-country banana

suppliers that served as the basis for calculating the shares of the tariff quotas for those countries and that, accordingly, it could only choose the same reference period for the purpose of granting individual reference quantities to operators.

53 Furthermore, the Commission was obliged to choose the period 1994 to 1996 as the reference period because at the time Regulation No 2362/98 was adopted the definitive figures for imports which had actually entered the Community were available only for that period, because at that time the 1997 figures were only provisional.

54 The Commission adds that, in paragraph 77 of its judgment in Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, the Court of First Instance upheld the lawfulness of the choice of the period 1994 to 1996 as the reference period.

55 Second, the Commission denies that operators in the new Member States obtained 'additional quantities' and states that there was accordingly no need to 'offset' or 'allocate' such quantities in this case.

56 It criticises the applicants' calculations (see paragraph 48 above). The fact that, for the first three quarters of 1995, certificates and import authorisations were granted throughout the Community covering 90 % of the annual tariff quota specifically led to its being increased by an additional quantity of 353 000 tonnes, a quantity corresponding to the needs of the new Member States. Since that quantity was not exceeded, the annual quota of 2 200 000 tonnes remained available in full to traditional operators in the other Member States. During those

same quarters, moreover, operators in the new Member States in fact used only a total of 258 671 tonnes of their import authorisations, or approximately 73 % of the additional quantity.

57 Next, the Commission states that 'the provisional nature of the determination of a quantity does not necessarily imply that it will subsequently be modified'. The term 'provisional' indicates that 'there will subsequently be a definitive determination, but does not mean that that definitive determination will necessarily be preceded by a modification'. It observes that, in Regulations Nos 3303/94, 479/95 and 1219/95, it stated clearly that the grant of import authorisations did not predetermine the reference quantities to be allocated subsequently to operators in the new Member States pursuant to Article 6 of Regulation No 1442/93. The additional quantity of 353 000 tonnes, it adds, was 'cleared' by Regulation No 1924/95.

58 Furthermore, the Commission maintains that the fact that the quantities intended for operators exporting to the new Member States differed from those which they would have obtained on the basis on Articles 3 and 5 of Regulation No 1442/93 is neither surprising nor unlawful, since 'it was precisely in order to deal with the new situation resulting from accession that it was necessary to introduce, by way of derogation from the existing rules, transitional rules setting, in particular, a new, provisional calculation in place of the former one'. In the Commission's submission, this was due to the fact that the new Member States obtained supplies of bananas exclusively from Latin America and had only Category A operators. Accordingly, the inclusion of 1995 in the reference period for the determination of the reference quantities for 1999 cannot be criticised.

59 Third, the Commission contests the assertion that the reference quantities for 1999 should have been determined on the basis of Articles 3 and 5 of Regulation No 1442/93. That regulation was repealed with effect from 1 January 1999 and was replaced by Regulation No 2362/98.

Findings of the Court

60 As regards, first of all, the applicants' criticisms of the choice of the years 1994 to 1996, rather than 1995 to 1997, as the reference period for imports to be effected in 1999, the Court holds that they are unfounded. The applicants have not put forward any evidence to demonstrate the inaccuracy of the Commission's statement that at the time when Regulation No 2362/98 was adopted, it did not yet have the definitive figures for actual imports into the Community in 1997. Nor have they challenged the Commission's explanation that the reference period laid down for operators had to correspond to the period to be taken into account in determining the shares of the tariff quotas for the principal supplier countries (see paragraph 52 above). Lastly, it must be borne in mind that, in paragraph 77 of its judgment in *Cordis* v *Commission*, cited above, the Court of First Instance has already upheld the lawfulness of the choice of the years 1994 to 1996 as the reference period.

61 Second, the applicants have not shown that operators in the new Member States obtained as definitive for 1995 'quantities higher than those to which they would normally have been entitled under the organisation of the markets'.

62 In particular, the two arguments which the applicants put forward in an attempt to establish that the quantities of third-country bananas which those operators were authorised to import during the first three quarters of 1995 were higher than those which they would have been able to import if, as from 1 January 1995, the tariff quota had been increased to 2 553 000 tonnes and had been distributed among all operators on the basis of the criteria laid down in Articles 3 and 5 of Regulation No 1442/93 (see paragraph 48 above) cannot be accepted.

63 These arguments demonstrate a selective reading on the applicants' part of the provisional rules adopted by the Commission following the accession of the new Member States (see paragraphs 11 to 18 above), since they consider the regulations applicable to the first three quarters of 1995, namely Regulations Nos 3303/94, 479/95 and 1219/95, in isolation from Regulation No 1924/95, whereas these different regulations must be considered as a whole.

64 Thus, although it is true that initially the various quotas set by Article 4(1) of Regulation No 3303/94 and by Article 1(1) of Regulations Nos 479/95 and 1219/95 (see paragraph 13 above) for imports of third-country bananas by operators in the new Member States for the first, second and third quarters of 1995 were to be applied to the tariff quota of 2 200 000 tonnes, that situation was changed by Regulation No 1924/95. The additional quantity of 353 000 tonnes introduced by the latter regulation was opened for imports of third-country bananas and non-traditional ACP bananas into the new Member States for the whole of 1995 and the quantities for which import authorisations had already been used for the first three quarters of 1995 were ultimately applied to that additional quantity and not to the tariff quota of 2 200 000 tonnes (see the ninth recital and Article 1 of Regulation No 1924/95). Thus, as rightly pointed out by the Commission, the latter tariff quota remained available in its entirety for operators in the other Member States.

65 The available balance of the additional quantity for the fourth quarter of 1995 was distributed, with 91 500 tonnes going to operators who had marketed third-country and non-traditional ACP bananas in the new Member States during the period 1991 to 1993 and who were registered with the competent authorities of the Member States pursuant to Article 3 of Regulation No 479/95 and 2 500 tonnes going to new operators established in the new Member States (see the 9th and 10th recitals and Article 2 of Regulation No 1924/95). The 91 500 tonnes were distributed amongst the operators concerned on the basis of the average annual quantity of bananas marketed in the new Member States during the years 1991 to 1993 and according to the criteria laid down in Articles 3 and 5 of

Regulation No 1442/93 (see the ninth recital and Article 3(1) of Regulation No 1924/95).

66 Since the reference quantities came to a total of 352 224 tonnes for those operators, the Commission, in order to determine the quantity of third-country bananas or non-traditional ACP bananas to be allocated to each of those operators for the fourth quarter of 1995, applied Article 3(3) of Regulation No 1924/95 in adopting Regulation (EC) No 2008/95 of 18 August 1995 fixing the single reduction coefficient for the determination of the quantity of third country or non-traditional ACP bananas to be allocated to each operator for import into the new Member States for the fourth quarter of 1995 (OJ 1995 L 196, p. 3). By that regulation, it decided that, for the purposes of the additional quantity, '[t]he quantity to be allocated to each operator mentioned in Article 2(a) of Regulation ... No 1924/95 for the period from 1 October to 31 December 1995... shall be calculated by applying to the operator's reference quantity for trade in [the new Member States], determined in accordance with Article 3 of Regulation No 1924/95, the following single reduction coefficient: 0.259778'. It should be borne in mind that, in each of the regulations applicable to the first three quarters of 1995, the Commission had stated that import authorisations granted to operators in the new Member States would not predetermine the reference quantities to be allocated to those operators for 1995 pursuant to Article 6 of Regulation No 1442/93 (see Article 4(1) of Regulation No 3303/94 and Article 1(1) of Regulations Nos 479/95 and 1219/95).

67 It should also be noted that the second argument put forward by the applicants (see paragraph 48 above) is factually incorrect. Although it is true that, pursuant to the regulations applicable to the first three quarters, import authorisations could, for the first three quarters of 1995 and for operators in the new Member States, cover a quantity representing up to 82 % in total of the average annual quantities imported by those operators in 1991, 1992 and 1993 (see paragraph 14 above), it is clear from the third recital of Regulation No 1924/95 that, for the first three quarters of 1995, those authorisations were in fact used for only 258 671 tonnes, or approximately 73 % of that average.

68 Accordingly, the fact that during the first three quarters of 1995, 1 980 000 tonnes of the tariff quota of 2 200 000 tonnes had already been used, that is, a quantity representing more than 75 % of that tariff quota plus the additional quantity of 353 000 tonnes, and that, for the same quarters, import authorisations could, for each of the operators in the new Member States, cover a quantity representing up to 82 % in total of the average annual quantities imported by those operators in 1991, 1992 and 1993 (see paragraph 48 above) does not prove that those operators obtained 'additional' quantities for those quarters, which they were then able to keep definitively.

69 Third, the applicants cannot rely on Article 6 of Regulation No 1924/95 to support their contention that the reference quantities for 1999 should have been determined according to the allocation formula provided for in Articles 3 and 5 of Regulation No 1442/93 and not according to 'actual importer' criterion referred to in Articles 3 and 5 of Regulation No 2362/98. As will be stated more fully in paragraphs 78 to 85 below, Regulation No 1442/93 was repealed with effect from 1 January 1999. Turning more specifically to the applicants' criticisms of the arrangements for furnishing proof for the purpose of the determination of the quantities of bananas actually imported into the new Member States in 1994 and during the first three quarters of 1995, it should be borne in mind that according to Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981, paragraphs 85 to 87, the Commission was fully entitled to adopt such arrangements.

Liability of the Community for an unlawful act

70 It is settled case-law that, 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 conduct alleged against the Community institutions must be unlawful, the damage must be real and there must be a causal link between that conduct and the damage complained of (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] II-1239, paragraph 20).

71 In the present case, it is appropriate to examine the action as regards the first of those conditions. In that respect the case-law requires it to be shown that there has been 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 to be fulfilled is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54; 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, paragraph 134).

72 The applicants put forward seven pleas in law in support of their action in so far as it is based on the Community's liability for an unlawful act:

— a first plea alleging infringement of Article 6 of Regulation No 1924/95 and of the principle of the protection of legitimate expectations;

— a second plea alleging infringement of the principle of legal certainty and of Regulation No 2362/98;

— a third plea alleging infringement of the principle of non-discrimination;

— a fourth plea alleging infringement of the principle of proportionality;

— a fifth plea alleging unlawful delegation of the Council's powers to the Commission;

— a sixth plea alleging infringement of the obligation to state reasons;

— a seventh plea alleging non-compliance with a decision of the Dispute Settlement Body ('DSB') of the World Trade Organisation (WTO).

First plea: infringement of Article 6 of Regulation No 1924/95 and of the principle of the protection of legitimate expectations

— Arguments of the parties

73 The applicants state, first, that the Community infringed Article 6 of Regulation No 1924/95 by determining their reference quantity for 1999 in accordance with the criteria laid down in Articles 3 and 5 of Regulation No 2362/98 and not those laid down in Articles 3 and 5 of Regulation No 1442/93. The reference period for

1999 included 1995 and the applicants had supplied the new Member States during that year. Regulation No 1924/95 was still in force in 1999 and had therefore not become inoperative following the repeal of Regulation No 1442/93 and Article 6 of Regulation No 1924/95 has its own scope and incorporates Articles 3 and 5 of Regulation No 1442/93, to which it refers.

74 The applicants submit, second, that Article 6 of Regulation No 1924/95 created a legitimate expectation on their part as regards the manner in which their reference quantity would be determined for 1999. They maintain that the Commission cannot plead its own conduct, namely the repeal of Regulation No 1442/93, to justify non-compliance with the assurances given. Nor, in the applicants' submission, can the Council and the Commission rely on Article 7 and the 12th recital of Regulation No 1924/95, since Article 7 merely provides for the possibility of increasing the tariff quota for 1995 and the 12th recital refers solely to that article. Lastly, they maintain that the Council and the Commission cannot rely on paragraphs 101 and 102 of *T. Port* v *Commission*, cited above, since Article 6 of Regulation No 1924/95 was not at issue in that case.

75 The Council and the Commission contend that the first plea must be rejected as unfounded.

76 They observe, first, that Regulation No 2362/98 introduced a new arrangement and, by Article 31, repealed Regulation No 1442/93 with effect from 1 January 1999. Article 6 of Regulation No 1924/95, which referred to Regulation No 1442/93, was therefore no longer applicable for the purpose of determining the reference quantities for 1999. The applicants' claim that Regulation No 1924/95 was still in force in 1999 is incorrect, for a number of reasons. First, that regulation contained transitional measures which were necessary owing to the accession of the new Member States to the Community and which

were intended to facilitate the transition from the arrangement existing in those States before their accession to the common organisation of the market in bananas. However that transitional stage had long been completed in 1999. The Commission states that Regulation No 1924/95 was based on Article 149(1) of the Act concerning the conditions of accession of the new Member States and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 9) and that that article provided for the possibility of adopting transitional measures only until 31 December 1997, their application being limited to that date. Second, the Council and the Commission state that the provisions of Regulation No 2362/98 are subsequent legislation and must therefore prevail over any inconsistent provisions of Regulation No 1924/95. Third, the Commission maintains that Article 6 of that regulation was also inapplicable in 1999, for substantive reasons. Once the transitional measures had expired, thus as from 1996, operators in the new Member States were to be treated in the same manner as those in other Member States. Accordingly, Article 6 of Regulation No 1924/95 provided that, even though 1995 was included in the reference period, the reference quantities for operators in the new Member States were to be determined in accordance with the general criteria laid down in Articles 3 and 5 of Regulation No 1442/93. However, since the 1993 regime had, in the meantime, been replaced by the 1999 regime, there was no point in continuing to guarantee the undifferentiated application to all Member States of provisions which had been repealed.

77 Second, the Council and the Commission deny that Article 6 of Regulation No 1924/95 contains assurances as to the determination of reference quantities for 1999. That regulation, in addition to being applicable only within the context of the 1993 regime, was intended to resolve transition-related problems and stated expressly in Article 7 and the 12th recital that its provisions were without prejudice to the decisions which the Council might take and, where appropriate, the rules necessary for their implementation. The Council and the Commission also refer to paragraphs 101 and 102 of *T. Port* v *Commission*, cited above. The Council further maintains that the applicants do not specify the actual measures which they took in reliance on the legitimate expectation to which they refer and which were rendered nugatory by subsequent acts of the Community institutions.

— Findings of the Court

78 The first part of this first plea, alleging the infringement of Article 6 of Regulation No 1924/95, must be rejected as unfounded.

79 Regulation No 2362/98 had introduced, as from 1 January 1999, a new arrangement for the import of bananas into the Community, namely, the 1999 regime, replacing the 1993 regime established by Regulation No 1442/93. The 1999 regime *inter alia* abolished the system of allocating import licences provided for under the 1993 regime, which was based on three categories of operators, on a subdivision according to three different economic activities and on a reference to the three years preceding the year for which the tariff quota was opened, and replaced it with a system based essentially on a distinction between 'traditional operators' and 'newcomers' and on the quantities of bananas actually imported in the period 1994 to 1996. Regulation No 1442/93 was thus expressly repealed as from 1 January 1999 by Article 31 of Regulation No 2362/98. The applicants' reference quantity for 1999 cannot therefore have been determined on the basis of the criteria laid down in Articles 3 and 5 of Regulation No 1442/93.

80 Admittedly, Article 6 of Regulation No 1924/95 provided as follows: 'On the determination of reference quantities in respect of any period that includes 1995, the rights of all operators who have supplied the new Member States, for the whole of 1995, shall be determined in accordance with Articles 3 and 5 of Regulation ... No 1442/93.' It is clear, however, that that provision could apply only within the context of the arrangement established by Regulation No 1442/93, to which it referred, and only during the period when it was in force, that is, until 31 December 1998. That is supported, in particular, by the purpose of Article 6 of Regulation No 1924/95, which was to ensure that, when the transitional measures adopted following the accession of the new Member States ceased to apply, the reference quantities for all operators, including those who had supplied those States in 1995, would be determined precisely in

accordance with the same criteria. As the Commission rightly observes, that purpose became meaningless once the 1993 regime had been abolished and replaced by the 1999 regime.

81 The second part of the first plea, alleging infringement of the principle of the protection of legitimate expectations, must also be rejected as unfounded.

82 It cannot be alleged that Article 6 of Regulation No 1924/95 contained specific assurances which created a legitimate expectation on the part of the applicants as regards the determination of their reference quantity for 1999.

83 It is settled case-law that since the Community institutions enjoy a margin of discretion in the choice of the means needed to implement their policy, operators cannot claim to have a legitimate expectation that an existing situation which is capable of being altered by decisions taken by those institutions within the limits of their discretionary power will be maintained (Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27; and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 80). This is particularly true in an area such as the common organisation of markets, which involves constant adjustments to meet changes in the economic situation (Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraphs 57 and 58; Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 59; and *T. Port* v *Commission*, cited above, paragraph 100).

84 In this case, since the determination of the criteria governing the allocation of rights to licences is one of the choices as to the appropriate means for implementing the policy of Community institutions with regard to the common

organisation of the market in bananas, those institutions had discretion in the matter. That being so, the applicants had no grounds for a legitimate expectation that the allocation criteria adopted under the 1993 regime would be maintained for the purpose of determining their reference quantity in 1999.

85 It follows from all of the foregoing considerations that both parts of the first plea must be rejected as unfounded.

Second plea: infringement of the principle of legal certainty and of Regulation No 2362/98

— Arguments of the parties

86 The applicants state, first, that the Community infringed the principle of legal certainty 'in that it retroactively applied the breakdown coefficient prescribed by Regulation No 2362/98, and more specifically the "actual importer" criterion, to reference quantities for the years 1994 to 1996'. Those quantities were determined at a time when another allocation formula was applicable, namely that provided for in Regulation No 1442/93, and thus gave life to an established situation before the adoption of Regulation No 2362/98.

87 Second, the applicants submit that the Community failed to comply with Regulation No 2362/98 itself because, as that regulation made no provision 'for its retroactive application', it could therefore apply only 'to references which did not constitute established situations'.

88 The Council and the Commission reply, first, that this second plea is based on a misconception of the principle of legal certainty.

89 Second, the Council states that the applicants do not specify which rule has allegedly been infringed by Regulation No 2362/98. The Commission maintains that that regulation is not required to contain any retroactive provision because it has no retroactive effect. The Council and the Commission add that, since that regulation was not applied retroactively, it cannot be alleged that the Community has infringed it.

— Findings of the Court

90 The Court finds that, as the Council and the Commission rightly observe, the applicants' plea alleging infringement of the principle of legal certainty is based on a misconception of that principle. Although that principle precludes the temporal scope of a Community act from commencing at a date before its publication, it does not preclude that act from taking into account, for the purpose of implementing a regime applicable after its publication, certain facts which predate its publication.

91 In this case, Regulation No 2362/98, which had been published in the *Official Journal of the European Communities* on 31 October 1998 and was aimed at introducing a new arrangement for imports of bananas into the Community as from 1 January 1999, applied only to imports of bananas which would be carried out as from that date. The fact that, for the purposes of determining the reference quantity to be attributed to operators under the 1999 regime, Regulation No 2362/98 took into account imports 'actually' carried out during an earlier reference period and laid down certain rules for proving that those imports had in

fact been carried out had no effect on a situation established before the publication of that regulation and, in particular, had no effect on the reference quantities determined under the 1993 regime.

92 Since Regulation No 2362/98 has no retroactive effect, the second part of this second plea must also be rejected. It is clear, for the same reasons, that that regulation was not required to contain any retroactive provision.

93 The plea alleging infringement of the principle of legal certainty and of Regulation No 2362/98 must therefore be rejected.

Third plea: infringement of the principle of non-discrimination

— Arguments of the parties

94 The applicants maintain, first, that operators in the new Member States received better treatment from the Community upon the accession of those States on 1 January 1995 than did operators established in Germany, the Benelux States, Denmark and Ireland when Regulation No 404/93 entered into force on 1 July 1993, even though all of those operators were in a comparable situation. They submit that there was no objective reason to justify such unequal treatment and that the Community was, in reality, 'making a "gift" [to the new Member States] in order to induce those countries, in the accession negotiations, to agree to the organisation of the market'.

95 Second, they state that, as regards the determination of the reference quantities for 1999, operators in the new Member States were given an advantage over operators established in Germany, the Benelux States, Denmark and Ireland owing to the three 'unusual features' of the 1999 regime referred to in paragraphs 45 to 50 above. They state that 'the distribution of quotas for 1999 led to the partitioning of the market by State'. Lastly, they contest the relevance of the reference made by the Council to paragraphs 81 to 89 of *T. Port* v *Commission*, cited above, stating that in that case, the applicant criticised the 'new allocation formula in general' and not the result of its application for 1999.

96 The Council and the Commission contend that the plea alleging infringement of the principle of non-discrimination must be rejected as unfounded.

97 They submit, first, that the applicants' argument based on a comparison of the situation of operators in the new Member States when those States acceded to the Community with that of operators established in Germany, the Benelux States, Denmark and Ireland when Regulation No 404/93 entered into force is irrelevant in that the actions do not concern the 1993 regime, but rather the 1999 regime. The Council also denies that the Community intended to make a 'gift' to operators in the new Member States.

98 Second, the Council, referring to paragraphs 81 to 89 of *T. Port* v *Commission*, cited above, submits that the respective situations of operators in the new Member States and those established in Germany, the Benelux States, Denmark and Ireland as regards the determination of the reference quantities for 1999 are not comparable within the meaning of the case-law. In that judgment, the Court of First Instance expressly demonstrated that paragraphs 3 and 4 of Article 5 of Regulation No 2362/98 are based on objective criteria and rejected as unfounded the plea alleging infringement of the principle of equal treatment as regards both the allocation formula in general and the result of its application in 1999. The

Commission reiterates that neither the transitional measures which it adopted in 1994 and 1995 for the import of bananas into the new Member States nor the impugned provisions on Regulation No 2362/98 were vitiated by any illegality. It also denies that in 1999 it brought about a partitioning of the market by State.

Findings of the Court

99 The Court finds that the first part of this plea, based on a comparison of the situation of operators in the new Member States upon the accession of those States to the Community on 1 January 1995 with that of operators established in Germany, the Benelux States, Denmark and Ireland when Regulation No 404/93 entered into force on 1 July 1993, is completely irrelevant. The present actions concern the lawfulness of the 1999 regime as established by Regulations Nos 1637/98 and 2362/98 and the lawfulness of that regime cannot be called in question by a mere reference to the applicants' situation under the previously-applicable regime. Nor have the applicants substantiated their allegation that the Community had intended to 'make a "gift" to the new Member States in order to induce them to agree to the common organisation of the market in bananas.

100 The second part of this plea, concerning alleged discrimination between operators in the new Member States and those established in Germany, the Benelux States, Denmark and Ireland as regards the determination of the reference quantities for 1999, must be rejected as unfounded.

101 It must be borne in mind in that regard that the Community legislature has in relation to the common agricultural policy a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty (now, after amendment, Articles 34 EC and 37 EC). Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (Joined Cases C-267/88 to C-285/88 *Wuidart and Others* [1990] ECR I-435, paragraph 14; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 14; and Case C-56/99 *Gascogne Limousin viandes* [2000] ECR I-3079, paragraph 38).

102 Nor have the applicants shown that the three 'unusual features' of the 1999 regime which they challenge were manifestly inappropriate. First, as already stated in paragraph 60 above, their criticisms of the choice of 1994 to 1996 as a reference period are unfounded. Second, they have not shown that operators in the new Member States obtained as definitive for 1995 reference quantities higher than those to which they would have been entitled on the basis of a total tariff quota of 2 553 000 tonnes and the criteria laid down in Articles 3 and 5 of Regulation No 1442/93 (see paragraphs 61 to 68 above). Third, the applicants' claim that their reference quantity for 1999 should have been determined according to the criteria laid down in Articles 3 and 5 of Regulation No 1442/93 and not according to that of the 'actual importer', and also their criticisms of the arrangements for furnishing proof for the purpose of determining the quantities of bananas actually imported into the new Member States in 1994 and during the first three quarters of 1995 are unfounded, for the reasons set out in paragraphs 69 and 78 to 85 above.

103 It follows that the plea alleging infringement of the principle of non-discrimination must be rejected as unfounded.

Fourth plea; infringement of the principle of proportionality

— Arguments of the parties

104 The applicants claim that the provisions of Regulation No 2362/98 establishing the reference period for 1999 and the allocation formula are contrary to the principle of proportionality in that they are manifestly inappropriate in relation to the objective pursued by the Community legislature.

105 First, as regards that reference period, the applicants again observe that it included 1994 but excluded 1997. Next, they state that, because of the specific rule on furnishing proof laid down in Article 5(4) of Regulation No 2362/98, only operators in the new Member States were able to obtain reference quantities for 1999 on the basis of their imports into those States in 1994. The applicants were thus unable to rely on their total imports into those States in 1994 for the purposes of the determination of their reference quantity for 1999. There was no objective justification for such a 're-allocation', particularly in the absence of information as to whether imports in 1997 were genuine. They also contest the relevance of the reference made by the Council to paragraph 77 of *Cordis* v *Commission*, cited above, stating that in that case the Court of First Instance did not adjudicate on the question of the proportionality of the measure at issue.

106 Turning, second, to the allocation formula, the applicants state that, for the determination of the reference quantities for 1999, in so far as they were based on imports into the new Member States in 1994 and during the first three quarters of 1995, actual imports were assessed on the basis of proof of payment of customs duties. This 'customs duties payment criterion' is manifestly ill-suited to the objective pursued in this area by the Community legislature, namely to 'maintain,

in the distribution of the tariff quota, the position of economic operators who, before 1 January 1999 bore the commercial risk of importing bananas'. By that criterion, imports into the new Member States in 1994 or during the first three quarters of 1995 would be taken into account 'solely from the point of view of their having been placed in free circulation'. In other words, according to the applicants, the allocation formula laid down in Regulation No 2362/98 had the consequence that rights were granted only to operators in the new Member States and traditional suppliers were deprived of their assets. Lastly, they dispute the relevance of the Council's and the Commission's reference to paragraphs 94 and 95 of Case T-30/99 *Bocchi Food Trade International* v *Commission* [2001] ECR II-943, since that case did not examine 'the scope and the effects of [that] distribution formula'.

107 The Council and the Commission contend that the provisions of Regulation No 2362/98 relating to the determination of the reference period and the distribution formula were necessary and appropriate.

108 As regards, first, the reference period, they reiterate the same arguments as set out in paragraphs 51 to 54 above.

109 As regards, second, the allocation formula, the Council and the Commission observe that Article 5(3) and (4) of Regulation No 2362/98 lay down rules on proof of actual imports. They submit that the Commission, in the exercise of its wide discretion, was entitled to base itself on an objective criterion such as the production of customs documents and lawful import licences. Article 5(4) was necessary in order to enable 1994 imports by operators in the new Member States to be taken into account in the determination of their reference quantity. Lastly, they state that in paragraphs 94 and 95 of *Bocchi Food Trade International* v *Commission*, cited above, the Court of First Instance held that the system for

allocating the tariff quota introduced by Regulation No 2362/98 must in principle be regarded as appropriate to the objective of allocating that quota equitably, even if, because of the different situations of the operators, the measure did not affect all of them in the same way.

— Findings of the Court

110 By way of measures of organisation of procedure, the applicants had, *inter alia*, been asked to clarify, at the hearing, the scope of their plea alleging infringement of the principle of proportionality and to explain how the two parts of that plea differed. In response to that request, they stated that they were putting forward that plea by way of alternative argument in case the Court should find that the Commission was right to determine the reference quantities for 1999 on the basis of the 'actual importer' criterion and that they disagreed with the 'combined effect' of the reference period chosen and the specific rule on proof laid down in Article 5(4) of Regulation No 2362/98.

111 It is sufficient to note in that regard that, as held in paragraphs 60, 69, 78 to 85 and 102 above, the applicants' criticisms of the choice of 1994 to 1996 as a reference period and of the arrangements for furnishing proof for the purpose of determining the quantities of bananas actually imported into the new Member States in 1994 and during the first three quarters of 1995 are unfounded.

112 Accordingly, the plea alleging infringement of the principle of proportionality must be rejected.

Fifth plea: unlawful delegation of the Council's powers to the Commission

— Arguments of the parties

113 The applicants state that under the third subparagraph of Article 37(2) EC it is for the Council to legislate in matters relating to the common agricultural policy. The Council itself is to adopt the essential elements of the matter to be regulated, in accordance with the procedure laid down in Article 37 EC. They submit that the Council was therefore not permitted to empower the Commission, by Article 19(1) of Regulation No 404/93, as amended by Regulation No 1637/98, to determine which operators would be entitled to a share of the tariff quotas and the amount of such shares. They also criticise the Council's failure to reserve to itself any power of intervention or control and state that, as the Council had transferred its powers in this area to the Commission, Member States were no longer in a position to defend the operators established in their territory. The Council thus significantly jeopardised the applicants' rights.

114 The Council and the Commission contend that the aim of the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained and not to protect individuals (Case C-282/90 *Vreugdenhil* v *Commission* [1992] I-1937, paragraph 20). Consequently, the infringement of the principles relating to the delegation of powers of implementation to the Commission is not such as to engage the Community's liability.

115 They add that, in any event, the delegation of power provided for in Article 19(1) of Regulation No 404/93, as amended by Regulation No 1637/98, was in keeping

with the principles developed by the Community Courts relating to the delegation of powers of implementation to the Commission.

— Findings of the Court

116 The aim of the rules applicable to the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained and not to confer rights on individuals (see, in that regard, *Vreugdenhil* v *Commission*, cited above, paragraph 20). Accordingly, any unlawful delegation of the Council's powers to the Commission is not such as to engage the Community's liability.

117 The plea is, in any event, unfounded.

118 Under the fourth indent of Article 155 of the Treaty (now Article 211 EC), the Commission, with a view to ensuring the proper functioning and development of the common market, is to exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter. According to settled case-law, it is clear from the Treaty context in which that article must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation. Since only the Commission is in a position to keep track of agricultural market trends and to act quickly when necessary, the Council may confer on it wide powers in that sphere. Consequently, the limits of those powers must be determined by reference amongst other things to the essential general aims of the market organisation (Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraph 30; and Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 54). Thus, the Court has held that, in matters relating to agriculture, the Commission is authorised to adopt all the

implementing measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council (*Netherlands* v *Commission*, cited above, paragraph 31; and *Germany* v *Commission*, cited above, paragraph 55).

119 The Court of Justice has also held that a distinction must be drawn between rules which, since they are essential to the subject-matter envisaged, must be reserved to the Council's power, and those which, being merely of an implementing nature, may be delegated to the Commission (Case 25/70 *Köster* [1970] ECR 1161, paragraph 6; and Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 36). It stated that only those provisions which are intended to give concrete shape to the fundamental guidelines of Community policy can be classified as essential (Case C-240/90 *Germany* v *Commission*, cited above, paragraph 37). The Court of Justice also stated that 'since the Council has laid down in its basic regulation the essential rules governing the matter in question, it may delegate to the Commission general implementing power without having to specify the essential components of the delegated power; for that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act' (Case C-240/90 *Germany* v *Commission*, cited above, paragraph 41).

120 In this case, the Court finds that Article 19(1) of Regulation No 404/93, as amended by Regulation No 1637/98, which empowers the Commission to adopt the rules for the management of the tariff quotas and imports of traditional ACP bananas, complies with the principles laid down by the case-law and referred to above. In particular, by there providing that 'the tariff quotas indicated in Article 18(1) and (2) and imports of traditional ACP bananas shall be managed in accordance with the method based on taking account of traditional trade flows ("traditionals/newcomers")', the Council adequately described the essential elements of the implementing power conferred on the Commission.

121 It follows from the foregoing that the plea alleging an unlawful delegation of the Council's powers to the Commission must be rejected.

Sixth plea: failure to state reasons

— Arguments of the parties

122 The applicants submit that, since the Community is a community governed by the rule of law, its non-contractual liability must be capable of being incurred when the Community legislature adopts an act whose validity cannot be reviewed due to a failure to state reasons or an inadequate statement of reasons. The plea alleging failure to state reasons consists of three heads.

123 First, the applicants submit that, in Regulation No 2362/98, the Commission did not explain sufficiently why it had been necessary to choose the years 1994 to 1996 as the reference period.

124 Second, the applicants maintain that the Community legislature did not explain adequately why operators in the new Member States had been able to keep as definitive the 'transitional quantities' which they had obtained for the first three quarters of 1995 and to have them taken into account in the determination of their reference quantity for 1999.

125 Third, the applicants claim in the reply that, in Regulations Nos 1637/98 and/or 2362/98, the Community legislature should have stated its reasons for precluding the application of Article 6 of Regulation No 1924/95.

126 The Council and the Commission submit that inadequacy in the statement of reasons for a legislative measure is not sufficient to cause the Community to incur liability (Case 106/81 *Kind* v *EEC* [1982] ECR 2885, paragraph 14).

127 They further submit that, in any event, Regulations Nos 1637/98 and 2362/98 do contain adequate statements of reasons.

— Findings of the Court

128 It is settled case-law that an inadequacy in the statement of reasons for a legislative measure is not sufficient to cause the Community to incur liability (*Kind* v *EEC*, cited above, paragraph 14; Case C-119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189, paragraph 20; and *Cordis* v *Commission*, cited above, paragraph 79).

129 In any event, the plea alleging infringement of the obligation to state reasons is unfounded.

130 First, the third recital of regulation No 2362/98, which refers to 'available knowledge on the de facto patterns of importation', states adequately the reasons why the years 1994 to 1996 were chosen as the reference period.

131 Second, the two other heads of the plea alleging infringement of the obligation to state reasons are based on incorrect assumptions (see paragraphs 60, 61 to 68 and 102 above).

132 The plea alleging infringement of the obligation to state reasons must therefore be rejected.

Seventh plea: non-compliance with a decision of the DSB

— Arguments of the parties

133 The applicants state, first, that the DSB found, on the basis of a report of 12 April 1999 by a WTO Panel, that the system for allocating banana import licences introduced by Regulations Nos 1637/98 and 2362/98 was incompatible with WTO rules. In its report, the WTO Panel found an infringement of the principles of most favoured nation and national treatment provided for in Articles II and XVII of the General Agreement on Trade in Services (GATS). More specifically, it found that, by basing the granting of import licences on the concept of 'actual importer' and thus on the use of the import licences during the reference period 1994 to 1996, the Community accorded more favourable

treatment to service providers who had marketed traditional ACP and/or Community bananas in the Community as compared with those who had marketed third-country bananas there. The Panel concluded that the Community regime for allocating import licences thus perpetuated the discriminatory aspects of the previous regime, which the WTO's Appellate Body had already criticised in its report of 9 September 1997.

134 The applicants maintain, next, that since the Community never challenged that decision of the DSB, it is bound by it (Opinion 1/91 [1991] ECR I-6079, paragraph 39). Moreover, 'the Community disregarded that binding effect by applying and/or inciting the Member States to apply [to the applicants] the organisation of the markets [resulting from the 1999 regime] and, in particular, the "actual importer" criterion as the allocation formula even after the [DSB] decision'.

135 Lastly, the applicants submit that, in its judgment in Case T-254/97 *Fruchthandelsgesellschaft Chemnitz* v *Commission* [1999] ECR II-2743, paragraph 30, the Court of First Instance left open the question of whether 'individuals may ... rely on decisions of the [DSB]'. Unlike the applicants in *Cordis* v *Commission*, *Bocchi Food Trade International* v *Commission* and *T. Port* v *Commission*, cited above, the applicants are not referring in the present case to actual provisions of WTO law. The reciprocal and mutually advantageous arrangements which, according to the case-law, serve to deprive individuals of the right to rely directly on those provisions do not apply 'when a party to the Treaty is unsuccessful in WTO dispute settlement proceedings and is reminded that it is bound by the decision in that case'.

136 The Council and the Commission contend that the alleged infringement of the DSB decision is not capable of engaging the Community's non-contractual liability.

137 They observe that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47). Referring to *Cordis* v *Commission*, *Bocchi Food Trade International* v *Commission* and *T. Port* v *Commission*, cited above, they state that the WTO rules are not in principle intended to confer rights on individuals and submit that the same is true of binding decisions of WTO bodies. Governments of Member countries of the WTO have a certain amount of room for manœuvre in terms of the consequences flowing from those decisions. The Council and the Commission also refer to paragraphs 19 and 20 of Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983. They further submit that Regulations Nos 1637/98 and 2362/98 are not aimed at ensuring the implementation of an obligation undertaken in the context of the WTO in the Community legal order and that those regulations do not refer expressly to specific provisions of the WTO agreements.

138 Lastly, the Council states that the regulations whose legality is disputed by the applicants were adopted before the DSB decision at issue was adopted. Consequently, they cannot criticise the Community for not having respected the mandatory nature of that decision.

— Findings of the Court

139 It is appropriate to recall that it is only where the Community intends to implement a particular obligation assumed in the context of the WTO or, as in this case, where the Community measure refers expressly to the precise provisions of the agreements contained in the annexes to the WTO Agreement, that it is for

the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules (*Portugal* v *Council*, cited above, paragraph 49).

140 The applicants do not allege, and still less do they prove, that by adopting Regulations Nos 1637/98 and 2362/98, respectively, the Council and the Commission 'intended to implement', within the meaning of the case-law (see, regarding the General Agreement on Tariffs and Trade (GATT) 1947, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31), specific obligations contained in the WTO Panel report of 12 April 1999 or in the DSB decision adopting that report, or earlier acts of WTO bodies. Nor do they allege or prove that those regulations refer expressly to specific provisions flowing from the WTO Panel report of 12 April 1999 or the DSB decision adopting that report, or earlier acts of WTO bodies.

141 It follows that the applicants cannot base their action on an alleged infringement of a DSB decision.

142 It follows from all of the foregoing considerations that the applicants have not established that the Council and the Commission acted unlawfully. Since one of the conditions to which non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty is subject is not satisfied, the actions, in so far as they are based on the Community's non-contractual liability arising from an unlawful act, must therefore be rejected in their entirety and it is not necessary to consider the two other conditions giving rise to that liability (see, to that effect, Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81).

Liability of the Community for a lawful act

Arguments of the applicants

143 In the alternative, relying on a constitutional tradition common to the Member States and Community case-law, the applicants submit that the Community's liability may be engaged for a lawful act by the Community institutions and ask the Court to recognise such liability in this case.

144 Referring to Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, they submit that that liability presupposes the fulfilment of three cumulative conditions: the damage alleged must be real; there must be a causal link between that damage and the impugned act of the Community institutions and the damage must be unusual and special. They assert that those conditions are fulfilled in this case.

145 First, the applicants submit that the alleged damage is real, i.e. measurable, and certain, i.e. irreversible and definitive.

146 Second, they maintain that they were made to bear unusual and special damage. First, their commercial activities in the new Member States have not carried 'risks intrinsically linked to the damage alleged'. More specifically, nothing gave them reason to believe that the three 'particularities' referred to in paragraphs 45 to 50 above would be introduced in the 1999 regime. Second, they submit that the charges resulting from the inclusion of those States in the common organisation of the market in bananas were imposed in a disproportionate manner on a

specific category of economic operators. They explain that 'operators in [other] Member States who had supplied bananas to the new Member States before their accession suffered ... three major disadvantages, whilst operators in the new Member States, enjoyed "accession gifts"'.

147 Third, the applicants submit that the alleged damage is directly and exclusively attributable to the Community legislature.

148 The Council and the Commission deny that the principle of Community liability arising from a lawful act by its institutions has already been recognised in Community law by the case-law or that it may be inferred from a constitutional traditional common to the Member States.

149 They submit that, in any event, the three cumulative conditions which must be met in order for such liability to be engaged are not fulfilled in this case. First, the applicants have not proven that they have suffered real and certain damage or that the alleged damage is directly attributable to the conduct of the institutions concerned. Second, that damage cannot be characterised as special, since the applicants do not belong to a specific category of economic operators on which a disproportionate charge was imposed by comparison with other operators. Furthermore, the determination of the reference quantities in accordance with the provisions of Regulation No 2362/98 was based on objective criteria applicable to all operators in a situation comparable to that of the applicants. Third, the alleged damage does not exceed the economic risks inherent in the sector concerned.

Findings of the Court

150 It should be recalled that, in the event of the principle of non-contractual liability as a result of a lawful act being recognised in Community law, a precondition for such liability would in any event be the cumulative satisfaction of three conditions: the reality of the damage allegedly suffered, the causal link between it and the act on the part of the Community institutions, and the unusual and special nature of that damage (Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 17 to 19; and Case T-196/99 *Area Cova and Others* v *Council and Commission* [2001] ECR II-3597, paragraph 171).

151 In its judgment in Case T-184/95 *Dorsch Consult* v *Council and Commission*, cited above, the Court of First Instance stated that damage is 'special' when it affects a particular class of economic operators in a disproportionate manner by comparison with other operators, and 'unusual' when it exceeds the limits of the economic risks inherent in operating in the sector concerned, the legislative measure that gave rise to the damage pleaded not being justified by a general economic interest (paragraph 80).

152 Those two conditions are clearly not satisfied in this case.

153 First, the reference quantity of each of the applicants for 1999 was determined on the basis of objective criteria contained in Regulation No 2362/98 and applicable without distinction to all economic operators in the same situation as the applicants. In particular, the applicants are concerned by the provisions of that regulation which they criticise in the same manner as any other traditional

operator who supplied bananas to the new Member States in 1994 and/or during the first three quarters of 1995. There can thus be no question of a particular sacrifice made by them alone.

154 Second, the economic and commercial risks inherent in operating in the banana sector were not exceeded. In that regard, it is sufficient to observe that the Community institutions enjoy a margin of discretion in the choice of the means needed to achieve their policy, especially in a sphere such as that of the common organisation of the markets, whose purpose involves constant adjustments to meet changes in the economic situation. The applicants' activities entailed, in particular, the risk that the arrangement for trade with third States introduced by Title IV of Regulation No 404/93 might be changed.

155 It follows that the applications must also be dismissed in so far as they are based, in the alternative, on the Community's liability arising from a lawful act.

156 The applications must therefore be dismissed in their entirety.

Costs

157 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, they must be ordered to bear their own costs and pay those incurred by the Council and the Commission, as applied for by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to bear their own costs and to pay those incurred by the Council and the Commission.**

García-Valdecasas Lindh Cooke

Delivered in open court in Luxembourg on 10 February 2004.

H. Jung
Registrar

P. Lindh
President