OPINION OF ADVOCATE GENERAL MISCHO
delivered on 25 June 1998 *

1. The French Government, supported by the Commission, has lodged an appeal for the partial annulment of the judgment of the Court of First Instance of 11 December 1996 in Case T-70/94 *Comafrica and Dole Fresh Fruit Europe* v *Commission*, [1] in so far as that judgment dismissed the Commission's plea of inadmissibility.

2. In that judgment, the Court of First Instance held the applicant companies' claims for the annulment of Commission Regulation (EC) No 3190/93 of 19 November 1993 fixing the uniform reduction coefficient for determining the quantities of bananas to be allocated to each operator in categories A and B in the context of the tariff quota 1994 [2] to be unfounded, and dismissed the applicants' claim for compensation under Article 178 and the second paragraph of Article 215 of the Treaty.

3. Before arriving at that decision on the substance of the action, the Court of First Instance had declared the applicants' claims for annulment admissible, and thus dismissed the Commission's plea of inadmissibility.

4. The French Government considers that, by holding that the applicant companies were directly and individually concerned by Article 1 of the disputed regulation, the Court of First Instance infringed the fourth paragraph of Article 173 of the Treaty, as interpreted by the case-law of the Court of Justice.

The novelty of this appeal

5. Whilst this is not the first time that the Court has had to consider provisions concerning the common organisation of the markets in the banana sector, these proceedings are unusual.

6. This appeal has been brought by the French Republic, which did not intervene at first instance. This is, so far as I am aware, the first application of the third paragraph of Article 49 of the EC Statute of the Court of Justice.

* Original language: French.

1 — [1996] ECR II-1741.

2 — OJ 1993 L 285, p. 28.

7. That provision, combined with the second paragraph of the same article, shows that a Member State does not have to demonstrate that it has an interest in bringing an action in order to lodge such an appeal.

8. Moreover, under the first paragraph of the same article, an appeal may be brought before the Court of Justice against decisions of the Court of First Instance 'disposing of a procedural issue concerning a plea of lack of competence or inadmissibility'.

9. Moreover, Article 113 of the Rules of Procedure of the Court of Justice provides that the appeal must seek the setting aside, in whole or in part, of the contested decision and the same form of order, in whole or in part, as that sought at first instance, and shall not seek a different form of order.

10. That is the case here, since the French Government's appeal seeks both the partial setting aside of the judgment of the Court of First Instance and the form of order sought by the Commission at first instance concerning the inadmissibility of the action.

11. It should be noted that the appeal does not seek to alter the final solution adopted by the Court of First Instance, namely the dismissal of the action. A strictly formal, or formalistic, approach would lead to the operative part of the contested judgment remaining unaltered. Should this appeal therefore be regarded as not seeking to have the judgment of the Court of First Instance 'set aside, in whole or in part', within the meaning of Article 113(1) of the Rules of Procedure?

12. Such reasoning would be no more than superficial. Apart from the wording of the operative part of the contested judgment, the stages which preceded it also need to be taken into consideration. The decision of the Court of First Instance to dismiss the substance of the action was preceded by a section headed 'Admissibility', at the end of which the Court expressly upheld the admissibility of the action, which the Commission had formally challenged by raising an objection to that effect. By so doing, the Court took a decision disposing of a procedural issue concerning a plea of inadmissibility within the meaning of the first paragraph of Article 49 of the EC Statute of the Court of Justice.

13. The fact that the Court of First Instance then logically moved on to examine the substance of the case and that there is no separate judgment concerning the plea of inadmissibility alone (as would have been the case if the plea had been upheld) should not hide the fact that, in reality, the Court took two successive decisions. An appeal must be possible against each of them.

14. Nor is it enough merely to observe that the French Government's appeal is, as it were, in the nature of an action brought in the interests of the correct interpretation and application of Community law. Given that the EC Statute of the Court of Justice provides that an appeal may be brought 'by Member States and Community institutions which did not intervene in the proceedings before the Court of First Instance', that type of action is permissible by implication.

15. Finally, Article 51 of the EC Statute of the Court of Justice shows that the appeal must concern a point of law. Whether the applicants were directly and individually concerned within the meaning of the fourth paragraph of Article 173 of the Treaty is undoubtedly a point of law, as, moreover, the Court of Justice has already held. [3]

16. The admissibility of the appeal is therefore not in doubt.

3 — Case C-209/94 P *Buralux and Others* v *Council* [1996] ECR I-615.

Legal background

17. The Court of First Instance described the legal background to the action before it as follows:

'1 Prior to 1993 the marketing of bananas within the Community took place under a variety of national arrangements. There were three main sources of supply: bananas produced within the Community itself, bananas produced in certain of the countries with which the Community had concluded the Lomé Convention (hereinafter "ACP bananas"), and bananas produced in other countries (hereinafter "third country bananas").

2 A common organisation of this market sector was introduced by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas [4] (hereinafter "Regulation No 404/93") which had the effect of introducing as from 1 July 1993 a common import system to replace the various national systems which had hitherto operated. Regulation No 404/93 was last amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector

4 — OJ 1993 L 47, p. 1.

in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations. [5] It is the version of 13 February 1993 which is relevant for the present judgment.

3 Title IV of Regulation No 404/93, which deals with trade with third countries, provides for the opening of an annual tariff quota for imports of third country bananas and non-traditional ACP bananas. The terms "traditional imports" and "non-traditional imports" of ACP bananas are defined in Article 15(1) of Regulation No 404/93. "Traditional imports" means the quantities, listed in an annex to Regulation No 404/93, of bananas exported to the Community by each ACP State which has traditionally exported bananas to the Community. Quantities exported by those ACP States in excess of the figures set out in the annex are designated "non-traditional ACP bananas".

4 Article 20 of Regulation No 404/93 authorises the Commission to adopt, in accordance with the management committee procedure described in Article 27, detailed rules concerning, in particular, the issue of import licences to different categories of operator, the frequency of issue of such licences and the minimum quantities which eligible operators must have placed on the market. The detailed rules for the implementation of Title IV of Regulation No 404/93 were established by 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 [6] (hereinafter "Regulation No 1442/93").

5 Article 18(1) of Regulation No 404/93 provided for the opening each year of a tariff quota of 2 000 000 tonnes (net weight) for imports of third country bananas and non-traditional ACP bananas and, for the first period of operation of the new market organisation, namely, the second half of 1993, set the volume for the tariff quota at 1 000 000 tonnes (net weight). Within the framework of the tariff quota, imports of third country bananas are subject to a levy of ECU 100 per tonne and imports of non-traditional ACP bananas are subject to a zero duty. Other than within the tariff quota, such imports bear a levy of ECU 850 and ECU 750 per tonne respectively.

...

9 Imports made within the framework of the annual tariff quota and the licences issued for that purpose are required in

5 — OJ 1994 L 349, p. 105.

6 — OJ 1993 L 142, p. 6.

accordance with Article 19 to be allocated to three categories of operators as follows:

— 66.5% to operators who had marketed third country and/or non-traditional ACP bananas;

— 30% to operators who had marketed Community and/or traditional ACP bananas;

— 3.5% to operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992.

10 Amongst the detailed rules laid down in Regulation No 1442/93 for implementation of the regime established by Regulation No 404/93, as described above, are the following provisions.

...

12 Article 5 provides that by 1 October 1993 (for the purposes of the year 1994) and by 1 July for each following year, the competent authorities of the Member States are required 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 quota was opened, broken down by reference to the different types of economic activity described in the definition of "operators" in Article 3 of Regulation No 1442/93. The average marketing quantity thus supplied by the competent authorities for an operator is termed the operator's "reference quantity".

13 Article 3(1) of Regulation No 1442/93 deems economic agents to be "operators" in Category A or Category B where they engage 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 (hereinafter "class (a) activities");

(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 (hereinafter "class (b) activities");

(c) as owners, the ripening of green bananas and their marketing within the Community (hereinafter "class (c) activities").

Operators engaged in these activities are hereinafter referred to as "primary importers", "secondary importers" and "ripeners" respectively.

14 Article 5(2) fixes weighting coefficients which are applied to the quantities marketed and which differ according to the activities engaged in. According to the third recital in the preamble of Regulation No 1442/93, these coefficients are intended to take account of the scale of business concerned and the commercial risks incurred and to correct the negative effects of counting the same quantities of products more than once at various stages of marketing.

15 Article 6 provides as follows:

"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 the 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 individually at the latest by 1 November 1993 as regards 1994 and by 1 August each year thereafter."

...

18 ... On 19 November 1993 the Commission adopted Regulation ... No 3190/93 ... Article 1 of Regulation No 3190/93 provides as follows:

"In the context of the tariff quota laid down in Articles 18 and 19 of Regulation No 404/93, the quantity allocated to each operator of categories A and B for the period 1 January to 31 December 1994 is determined by applying the following reduction coefficients to the oper-

ator's reference quantity, determined in accordance with Article 5 of Regulation (EEC) No 1442/93:

— for each category A operator: 0, 506617

— for each category B operator: 0, 430217."'

The findings of the Court of First Instance on the question of admissibility

18. As regards the parties' arguments before the Court of First Instance concerning the Commission's plea of inadmissibility, I refer to the summary given in paragraphs 32 to 37 of the judgment of 11 December 1996.

19. It does, however, seem to me to be necessary to recall in detail the findings of the Court of First Instance on that plea of inadmissibility, which are worded as follows:

'38 The fourth paragraph of Article 173 of the Treaty entitles individuals to contest a decision which, although adopted in the form of a regulation, is shown to be of direct and individual concern to them. As the Court of Justice and the Court of First Instance have consistently held, one of the main purposes of that provision is to prevent the Community institutions, by mere choice of the form of a regulation, from depriving an individual of a right of action against a measure which is in reality a decision having a direct and distinct impact on his particular situation. It is therefore clear that the choice of form cannot of itself determine the legislative character of a measure. [7]

39 The Court of Justice and the Court of First Instance have also held that, in order for economic operators to be regarded as being individually concerned by the measure they seek to have annulled, their legal position must be affected by reason of circumstances which differentiate them from all other persons and distinguish them individually in the same way as an addressee of a decision. [8]

40 Furthermore, in the particular context of the management of a tariff quota opened in the beef and veal market, the Court of Justice has held that a Commission regulation specifying the extent to which the competent authorities of the Member States should satisfy applications for import licences was of individual concern to those operators who had already

7 — Judgment of the Court of Justice in Joined Cases 789/79 and 790/79 *Calpak and Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949, paragraph 7, and order of the Court of First Instance in Case T-476/93 *FRSEA and FNSEA* v *Council* [1993] ECR II-1187, paragraph 19.

8 — Order of the Court of Justice in Case C-131/92 *Arnaud* v *Council* [1993] ECR I-2573.

applied for import licences at the time of its adoption. [9] In finding that the operators in question were individually concerned, the Court took account of the fact that, in determining the extent to which the applications were to be satisfied, on the basis of the total quantities applied for and in circumstances in which no new applications could be added, the Commission had, in fact, decided on the treatment to be accorded to each application. Consequently, the Court of Justice considered that the regulation in question was to be regarded as a collection of individual decisions and not as a measure of general application within the meaning of Article 189 of the Treaty.

41 The Court notes that in this case Regulation No 3190/93 is of relevance only to those operators who had applied for and obtained reference quantities for imports of Category A or Category B bananas for the year 1994. It informs each operator concerned that the quantity of bananas it was entitled to import under the tariff quota for the year 1994 may be determined by applying the stated uniform reduction coefficient to its reference quantity. Inasmuch as the only legislative function of the regulation is to fix and publish this reduction coefficient figure, it has the immediate and direct effect of enabling each operator to ascertain his own precise entitlement by applying that coefficient to the reference quantity already allocated to him. As such, it is properly construed as a collection of individual decisions addressed to each operator effectively informing him of the precise quantities which he will be entitled to import in 1994.

42 The Court also notes that the Commission has not contested the applicants' assertion that they are also directly concerned by Regulation No 3190/93 because it does not allow Member States any margin of discretion in relation to the licence applications made.

43 In these circumstances, the action for annulment of Regulation No 3190/93 must be declared admissible.'

Analysis of the reasoning adopted by the Court of First Instance and the arguments submitted on appeal

20. Having recalled the well-known case-law of the Court of Justice and the Court of First Instance according to which, in order for economic operators to be regarded as being individually concerned by the measure they seek to have annulled, their legal position

9 — Judgment in Case C-354/87 *Weddel* v *Commission* [1990] ECR I-3847, paragraphs 19 to 23.

must be affected by reason of circumstances which differentiate them from all other persons and distinguish them individually in the same way as an addressee of a decision (paragraphs 38 and 39 of the judgment), the Court of First Instance went on to refer to the judgment of the Court of Justice in *Weddel* v *Commission*. It clearly thought that *Comafrica and Dole Fresh Fruit Europe* v *Commission* bore a complete analogy with that case (paragraph 40 of the judgment).

21. The case of *Weddel* v *Commission* concerned the opening of a tariff quota of 4 617 tonnes. The applicant had submitted an application for import licences totalling 320 000 tonnes. It challenged the validity of a provision of the regulation in question, to the effect that any application exceeding 4 617 tonnes would be automatically regarded as an application for that amount. The purpose was to prevent operators from cornering the greater part of the quota simply by lodging highly exaggerated applications.

22. The contested regulation further provided that each application would be met only up to 0.2425% of the quantity requested. [10]

23. Thus it had effectively been possible for *each operator* to determine the final quantity which would be allocated to him. It was sufficient for him to apply the weighting coefficient either to the exact figure of his application, if it were for an amount less than 4 617 tonnes, or to the figure of 4 617 tonnes if his application exceeded that ceiling.

24. The Court of Justice concluded that 'even if the Commission was aware only of the quantities applied for ..., it thereby decided on the treatment to be accorded to each application lodged' and that, therefore, this was a case of 'a bundle of individual decisions ... in the guise of a regulation, each of those decisions affecting the legal position of each applicant'.

25. In paragraph 41 of the judgment under appeal in this case, the Court of First Instance stated:

'... in this case Regulation No 3190/93 is of relevance only to those operators who had applied for and *obtained* [11] reference quantities for imports of Category A or Category B bananas for the year 1994. It informs each operator concerned that the quantity of bananas it was entitled to import under the tariff quota for the year 1994 may be determined by applying the stated uniform reduc-

10 — Commission Regulation (EEC) No 2806/87 of 18 September 1987 on the issue of import licences for high-quality fresh, chilled or frozen beef and veal (OJ 1987 L 268, p. 59).

11 — Emphasis added.

tion coefficient to *its* [12] reference quantity. Inasmuch as the only legislative function of the regulation is to fix and publish this reduction coefficient figure, it has the immediate and direct effect of enabling each operator to ascertain his own precise entitlement by applying that coefficient to the *reference quantity already allocated to him.* [13] As such, it is properly construed as a collection of individual decisions addressed to each operator effectively informing him of the *precise quantities which he will be entitled to import* [14] in 1994.'

26. Like the Commission, however, I am not convinced that there is a sufficient analogy between the cases of *Weddel* and *Comafrica and Dole*. In particular, I am not convinced that under the system in question here:

— an operator 'obtained' a reference quantity or that such a quantity was 'allocated' to him before the adoption of Regulation No 3190/93;

— it was possible for each operator to determine the final quantity which he would be entitled to import in 1994 by simply multiplying a quantity known to him by the reduction coefficient.

27. Contrary to what happens in the beef and veal sector, the system established in the banana sector is extremely complicated and there may be a considerable divergence between the figures which the operator submits to the competent authorities and those which serve as the basis for the final multiplication. The procedure is as follows.

28. Pursuant to Article 4 of Regulation No 1442/93, the competent authorities of the Member States draw up separate lists of operators in Categories A and B and the quantities which each operator has marketed in each of the three preceding years. For that purpose, operators notify the competent authorities of the overall quantities of bananas, breaking them down

— according to the origin of the bananas (bananas originating in third countries and non-traditional ACP quantities, ACP bananas, bananas produced in the Community),

— according to each of the economic activities defined in Article 3(1) of Regulation No 1442/93, concerning the detailed rules

12 — Emphasis added.
13 — Emphasis added.
14 — Emphasis added.

for the application of the quota arrangements (that is to say, purchase of green bananas, supply and release for free circulation as owner, ripening as owner).

29. As is apparent from the judgment of the Court of First Instance, experience has shown that that operation may involve mistakes on the part of operators.

30. In a second phase, the competent authorities establish for each Category A and Category B operator registered with them the average quantities marketed during the preceding three years, likewise broken down by economic activity.

31. That average is termed the 'quantitative reference' in certain language versions and 'reference quantity' in others. Notwithstanding that nuance, however, the expression tends to suggest that one is dealing here not with an allocated quantity but with a basis of reference for future operations.

In order to obtain the 'reference quantity', the competent authority applies weighting coefficients to the quantities which have been marketed (57%, 15% or 28%) according to the 'activities' referred to in Article 3, thus giving rise to a further possibility of errors.

32. Under Article 8 of Regulation No 1442/93, '[t]he competent authorities shall conduct all necessary checks to verify the validity of applications and supporting documents submitted by operators. To that end they may in particular take account of expert opinions and reports drawn up by internal and independent auditors'.

33. Regulation No 1442/93 makes no provision requiring the competent authorities to notify operators of the results of all their checks before proceeding to the third main phase of the procedure, namely notification to the Commission of the 'total reference quantities weighted' and the 'total quantities of bananas marketed in respect of each activity by operators registered with them' (Article 5(3)).

34. Save where there is indiscretion on the part of the competent national authority, therefore, an individual operator is unaware of the amounts which that authority has finally adopted concerning him by including them in the two totals notified to the Commission.

35. It is important to note that those amounts notified to the Commission are total amounts, and not amounts for individual operators. That has, moreover, been confirmed by the Commission in its reply to the questions put by the Court of First Instance [Doc. JUR(96)

01479 of 15 February 1996] which reads as follows:

'It must also be recalled that the Commission received only the aggregate provisional reference quantities for the operators in each Member State. It did not receive that amount broken down operator by operator.'

36. The next phase is under the control of the Commission (Article 6 of Regulation No 1442/93), and consists in the Commission making a comparison between the volume of the annual tariff quota and the total amount of operators' reference quantities notified to it by the various Member States.

37. If the total applications exceed the volume of the tariff quota, the Commission is to fix 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' (Article 6(1)).

38. Finally, the Member States are to *determine* that quantity for each registered operator and *notify* the latter thereof (Article 6(2)).

39. It is thus only at that stage that the operator actually learns what annual quantity has been allocated to him.

40. It became apparent, moreover, in the course of the proceedings before the Court of First Instance that the Commission did not make a purely mathematical calculation but felt it needed to question the total amounts notified by the competent authorities of the Member States. It thus required them to correct for a second time some of the reference quantities which they had already checked, and in some cases rectified, at the previous stage, before notifying the total amounts to the Commission.

41. It may be seen from paragraph 65 of the judgment of the Court of First Instance which is the subject of the present appeal that the Commission acknowledged 'that reference quantities originally submitted by the Member States led it to believe that there had been cases of double counting and of overlapping in the figures concerning operators carrying on different classes of activity, and that it was obliged for that reason to correct the figures before applying [by which doubtless "calculating" is meant] the reduction coefficient'.

42. The Commission stated, according to paragraph 64 of the judgment, that reference quantities were corrected 'by its services or at their instigation'. In other words, the Commission and the Member States, acting together, rectified certain figures.

43. In a number of cases, 'agreement with Member States was not possible and the Commission was therefore obliged to reduce the figures' for two Member States by 170 000 tonnes. It might be asked what figures those two Member States finally adopted when they 'allocated' the individual quantities, but it is not necessary to consider that problem further here (paragraph 66 of the judgment).

44. It is in any event clear that no operator could be certain that the figures communicated by him to the competent authorities of his Member State would be the same as those finally used when allocating his annual quantity.

45. Finally, it should be noted that Regulation No 3190/93 does not itself elaborate on its reference to corrections for 'quantities counted twice' estimated by the Commission (penultimate recital in the preamble to the regulation).

46. An individual operator was therefore not able to determine by himself:

— either on the basis of the figures notified by him to the competent national authority,

— or on the basis of the provisions of the disputed regulation,

what the individual reference quantity was to which the reduction coefficient would be applied, or, therefore, what 'the precise quantities which he [would be] entitled to import in 1994' were.

47. In my opinion, the Court of First Instance was therefore wrong to reach the opposite conclusion (end of paragraph 41 of the judgment) and to infer that Regulation No 3190/93 distinguished operators individually in the same way as an addressee of a decision.

48. Moreover, as the Commission has rightly emphasised, the regulation in question 'concerns only the future or nascent entitlement to licences for which *applications are to be made* during the first week of the last month of each quarter in accordance with Article 9(2) of Regulation No 1442/93'.

49. In other words, import licences are issued only on a quarterly basis. For that purpose, the first step is the fixing of 'indicative quantities ... using data and forecasts relating to the Community market, on the basis of the forecast supply balance for production and

consumption in the Community and of imports and exports'.

50. Next, 'operators shall submit their import licence applications ... for up to the quantity which may be allowed in the quarter in question of the total annual quantity allocated to them, to the competent authorities of the Member State ...

51. Where the quantities covered by import licence applications from one or more of the categories of operators appreciably exceed the indicative quantity fixed, *a single percentage* [15] shall be set to be applied to applications ... *to reduce the quantities allocated*' (Article 9(2) and (3) of Regulation No 1442/93).

52. Finally, the competent authorities are to issue import licences to each operator in each separate category on the basis of the annual quantity allocated to him pursuant to Article 6 (Article 9(5) of Regulation No 1442/93).

53. This is therefore a fundamentally different situation from that in *Weddel* v *Commission*, where the role of the competent authorities of the Member States was limited to the immediate issue of import licences by carrying out, on the basis of the Commission regulation, a simple multiplication which each operator was capable of performing himself.

54. One might therefore go so far as to ask whether, in this case, the operators were directly concerned by the regulation in question, given all the phases which had still to follow its publication. In that regard, one cannot ignore the fact that the formal submission of applications for import licences did not take place until after notification of the annual quantities, and that the licences granted for any given quarter were not always the product of simply dividing the annual quantity allocated by four.

55. In its response, the Commission adduces further arguments to demonstrate that '[t]he case of *Weddel* v *Commission* is of little assistance'. Comafrica and Dole attempt to refute them in their further pleadings.

56. The Commission argues first that, in *Weddel* v *Commission*, the operator who applied for a licence was under an obligation to carry out the import transaction once the licence was granted to him and was exposed to various sanctions in the event of failure to do so. In particular, he risked losing the security that had already been constituted, and in respect of which he had already incurred

15 — Emphasis added.

costs. The disputed regulation in *Weddel* v *Commission* thus retrospectively affected the rights and obligations of such operators.

57. I share the Commission's view that the situation in this case is completely different, since Regulation No 3190/93 concerns only the future or nascent entitlement to licences for which applications are yet to be made.

58. The Commission also draws attention to the fact that the licences which operators are able to obtain are assignable. In its submission, therefore, the import licence is merely a tradable commodity. However, unchallenged statements in *Weddel* v *Commission* show that the licences at issue in that case were also assignable, which did not prevent this Court from holding that action admissible.

59. It could also be said that, unlike the present case, the action by Weddel concerned only very indirectly the fixing of the weighting coefficient. What that company was challenging was the Commission's decision to limit applications to the quantity available. That necessarily resulted in the reduction of individual applications exceeding that quantity, such as that submitted by Weddel, whereas the decision affected only indirectly at most those operators whose applications did not exceed the stipulated maximum quantity. Weddel was thus individually distinguished in relation to other applicants for licences.

60. I cannot help noticing, however, that in its judgment in *Weddel* v *Commission* this Court did not base its argument on that aspect (which it merely noted as being among the positions adopted by the applicant) but merely referred to the weighting coefficient applying to the applications as a whole.

61. Whatever the case may be on that latter point, I conclude on the basis of the above arguments as a whole that the Court of First Instance was wrong in its analysis of Regulation No 3190/93 and Regulation No 1442/93 inasmuch as it thought that the situation of Comafrica and Dole could be entirely assimilated to that of Weddel and concluded from this that the action of Comafrica and Dole was admissible because those companies were individually concerned.

62. However, the question still arises whether the conclusion which the Court of First Instance reached, namely that the action was admissible, may be based on another ground in substitution for the erroneous one put forward by the Court of First Instance. Such substitution, allowing the operative part of a judgment to remain intact whilst rectifying the grounds accompanying it, is an operation which is perfectly common practice under the machinery for setting aside judgments on points of law.

63. It thus remains to be examined whether, by virtue of their situation as correctly analysed, Comafrica and Dole are in a position to claim that they are individually concerned by the contested regulation. In so doing, it is necessary to consider the other arguments put forward before the Court of Justice in the light of its case-law on the fourth paragraph of Article 173.

64. Comafrica and Dole lay much emphasis on the fact that, in their submission, Regulation No 3190/93 applies only to a closed category of operators. I believe their argument on that point must be accepted, since that regulation does in fact concern applications that were made in the past, at a specific time and in accordance with specific procedures, and to which no further application may be added.

65. The closed category is also a restricted one, since the operators in question are defined by the fact that they are the only ones that comply with a certain number of procedural and substantive conditions; they must have imported certain categories of bananas during the three years preceding the adoption of the regulation and have sent those figures to the competent authority of their Member State, within the prescribed time-limits and in accordance with the prescribed procedures. That much follows from the legislative context described above.

66. Comafrica and Dole submit that the mere existence of a closed and restricted category of addressees of the measure is enough to deprive it of its legislative character and to transform it into a bundle of individual decisions against which an action may be brought. They cite a number of judgments of the Court of Justice in support of that proposition. [16]

67. It is necessary to discount from the outset the case of *Arposol* v *Council*, in which the Court's judgment merely found that the applicant company was not directly concerned and did not examine whether it was individually concerned.

68. The other cases cited also concern situations which were different from that in the present case. Thus, in *CAM* v *Commission*, the action was not declared admissible solely on the ground that the contested measure applied to a closed category of addressees, but primarily because the latter had taken, or could be deemed to have taken, certain commercial measures on the strength of legislation which was then suddenly amended.

69. In *Société pour l'Exportation des Sucres* v *Commission*, unlike the present case, the regu-

16 — Case 100/74 *CAM* v *Commission* [1975] ECR 1393; Case 88/76 *Société pour l'Exportation des Sucres* v *Commission* [1977] ECR 709; Case 232/81 *Agricola Commerciale Olio and Others* v *Commission* [1984] ECR 3881; Case 264/81 *Savma* v *Commission* [1984] ECR 3915; Case 55/86 *Arposol* v *Council* [1988] ECR 13.

lation at issue was one which retrospectively altered the rights and obligations of operators who held licences and had thus already entered into commitments.

70. The cases of *Agricola Commerciale Olio and Others* v *Commission* and *Savma* v *Commission* both involved an attempt by the Commission to annul by means of a regulation a national intervention agency's sale of quantities of olive oil to tenderers who had already been designated and whose rights and obligations were, as a result, retrospectively altered. No such effect exists in the present case.

71. It is moreover clear that, by reason of their status as designated tenderers, the position of the applicants in those cases showed a much closer link to the contested measure than does the situation of the applicants at first instance in this case. As has already been seen, their connection with the contested measure is limited to the fact that they sent the figures concerning their previous imports to the competent national authority with the intention of subsequently applying for quarterly import licences.

72. The case-law in question thus concerned situations which are far from identical with the present case. What does, on the other hand, appear to me to be relevant in determining whether the admissibility of the action brought by Comafrica and Dole is admissible is the Court's case-law according to which the fact that a measure affects a closed and restricted category of addressees is not sufficient for them to be individually concerned for the purposes of the fourth paragraph of Article 173.

73. The Court has held on numerous occasions that the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no means implies that the measure must be regarded as being of individual concern to them, as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question. [17]

74. That is precisely the case here as regards Regulation No 3190/93, which, as the French Government has pointed out, displays all the features of a legislative measure. It has a general purpose, namely the implementation for a given period *of one of the aspects of the system* of quotas applicable to the operators defined by Regulation No 1442/93, cited above. That regulation requires the Commission to take the measures necessary to ensure the correct functioning of the common organisation of the market by globally adjusting the quantities capable of being applied for on the basis of past imports to the quantities available pursuant to the basic regulation. The Court's judgment in Case C-478/93 *Nether-*

17 — See, for example, Case C-264/91 *Abertal and Others* v *Council* [1993] ECR I-3265.

lands v *Commission* [18] concerning the weighting coefficient applicable to the second half of 1993, that is to say just before that fixed by the contested regulation, clearly shows how the fixing of that coefficient falls within a more general obligation of the Commission, namely that of implementing the basic regulation.

75. Such a regulation is necessarily applicable to a closed and restricted category of addressees, since the persons in question can only be those operators entitled to express an interest in importing the quantities that are to be allocated. Both those operators and the period are determined by reference to objective data resulting, in particular, from the basic regulation.

76. By virtue of its very objective, the contested regulation could apply only to category A and category B operators, defined by Regulation No 1442/93, who wished to import bananas under the 1994 quota and had therefore taken the necessary preliminary steps prescribed by that regulation.

18 — [1995] ECR I-3081.

77. The finding that the contested measure is legislative in nature is not, however, sufficient to exclude entirely the possibility of the actions being admissible. The Court has accepted that a measure might, without losing its legislative character, directly and individually concern a specific operator who finds himself in a situation which is distinct from that of any other person. [19] It is also possible, according to the case-law, [20] for certain provisions of a legislative measure to constitute in reality a decision directly and individually concerning one or more operators.

78. In all those cases, admissibility of the action presupposes that the legal position of the operators in question is affected because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as an addressee of a decision.

79. I believe I have demonstrated above that that is not the case here. The measure taken applies uniformly to the whole category of operators falling within the scope of Regulation No 3190/93. The reduction coefficient is

19 — See, for example, the judgment in Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, where the applicant was individually concerned because the contested legislative measure affected his specific rights, or the judgment in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, in which, in the context of an anti-dumping proceeding, the applicant was individually concerned by reason of his factual situation as the principal importer of the product, its final user and the main competitor of the Community producer in relation to the processed product.

20 — See, in particular, the judgment in Case 240/84 *NTN Toyo Bearing Company and Others* v *Council* [1987] ECR 1809.

applied in the same way to each of them. The various operators are in no way distinguished individually in relation to each other. They are distinguished only in relation to those operators who have not applied for the award of reference quantities.

80. Nor, as the French Government points out, have the applicants at first instance sought to demonstrate the existence of a particular factual situation capable of differentiating them from all the other operators to whom Regulation No 3190/93 applies.

81. Finally, the applicants at first instance raise the point that no other remedy is available to them against the measure in question.

82. It should be recalled, however, that Regulation No 3190/93 does not constitute the measure whereby the final 'reference quantity' (which does not in any event entail the granting of import licences) is notified to each individual operator. I repeat that, by virtue of Article 6 of Regulation No 1442/93, that measure can emanate only from the competent national authority. It is only against that latter measure that an action may be brought by an operator who considers that his rights have for one reason or another been infringed on the allocation of his reference quantity. It goes without saying that in the context of such an action the applicants may put forward any plea in law and that, in so far as it has doubts as to the validity of the regulation, the national court may refer the point to the Court of Justice by means of a reference for a preliminary ruling.

83. In my opinion, it follows from all the foregoing considerations that the applicants at first instance do not fulfil the condition of being individually concerned by the contested measure for the purposes of the fourth paragraph of Article 173 of the Treaty.

Conclusions

84. I therefore propose that the Court should allow the appeal by the French Republic and set aside the judgment of the Court of First Instance of 11 December 1996 in Case T-70/94 in so far as it declared admissible the action for annulment brought by Comafrica SpA and Dole Fresh Fruit Europe Ltd and Co. against Commission Regulation (EC) No 3190/93 of 19 November 1993 fixing the uniform reduction coefficient for determining the quantities of bananas to be allocated to each operator in categories A and B in the context of the tariff quota 1994.

85. I further propose, pursuant to Article 54 of the EC Statute of the Court of Justice, that the Court should give final judgment in the dispute by dismissing as inadmissible the action brought by Comafrica SpA and Dole Fresh Fruit Europe Ltd and Co.

86. On the matter of costs, I propose that each party should be ordered to bear its own costs, pursuant to the final paragraph of Article 122 of the Rules of Procedure of the Court of Justice.