JUDGMENT OF THE COURT OF FIRST INSTANCE (Grand Chamber)

14 December 2005 *

In Case T-69/00,

Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), established in Montecchio Maggiore (Italy),

Fabbrica italiana accumulatori motocarri Montecchio Technologies, Inc. (FIAMM Technologies), established in East Haven, Delaware (United States),

represented by I. Van Bael, A. Cevese and F. Di Gianni, lawyers, with an address for service in Luxembourg,

applicants,

v

Council of the European Union, represented by G. Maganza, J. Huber, F. Ruggeri Laderchi and S. Marquardt, acting as Agents,

* Language of the case: Italian.

and

Commission of the European Communities, represented initially by P. Kuijper, L. Gussetti, V. Di Bucci, C. Brown and E. Righini, and subsequently by P. Kuijper, L. Gussetti, V. Di Bucci and E. Righini, acting as Agents, with an address for service in Luxembourg,

defendants,

supported by

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

intervener,

APPLICATION for compensation in respect of the damage allegedly caused by the levying by the United States of America of increased customs duty on imports of the applicants' stationary batteries, as authorised by the Dispute Settlement Body of the World Trade Organisation (WTO), following a finding that the Community regime governing the import of bananas was incompatible with the agreements and understandings annexed to the Agreement establishing the WTO,

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

composed of B. Vesterdorf, President, P. Lindh, J. Azizi, J. Pirrung, H. Legal, R. García-Valdecasas, V. Tiili, J.D. Cooke, A.W.H. Meij, M. Vilaras and N.J. Forwood, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearings on 11 March 2003 and 26 May 2004,

gives the following

Judgment

Legal context

1 On 15 April 1994 the Community signed the Final Act concluding the Uruguay Round multilateral trade negotiations, the Agreement establishing the World Trade Organisation (WTO) and all the agreements and understandings in Annexes 1 to 4 to the Agreement establishing the WTO ('the WTO agreements').

2 Following signature of those instruments, the Council adopted Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

3 As is apparent from the preamble to the Agreement establishing the WTO, the contracting parties intended to enter into 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'.

4 Article II(2) of the Agreement establishing the WTO provides:

'The agreements and associated legal instruments included in Annexes 1, 2 and 3 ... are integral parts of this Agreement, binding on all Members.'

5 Article XVI of the Agreement establishing the WTO, headed 'Miscellaneous Provisions', provides in paragraph 4:

'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.'

6 The Understanding on Rules and Procedures Governing the Settlement of Disputes ('the DSU'), which is set out in Annex II to the Agreement establishing the WTO, specifies, in the final sentence of paragraph 2 of Article 3, which is headed 'General Provisions':

'Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements.'

7 Article 3(7) of the DSU states:

'Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which [the DSU] provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorisation by the [Dispute Settlement Body] of such measures.'

8 Article 7 of the DSU provides that panels are to make such findings as will assist the Dispute Settlement Body ('the DSB') in making recommendations or in giving rulings on the matters submitted to that body. Under Article 12(7) of the DSU, where the parties to the dispute do not manage to develop a mutually satisfactory solution, the panel is to submit its findings in the form of a written report to the DSB.

9 Article 17 of the DSU provides for establishment by the DSB of a standing Appellate Body responsible for hearing appeals from panel cases.

10 As provided in Article 19 of the DSU, where a panel or the Appellate Body concludes that a measure is inconsistent with a WTO agreement, it is to recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

11 According to Article 21(1) of the DSU, under the heading 'Surveillance of Implementation of Recommendations and Rulings', prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

12 By virtue of Article 21(3) of the DSU, a Member unable to comply immediately with the DSB's recommendations and rulings is to be allowed a reasonable period of time, determined, if necessary, through binding arbitration.

13 Where there is disagreement as to the existence, or consistency with a WTO agreement, of measures taken to comply with the DSB's recommendations and rulings, Article 21(5) of the DSU states that such dispute is to be decided through recourse to the dispute settlement procedures laid down by the DSU, including wherever possible resort to the original panel.

14 Under Article 21(6) of the DSU, the DSB keeps under surveillance the implementation of adopted recommendations or rulings and, unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings is placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to Article 21(3) and remains on the DSB's agenda until the issue is resolved.

15 Article 22 of the DSU, headed 'Compensation and the Suspension of Concessions', provides:

'1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no

later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

...

4. The level of the suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment.

...

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorisation to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorisation to suspend concessions or other obligations ... , the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. ... The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall, upon request, grant authorisation to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with [Article 21(6) of the DSU], the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

...'

Facts

16 On 13 February 1993 the Council adopted Regulation (EEC) No 404/93 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) ('the COM for bananas'). The regime governing trade with third countries that was laid down by Title IV of the regulation contained preferential provisions for bananas originating in certain African, Caribbean and Pacific (ACP) States which were cosignatories of the Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 (OJ 1991 L 229, p. 3).

17 Following complaints lodged in February 1996 with the DSB by several WTO members, including Ecuador and the United States of America, on 22 May 1997 the panel constituted in accordance with the DSU presented its reports concluding that the import regime under the COM for bananas was incompatible with the obligations entered into by the Community under the WTO agreements. The

reports drawn up by the panel also recommended that the DSB request the Community to bring that regime into conformity with its obligations under the WTO agreements.

18 Following an appeal by the Community, on 9 September 1997 the Appellate Body essentially upheld the panel's conclusions, and recommended that the DSB request the Community to bring the Community provisions at issue into conformity with the WTO agreements.

19 On 25 September 1997 the reports of the panel and the Appellate Body were adopted by the DSB.

20 On 16 October 1997 the Community informed the DSB, in accordance with Article 21(3) of the DSU, that it would fully respect its international obligations.

21 On 17 November 1997, the complainant States requested, pursuant to Article 21(3)(c) of the DSU, that the reasonable period within which the Community was to comply with its obligations be fixed by binding arbitration.

22 By award published on 7 January 1998, the arbitrator specified for that purpose the period from 25 September 1997 to 1 January 1999.

23 By adopting Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation No 404/93 (OJ 1998 L 210, p. 28), the Council amended the regime governing trade in bananas with third countries.

24 The preamble to Regulation No 1637/98 states:

'(1) ... a number of changes are required in the provisions on trade with third countries contained in Title IV of Regulation ... No 404/93;

(2) ... the Community's international commitments under the [WTO] and to the other signatories of the Fourth ACP-EC Convention should be met, whilst achieving at the same time the purposes of the [COM for bananas];

...

(9) ... operation of this Regulation should be reviewed at the end of an adequate trial period;

...'

25 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). This regulation contains the body of provisions necessary for implementation of the new regime governing trade in bananas with third countries, including the transitional measures justified by the imminence of the entry into force of its implementing rules.

26 Since the United States of America took the view that the Community had set up a banana import regime that was designed to preserve the unlawful elements of the previous regime, in breach of the WTO agreements and the DSB's decision of 25 September 1997, it published on 10 November 1998 in the *Federal Register* a provisional list of products originating in Member States of the Community on whose import it proposed to charge increased customs duty by way of retaliation.

27 On 21 December 1998 the United States of America announced that it intended to apply from 1 February 1999, or at the latest 3 March 1999, customs duty at the rate of 100% on imports of Community products appearing on a list drawn up by the United States authorities.

28 On 14 January 1999 the United States of America requested the DSB, pursuant to Article 22(2) of the DSU, to authorise suspension of the application to the Community and its Member States of tariff concessions and related obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the General Agreement on Trade in Services (GATS), in respect of trade amounting to USD 520 million.

29 At a meeting of the DSB which took place from 25 January to 1 February 1999, the Community contested that amount, on the ground that it did not correspond to the level of nullification or impairment suffered by the United States of America and maintained that the principles and procedures laid down by Article 22(3) of the DSU had not been observed.

30 On 29 January 1999 the DSB decided, at the request of the Community, to refer this matter for arbitration by the original panel, on the basis of Article 22(6) of the DSU, and deferred a decision on the United States of America's request for authorisation pending determination of the permitted amount of duty to be levied by way of retaliatory measure.

31 On 3 March 1999 the United States authorities introduced a requirement for Community exporters of products appearing on a new list drawn up by them to provide a bank guarantee for 100% of the value of the imports covered.

32 By decision of 9 April 1999 the arbitrators, first, found that several provisions of the new import regime under the COM for bananas were contrary to provisions of the WTO agreements and set the level of nullification or impairment suffered by the United States of America at USD 191.4 million per year, and second, held that the suspension by that country of the application to the Community and its Member States of tariff concessions and related obligations under the GATT 1994 covering trade in a maximum amount of USD 191.4 million per year would be consistent with Article 22(4) of the DSU.

33 On 7 April 1999 the United States of America requested pursuant to Article 22(7) of the DSU that the DSB authorise it to levy customs duty on imports up to that amount.

34 By press release of 9 April 1999, the United States Trade Representative ('the Trade Representative') announced the list of products whose import was subject to 100% customs duty. The products listed, originating in Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden or the United Kingdom, included 'lead-acid storage batteries other than of a kind used for starting piston engines or as the primary source of power for electric vehicles'. It was stated that the Trade Representative would publish the determination imposing the 100% duty in the *Federal Register* and intended to make imposition of the duty effective as from 3 March 1999.

35 That decision, published on 19 April 1999 in the *Federal Register* (Volume 64, No 74, pp. 19209 to 19211), was adopted on the basis of section 301 of the 1974 Trade Act, which provides that the Trade Representative is to take the measures authorised if he finds a breach of the rights of the United States of America under a trade agreement.

36 It is apparent from the section of that decision concerning the 'effective date' that the Trade Representative 'determined that, effective April 19 1999, a 100% ad valorem rate of duty [would] be applied to the articles that are entered, or withdrawn from warehouse, for consumption on or after March 3 1999'.

37 A panel constituted following a request made by Ecuador on 18 December 1998 under Article 21(5) of the DSU also concluded, on 6 April 1999, that the new Community regime governing the import of bananas was incompatible with the WTO agreements. The panel's report was approved by the DSB on 6 May 1999.

38 On 19 April 1999 the DSB authorised the United States of America to levy customs duties in respect of trade amounting to up to USD 191.4 million per year on imports originating in the Community.

39 On 25 May 1999 the Community contested before the WTO bodies the United States retaliatory measures in respect of the period from 3 March to 19 April 1999, in particular on the ground that they took effect on 3 March 1999.

40 Since the panel to which the matter was referred by the Community found that the entry into force of the United States increased duty on 3 March 1999 was contrary to the DSU, it deferred the date on which that measure took effect to 19 April 1999.

41 In negotiations with all the interested parties, the Community proposed amendments to the new COM for bananas. Those amendments were enacted in Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2).

42 The preamble to Regulation No 216/2001 states:

'(1) There have been numerous close contacts with supplier countries and other interested parties to settle the disputes arising from the import regime established by Regulation ... No 404/93 and to take account of the conclusions of the [panel] set up under the dispute settlement system of the [WTO].

(2) Analysis of all the options presented by the Commission suggests that establishment in the medium term of an import system founded on the application of a customs duty at an appropriate rate and application of a preferential tariff to imports from ACP countries provides the best guarantees, firstly of achieving the objectives of the common organisation of the market as regards Community production and consumer demand, secondly of complying with the rules on international trade, and thirdly of preventing further disputes.

(3) However, such a system must be introduced upon completion of negotiations with the Community's partners in accordance with WTO procedures, in particular Article XXVIII of the [GATT]. The result of these negotiations must be submitted for approval to the Council which must also, in accordance with the provisions of the Treaty, establish the applicable level of the Common Customs Tariffs.

(4) Until the entry into force of that regime, the Community should be supplied under several tariff quotas open to imports from all origins and managed in line with the recommendations made by the [DSB].

(5) In view of the contractual obligations towards the ACP countries and the need to guarantee them proper conditions of competition, application to imports of bananas originating in those countries of a tariff preference of EUR 300 per tonne would allow the trade flows in question to be maintained. This will entail in particular the application to such imports of zero duty under the ... tariff quotas.

(6) The Commission should be authorised to open negotiations with supplier countries having a substantial interest in supplying the Community market to endeavour to achieve a negotiated allocation of the first two tariff quotas. ...'

43 On 11 April 2001 the United States of America and the Community concluded a memorandum of understanding identifying 'the means by which the long-standing dispute over the EC's banana import regime can be resolved'. That memorandum provided that the Community undertook to 'introduce a tariff-only regime for imports of bananas no later than 1 January 2006'. The memorandum defined the measures which the Community undertook to take during the interim period expiring on 1 January 2006. In return, the United States of America undertook to suspend provisionally the imposition of the increased customs duty which they were authorised to levy on Community imports. The United States of America stated, however, by a communication to the DSB of 26 June 2001, that that memorandum of understanding '[did] not in itself constitute a mutually agreed solution pursuant to Article 3(6) of the DSU [and that], in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda'.

44 By Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Regulation No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6), the Commission set out the detailed rules for applying the new Community regime for importing bananas that had been introduced by Regulation No 216/2001.

45 The United States of America suspended application of the increased customs duty with effect from 30 June 2001. From 1 July 2001 its import duty on stationary batteries originating in the Community was reduced to its initial rate of 3.5%.

46 Statistics produced by the Commission at the Court's request show that the total c.i.f. (cost, insurance, freight) value of imports into the United States of lead-acid storage batteries originating in the Community amounted to USD 33 748 879 in 1998, USD 21 825 385 in 1999, USD 15 938 040 in 2000 and, finally, USD 15 617 997 in 2001.

47 The business activities of Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies, Inc. (FIAMM Technologies) relate inter alia to stationary batteries used mainly in the telecommunications field which were among the products subject to the increased customs duty from 19 April 1999 to 30 June 2001.

Procedure

48 By application lodged at the Registry of the Court of First Instance on 23 March 2000, the applicants brought the present action claiming compensation for the damage alleged to result from the increased duty.

49 By order of the President of the Fourth Chamber of 11 September 2000, the Kingdom of Spain was granted leave to intervene in support of the forms of order sought by the defendants.

50 Following a request made by the Commission pursuant to the second subparagraph of Article 51(1) of the Rules of Procedure of the Court of First Instance, the case was referred to a chamber in extended composition, composed of five Judges, by decision of the Court of 4 July 2002.

51 The case was reassigned to the First Chamber, Extended Composition, on 7 October 2002, pursuant to the decision of the Court of First Instance of 4 July 2002 on the composition of chambers and the assignment of cases to them.

52 When the Judge-Rapporteur initially designated could no longer act as a result of ceasing to hold office, the President of the Court appointed a new Judge-Rapporteur, by decision of 13 December 2002.

53 By order of the President of the First Chamber, Extended Composition, of 3 February 2003, the present case and the connected cases T-151/00 and T-301/00 were joined, after the parties had been heard, for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure.

54 The parties presented oral argument and answered questions put by the Court at the hearing of the First Chamber, Extended Composition, which took place on 11 March 2003.

55 By decision of 23 March 2004, the Court reopened the oral procedure in the present case.

56 On 1 April 2004 the Court, after hearing the parties, decided to refer Cases T-69/00, T-151/00 and T-301/00 which had been joined and Cases T-320/00, T-383/00 and T-135/01, which were connected, to the Grand Chamber of the Court.

57 By order of 19 May 2004, the President of the Grand Chamber, after hearing the parties, joined the six cases for the purposes of the oral procedure.

58 By way of measures of organisation of procedure, the Court requested the parties to reply in writing prior to the hearing to a series of questions. The parties duly adduced the information required.

59 The parties presented oral argument and answered questions put by the Court at the hearing of the Grand Chamber which took place on 26 May 2004.

Forms of order sought

60 In their application, the applicants claim that the Court should:

— order the defendants to pay them damages amounting to EUR 10 760 798.35 (ITL 20 835 811 027.16) or such other sum as the Court considers reasonable,

subject to updating in the course of the proceedings, together with interest at the Italian statutory rate from the time of actual payment by the applicants to the United States customs authorities of the 96.5% duty increase, until final settlement, and default interest at the rate of 8% in the event of delay, after delivery of the judgment, in payment of the sums awarded;

— order the defendants to pay the costs.

61 The applicants stated in the course of the proceedings, when asked to update the amount of the alleged damage, that they had sustained a loss of EUR 12 139 521 solely by reason of payment of the increased customs duty.

62 The defendants, supported by the Kingdom of Spain, contend that the Court should:

— dismiss the action as inadmissible or as unfounded;

— order the applicants to pay the costs.

Admissibility

63 The defendants do not raise a formal objection of inadmissibility under Article 114 of the Rules of Procedure, but state that the action is inadmissible because (i) the

application does not comply with the requirements of Article 44(1)(c) of the Rules of Procedure and (ii) the Court lacks jurisdiction.

Failure of the application to comply with the requirements of Article 44(1)(c) of the Rules of Procedure

Arguments of the parties

64 The defendants contend that, contrary to the requirements laid down by Article 44 (1)(c) of the Rules of Procedure, the application does not specify clearly the measure of the institutions giving rise to non-contractual Community liability or set out clearly the conduct, be it a positive act or an omission, of which the defendant institutions are accused.

65 The applicants submit, on the other hand, that they have defined sufficiently precisely the conduct of which they accuse the defendants, namely the failure to adopt, within the period laid down by the DSB, provisions appropriately amending Regulation No 404/93, in breach of the obligations entered into by the Community under the WTO agreements.

66 The applicants state that it is a matter purely of terminology whether the Community infringed WTO rules deliberately, through the adoption of the contested Community provisions, or by omission, because of the failure to bring those provisions into conformity with the WTO agreements.

Findings of the Court

67 Under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to the procedure before the Court of First Instance by virtue of the first paragraph of Article 53 of that Statute, and under Article 44(1)(c) of the Rules of Procedure of the Court, all applications must indicate the subject-matter of the dispute and contain a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself.

68 In order to satisfy those requirements, an application seeking, as in the present case, compensation for damage allegedly caused by Community institutions must set out the evidence from which can be identified both the conduct of which the applicant accuses those institutions and the reasons for which the applicant considers that there is a causal link between that conduct and the damage he claims to have suffered (Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraphs 29 and 30).

69 As is apparent from their arguments, the applicants contend that they have suffered damage because the defendant institutions did not amend the Community regime governing the import of bananas so as to bring it into conformity with the obligations entered into by the Community under the WTO agreements within the time-limit laid down by the DSB.

70 Contrary to the submissions made by the defendants, the application thus contains the evidence enabling the conduct of which the applicants accuse the defendants and which they consider to be the cause of the damage to them to be identified.

71 It is, moreover, apparent from the arguments set out by the defendants on the merits of the action that they have been fully able to prepare their defence on the conditions under which the Community incurs non-contractual liability. It follows that the Court is in a position to rule on the action fully informed of the file contents and in compliance with the *audi alteram partem* rule.

72 The ground of challenge put forward by the defendants alleging that the application does not comply with the requirements of Article 44(1)(c) of the Rules of Procedure will therefore be rejected.

Jurisdiction of the Court

Arguments of the parties

73 The Commission submits that the increased customs duty applied to the products imported by the applicants into the United States is a result of a decision of the United States Government and not of an act of a Community institution.

74 In addition, the wording of Article 288 EC requires there to be a direct link between the act in issue and the sphere of Community activity. The Court of First Instance's jurisdiction cannot be dependent solely on the applicants' formal allegation that the damage to them stems from acts adopted by the Community institutions.

75 When the applicants assert that the United States Government would never have increased the import duty at issue if it had not been authorised to do so by the DSB following the finding that the Community legislation was incompatible with WTO rules, they do not demonstrate that such a decision is directly attributable to the Community institutions. Their assertion shows, on the contrary, that the act whose effects the applicants complain of is an act adopted by the United States of America in the exercise of its discretion. In those circumstances, the Court cannot declare that it has jurisdiction to hear and determine the present action (Joined Cases 89/86 and 91/86 *Étoile commerciale and CNTA* v *Commission* [1987] ECR 3005, paragraphs 18 to 20).

76 The applicants submit that it cannot reasonably be denied that a causal link exists between the damage sustained by them and the conduct of the defendant institutions. There is no doubt that the United States Government would not have increased the import duty on the applicants' products had it not been authorised so to do by the DSB following the Community's breach of WTO rules. The origin of the damage suffered lies in the fact that the reaction of the United States of America resulted from the Community's breach of the WTO agreements.

Findings of the Court

77 Article 235 EC, in conjunction with the second paragraph of Article 288 EC, confers jurisdiction upon the Community courts to hear actions seeking compensation for damage caused by the Community institutions or by their servants in the performance of their duties.

78 In the present case, the applicants claim compensation for the damage allegedly suffered by them by reason of the increase in the import duty imposed on their products by the authorities of the United States of America, in accordance with the authorisation granted by the DSB following the finding that the Community regime governing the import of bananas was incompatible with the WTO agreements.

79 The action is grounded on the Community's non-contractual liability which the applicants claim is incurred because the cause of their loss lies in the enactment by the Council and the Commission of legislation which was found by the DSB to be incompatible with the WTO agreements.

80 The Court therefore has jurisdiction to hear, under Article 235 EC and the second paragraph of Article 288 EC, the present claim for compensation which, in contrast to the situation obtaining in *Étoile commerciale and CNTA* v *Commission*, cited in paragraph 75 above, on which the Commission relies, is not directed exclusively at a decision of a national body as the basis for liability.

81 It is true that, according to settled case-law, in order for the Community to incur liability the damage alleged must be attributable to the conduct of the Community institutions. However, this involves a substantive condition, which must be investigated when reviewing whether a sufficiently direct causal link exists between the damage alleged and the institutions' conduct and which does not enable the Court to deny jurisdiction, once it is alleged that the damage is attributable to the conduct of the Community institutions.

82 The line of argument developed by the Commission concerning the Court's lack of jurisdiction will therefore be rejected, but without prejudice to the assessment of the causal link between the conduct of the Council and the Commission and the alleged damage, which will be made when examining whether the conditions for non-contractual liability are fulfilled.

83 Accordingly, the action will be declared admissible.

Substance

84 The applicants' claim for compensation is founded principally on the rules governing non-contractual liability of the Community for the unlawful conduct of its institutions. The applicants also seek the application by analogy of the rules governing non-contractual liability that are applicable to the Member States where the Court of Justice finds under Article 226 EC that they have infringed their Community obligations. Finally, the applicants rely on the rules governing the non-contractual liability that the Community may incur even in the absence of unlawful conduct of its institutions.

Liability of the Community for unlawful conduct of its institutions

85 It is settled case-law that in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions a number of conditions must be satisfied: the institutions' conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44, Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30, and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20).

86 If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

87 The unlawful conduct alleged against a Community institution must consist of 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).

88 The decisive test for finding that that requirement is fulfilled is whether the Community institution concerned manifestly and gravely disregarded the limits on its powers.

89 Where an 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 (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, and Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission* [2004] ECR II-521, paragraph 71).

90 It is in the light of those observations that the applicants' claim for compensation will be examined.

Arguments of the parties

— The unlawful conduct of which the defendant institutions are accused

91 The applicants complain that the Council and the Commission did not, within the period of 15 months set by the DSB, bring the Community regime governing the

import of bananas into conformity with the commitments entered into by the Community under the WTO agreements. The applicants state that the increased duty imposed by the United States, which is causing them serious damage, is the direct consequence of the retention in force of that regime, which the DSB has found to be incompatible with the WTO agreements.

92 In the applicants' submission, the retention in force of that regime is contrary to certain fundamental principles of Community law, including the principle *pacta sunt servanda*. Under this first head, the Community has failed to fulfil its obligations as a WTO member, regard being had to the binding nature of the WTO agreements and of the DSU.

93 The defendants have also infringed the principles of the protection of legitimate expectations and of legal certainty. Every citizen must be able to enjoy the legal certainty that he will not have to bear the consequences of unlawful conduct by the Community authorities. The applicants claim that they had a legitimate expectation, not that the tariff concessions negotiated with the United States of America in the form of the original import duty at the rate of 3.5% would continue to apply, but that those concessions would not be altered because of the Community institutions' unlawful conduct. However, the Community did not bring its legislation into line with WTO rules even though it had assured its trading partners of its intention to comply with the DSB's rulings and had obtained an exceptional extension of the period granted for that purpose.

94 The defendant institutions also infringed the applicants' right to property and pursuit of an economic activity, which is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950. In the present case, the applicants were compelled to pay prohibitive customs duty on their imports of batteries into the United States and to relocate their production facilities.

95 Finally, the Council and the Commission infringed the principle of proper administration by not bringing the Community legislation at issue into conformity with WTO rules and underestimating the effect that adoption of the United States retaliatory measures was capable of having on the activity of persons under their administration.

96 The defendant institutions state in response that the Community has always intended to comply with all its international obligations, including those resulting from the Lomé Conventions and the WTO agreements.

97 Since negotiation and the grant of compensation are a form of dispute settlement, the applicants could not have entertained any legitimate expectation that the banana import regime would be amended, instead of compensation being negotiated. Nor can an entitlement to compensation from the Community be founded on the existence of an established right to retention of a trade concession by a non-member State, in the absence of any obligation on the Community to act with a view to obtaining a given level of tariff concessions.

98 The alleged restrictions on the right to property are in no way comparable to expropriation and do not fall outside the normal risks of any commercial activity.

99 Finally, no infringement of the principle of proper administration has been committed. The Commission negotiated with all the WTO members concerned in order to find a solution acceptable to everybody and sought to obtain the agreement of the United States of America to compensation in the form of access to the Community market for certain United States products, so as to avoid a unilateral withdrawal of concessions.

— The legal nature of the rules of law allegedly infringed by the defendants

100 The applicants observe that all the principles infringed by the defendants are superior in rank and are designed to protect individuals. Before the United States increased the import duty, the WTO regime directly granted the applicants the right to import their products into the United States paying the original import duty at the reduced rate of 3.5%. Even if the WTO agreements are not to be regarded as directly applicable, such effect must be accorded to the DSB decision that found against the Community, which meets all the conditions laid down for that purpose by Community case-law.

101 The defendants counter that the WTO agreements create rights only in favour of the contracting parties, to the exclusion of individuals. The same is true of DSB decisions, which merely interpret WTO rules.

102 The WTO agreements are designed to regulate and manage international trade relations between subjects of international law only. Tariff concessions agreed to by WTO members allow access to a national market without, however, guaranteeing such access or a specified price level on that market, or directly conferring on businesses the right to a given tariff treatment or a right enforceable against the Community institutions.

103 The Community, which is tolerating the suspensions of the United States concessions temporarily, during the period needed for finding a solution to the banana dispute, is therefore complying fully with WTO rules, of which the increase in the United States import duty on batteries is merely an application.

104 Since the WTO agreements cannot be relied upon by the applicants, nor can it be pleaded that the principle *pacta sunt servanda* has been infringed or that a legitimate expectation that those agreements would be complied with has been thwarted.

— The seriousness of the alleged breaches

105 The applicants contend that the breaches committed by the defendants are sufficiently serious to be able to give rise to non-contractual Community liability. The degree of clarity and precision of the infringed rules of law should be noted, as should the lack of discretion allowed to the defendant institutions for bringing the incompatible Community legislation into conformity with the WTO agreements, given the precise detail supplied in this regard by the DSB's recommendations and rulings. Furthermore, the Community has persisted in its breach of WTO law and, therefore, Community law, even after expiry of the 15-month period which it was granted by the arbitrator to comply with WTO rules.

106 The defendants contend that they did not exceed the limits of their discretion in particular because the situations to be resolved were complex and application and interpretation of the provisions at issue were difficult. It cannot be complained that the defendants failed to take the necessary measures, since Regulations No 1637/98 and No 2362/98, the subject of a fresh procedure initiated by the United States of America, establish a Community import regime different from the original regime.

107 The role played by the suspension of concessions, which is provided for by Article 22 of the DSU and constitutes the best solution after full implementation of the DSB's recommendations, should be noted in this regard. Article 3(7) of the DSU, which favours selection of a mutually agreed solution, has the effect of conferring a wide

discretion on the competent authorities of WTO members enabling them to break free, even if only temporarily, from their obligations arising from the WTO agreements.

Findings of the Court

— The preliminary question as to whether the WTO rules may be relied upon

108 Before examining the legality of the conduct of the Community institutions, it is necessary to decide whether the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules.

109 The applicants rely in this connection on the principle *pacta sunt servanda*, which is one of the rules of law with which the Community institutions must comply when carrying out their functions, being a fundamental principle of all legal orders and particularly of the international legal order (Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 49).

110 However, the principle *pacta sunt servanda* cannot be asserted against the defendants in the present case since, in accordance with settled case-law, the WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions (judgment in Case C-149/96 *Portugal* v *Council* [1999] ECR

I-8395, paragraph 47; order in Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159, paragraph 24; and judgments in Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 93, Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 53, and Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 52).

111 First, the Agreement establishing the WTO is founded on reciprocal and mutually advantageous arrangements which distinguish it from those agreements concluded between the Community and non-member States that introduce a certain asymmetry of obligations. It is common ground that some of the most important commercial partners of the Community do not include the WTO agreements among the rules by reference to which their courts review the legality of their rules of domestic law. To review the legality of actions of the Community institutions in the light of those rules could therefore lead to an unequal application of the WTO rules depriving the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners (*Portugal* v *Council*, cited in paragraph 110 above, paragraphs 42 to 46).

112 Second, to require the courts to refrain from applying rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of the DSU of entering into negotiated arrangements, even on a temporary basis, in order to arrive at mutually acceptable compensation (*Portugal* v *Council*, cited in paragraph 110 above, paragraphs 39 and 40).

113 It follows that in principle the Community cannot incur non-contractual liability by reason of any infringement of the WTO rules by the defendant institutions (Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, paragraph 51, Case T-30/99 *Bocchi Food Trade International* v *Commission* [2001] ECR II-943, paragraph 56, and Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981, paragraph 51).

114 It is only where the Community intends to implement a particular obligation assumed in the context of the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Court can review the legality of the conduct of the defendant institutions in the light of the WTO rules (see, as regards the GATT 1947, Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paragraphs 19 to 22, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31, and, as regards the WTO agreements, *Portugal* v *Council*, cited in paragraph 110 above, paragraph 49, and *Biret International* v *Council*, cited in paragraph 110 above, paragraph 53).

115 However, notwithstanding the existence of a decision of the DSB finding the measures taken by a member to be incompatible with WTO rules, neither of those exceptions is applicable in this instance.

— The exception based on an intention to implement a specific obligation assumed within the WTO

116 In undertaking, after the adoption of the DSB decision of 25 September 1997, to comply with the WTO rules, the Community did not intend to assume a specific obligation in the context of the WTO capable of justifying an exception to the principle that WTO rules cannot be relied upon before the Community courts and of allowing the latter to review the legality of the conduct of the Community institutions by reference to those rules.

117 It is true that, compared with the GATT 1947, the DSU has strengthened the dispute settlement mechanism, in particular in respect of the adoption of panel reports.

118 Thus, Article 3(7) of the DSU makes it clear that the first objective of the dispute settlement mechanism is usually the withdrawal of measures which have been found to be incompatible with the WTO agreements. Similarly, Article 22(1) of the DSU favours full implementation of a recommendation to bring a measure into conformity with the WTO agreements.

119 Furthermore, as provided in Article 17(14) of the DSU, an Appellate Body report adopted, as in the present case, by the DSB is to be unconditionally accepted by the parties to the dispute. Finally, Article 22(7) states that the parties are to accept as final the arbitrator's decision determining the level of the suspension of concessions.

120 None the less, the DSU in any event accords considerable importance to negotiation between WTO members which are parties to a dispute (*Portugal* v *Council*, cited in paragraph 110 above, paragraphs 36 to 40).

121 The DSU thus allows the WTO member involved several methods of implementing a recommendation or ruling of the DSB finding a measure incompatible with WTO rules.

122 Where immediate withdrawal of the incompatible measure is impracticable, the DSU envisages, in Article 3(7), that the member harmed may be granted compensation or may be authorised to suspend the application of concessions or other obligations on an interim basis pending the withdrawal of the incompatible measure (see *Portugal* v *Council*, cited in paragraph 110 above, paragraph 37).

123 Under Article 22(2) of the DSU, if the impugned WTO member fails to comply with its obligation to implement the recommendations and rulings of the DSB within the period of time that it has been set, it is, if so requested and no later than the expiry of that period, to enter into negotiations with the complaining party with a view to arriving at mutually acceptable compensation.

124 If no satisfactory compensation has been agreed within 20 days after the expiry of the reasonable period of time provided for in Article 21(3) of the DSU for complying with WTO rules, the complaining party may request authorisation from the DSB to suspend the application to that member of concessions or other obligations under the WTO agreements.

125 Even on expiry of the period of time set for bringing the measure declared incompatible into conformity with WTO rules and after authorisation and adoption of measures granting compensation or suspending concessions under Article 22(6) of the DSU, considerable importance is still accorded to negotiation between the parties to the dispute.

126 Article 22(8) of the DSU thus makes it clear that the suspension of concessions or other obligations is temporary in nature and states that the suspension is only to be applied 'until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached'.

127 Article 22(8) further provides that, in accordance with Article 21(6), the DSB is to continue to keep the implementation of adopted recommendations or rulings under surveillance.

128 In the event of disagreement as to the compatibility with a WTO agreement of measures taken to comply with the DSB's recommendations and rulings, Article 21 (5) of the DSU provides that the dispute is to be decided 'through recourse to these dispute settlement procedures', which include pursuit by the parties of a negotiated solution.

129 Neither the expiry of the period set by the DSB for the Community to bring its banana import regime into conformity with the DSB's decision of 25 September 1997 nor the decision of 9 April 1999, by which the DSB arbitrators expressly found that the new mechanism for banana imports established by Regulations No 1637/98 and No 2362/98 was incompatible with WTO rules, resulted in exhaustion of the methods for settling disputes made available by the DSU.

130 To that extent, review by the Community courts of the legality of the conduct of the defendant institutions by reference to WTO rules could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute that is consistent with WTO rules.

131 In those circumstances, to require courts to refrain from applying the rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded in particular by Article 22 of the DSU of entering into a negotiated arrangement even on a temporary basis (*Portugal* v *Council*, cited in paragraph 110 above, paragraph 40).

132 The applicants are therefore wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO member to comply, within a specified period, with the

recommendations and rulings of the WTO bodies and in contending that DSB rulings are enforceable unless the contracting parties unanimously oppose this.

133 Moreover, in again amending, by Regulation No 216/2001, the banana import regime, the Council sought to reconcile various divergent objectives. The preamble to Regulation No 216/2001 thus states, in the first recital, that there were numerous close contacts in order, in particular, 'to take account of the conclusions of the [panel]' and, in the second recital, that the new import system envisaged provides the best guarantees both 'of achieving the objectives of the [COM for bananas] as regards Community production and consumer demand' and 'of complying with the rules on international trade'.

134 It was, ultimately, in return for the Community's undertaking to establish a tariff-only regime for imports of bananas before 1 January 2006 that the United States of America agreed, as set out in the memorandum of understanding concluded on 11 April 2001, to suspend provisionally the imposition of the increased customs duty.

135 Such an outcome could have been jeopardised by intervention of the Community courts in reviewing the legality by reference to WTO rules of the conduct of the defendant institutions in the present case with a view to awarding compensation for the loss sustained by the applicants.

136 The Court notes in this regard that, as the United States of America has expressly stated, the memorandum of understanding of 11 April 2001 does not in itself constitute a mutually agreed solution for the purposes of Article 3(6) of the DSU and that the question of implementation by the Community of the DSB's recommenda-

tions and rulings was still included on 12 July 2001, that is to say after the present action had been brought, on the agenda of the meeting of the DSB.

137 It follows that the defendant institutions did not intend, by amending the Community regime at issue governing the import of bananas, to implement specific obligations arising from the WTO rules and in the light of which the DSB had found that regime to be incompatible with those rules.

138 Besides, as is apparent from the preamble to Regulation No 1637/98, the Council intended in the present instance to reconcile the Community's international commitments both under the WTO and to the other signatories of the Fourth Lomé Convention, by utilising the various methods of dispute settlement defined by the DSU, whilst also safeguarding the objectives of the COM for bananas.

139 That intention is confirmed by Article 20(e) of Regulation No 404/93, as amended by Regulation No 1637/98. In so far as Article 20(e) states that the provisions which the Commission is empowered to adopt for the purposes of application of Title IV of Regulation No 404/93, which relates to trade in bananas with third countries, include measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article 300 EC, it encompasses all the contractual obligations entered into, without giving greater weight to the obligations assumed by the Community under the WTO agreements.

140 Furthermore, in the ninth recital in the preamble to Regulation No 1637/98 the Community legislature expressly reserved the possibility of reviewing the operation of that regulation at the end of an adequate trial period.

— The exception based on express reference to specific provisions of the WTO agreements

141 The COM for bananas, as established by Regulation No 404/93 and subsequently amended, cannot be regarded as referring expressly to specific provisions of the WTO agreements (see, to this effect, *OGT Fruchthandelsgesellschaft*, cited in paragraph 110 above, paragraph 28).

142 In particular, the preambles to the various regulations amending the banana import regime do not show that the Community legislature referred to specific provisions of the WTO agreements when it purported to bring the regime into conformity with those agreements.

143 Thus, Regulation No 2362/98 contains no express reference to specific provisions of the WTO agreements (*Cordis* v *Commission*, cited in paragraph 113 above, paragraph 59, *Bocchi Food Trade International* v *Commission*, cited in paragraph 113 above, paragraph 64, and *T. Port* v *Commission*, cited in paragraph 113 above, paragraph 59).

144 Accordingly, notwithstanding a finding of incompatibility made by the DSB, the WTO rules do not in the present case, whether because of particular obligations which the Community intended to implement or because of an express reference to specific provisions, amount to rules of law by reference to which the legality of the institutions' conduct may be assessed.

145 It follows from the above reasoning that the applicants are not entitled to argue, for the purposes of their claim for compensation, that the conduct of which the Council and the Commission are accused is contrary to WTO rules.

146 The complaints advanced by the applicants based on breach of the principles of the protection of legitimate expectations and of legal certainty, on infringement of the right to property and to pursuit of an economic activity and, finally, on failure to observe the principle of proper administration all rest on the premiss that the conduct of which the defendant institutions are accused is contrary to WTO rules.

147 Inasmuch as those rules are not among the rules by reference to which the Community courts review the legality of the Community institutions' conduct, these complaints will therefore be rejected.

148 It follows that the defendant institutions' conduct cannot be regarded as unlawful and there is no need to consider the applicants' arguments relating to the legal nature of the provisions and principles claimed to be infringed and to the alleged gravity of their infringement.

149 Since it has not been proved that the conduct of which the defendant institutions are accused was unlawful, one of the three cumulative conditions of non-contractual liability of the Community for unlawful conduct is not met.

150 In those circumstances, the applicants' claim for compensation grounded on this liability regime will be dismissed and it is not necessary, in this context, to consider whether the other two conditions, relating to the reality of the damage and to the existence of a causal link between the conduct and the damage, are met (Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 14, and Case T-220/96 *EVO* v *Council and Commission* [2002] ECR II-2265, paragraph 39).

Application by analogy of the rules governing non-contractual liability of the Member States

151 The applicants essentially contend that the arbitrators' decision of 9 April 1999 authorising the retaliatory measures against Community exports is comparable to a judgment of the Court of Justice declaring, on the basis of Article 226 EC, that a Member State has failed to fulfil its Community obligations. The Community courts will therefore be led to find that the applicants are entitled to compensation for the damage resulting from the defendants' unlawful conduct (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, and Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029).

152 The defendant institutions submit that the Court of Justice's case-law relating to the Member States' non-contractual liability for breach of their Community obligations is inapplicable in this instance.

153 The Court need only state that, even assuming that DSB recommendations and rulings may be treated like judgments of the Court of Justice, the applicants' claim for compensation is founded on the application by analogy to the Community of a liability regime based on the premiss of unlawful conduct by the defendant institutions.

154 Since the conduct of which the parties concerned are accused in the present case has not been shown to be unlawful, such a claim can only be dismissed as unfounded.

Liability of the Community in the absence of unlawful conduct of its institutions

The principle of non-contractual liability of the Community in the absence of unlawful conduct of its institutions

— Arguments of the parties

155 In the applicants' submission, even if the defendants could lawfully have disregarded the DSB's rulings, the conditions which Community case-law imposes for the incurring of non-contractual liability by the Community for damage caused by its institutions even in the absence of unlawful action by them are in any event met, namely that actual damage has been suffered, that a causal link exists between that damage and the conduct of the Community institutions and that the damage is unusual and special in nature (judgment in Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraph 59, upheld on appeal in Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549).

156 The defendants counter that the principle under which the Community may incur non-contractual liability in the absence of unlawful conduct by its institutions cannot be considered a general principle common to the laws of the Member States within the meaning of the second paragraph of Article 288 EC. In any event, such a principle has not yet been laid down by Community case-law and the applicants do not satisfy the strict conditions of this liability regime that are imposed by the national legal systems which have recognised it.

— Findings of the Court

157 Where, as in the present case, it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets can in no circumstances obtain compensation by virtue of the Community's non-contractual liability (see, to this effect, Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677, paragraph 17).

158 The second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on the 'general principles common to the laws of the Member States' and therefore does not restrict the ambit of those principles solely to the rules governing non-contractual Community liability for unlawful conduct of those institutions.

159 National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage.

160 When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met (Case C-237/98 P *Dorsch Consult* v *Council and Commission*, cited in paragraph 155 above, paragraph 19).

161 It is necessary therefore to examine whether those three conditions are met here.

The existence of actual and certain damage

— Arguments of the parties

162 The applicants submit that the damage to them is comprised by, first, the 96.5% increase in the import duty levied by the United States authorities on the applicants' imports of batteries into the United States and, second, the costs incurred in respect of the setting up and the relocation of production units for those products which they were compelled to undertake in response to that trade retaliation measure. To this must be added losses of turnover resulting from the reconversion of the production units in question.

163 In the course of the proceedings, the applicants stated that by expediting the establishment of a battery production unit in the United States and by converting a site in another non-member State into a factory for the manufacture of batteries, they had been able to reduce to a minimum the adverse impact of the increased customs duty and to save their share of the United States market. The applicants therefore did not lose sale volumes but suffered only pecuniary loss.

164 The defendants counter by stating that the sales contracts between the applicants and their United States customers provide for variation of the price of their products and that it has not been shown that the persons concerned entered into negotiations to that end. By agreeing to clauses limiting increases to their prices, the applicants were themselves responsible for the financial disadvantages allegedly resulting from the increased customs duty. The defendants add that the applicants' distribution agreement, under which the prices agreed with the purchaser are based on the fob (free-on-board) clause, places the risk of variation of the customs duty on imports

exclusively with the purchaser. The amount of United States import duty is naturally added, together with the amounts for transport and insurance, to the fob price initially agreed.

165 Also, the applicants have not shown that they were unable to export their batteries to other countries and thereby avoid any loss of profit. Finally, far from giving rise to a loss, their relocation measures result, on the contrary, in access to more profitable high-technology production.

— Findings of the Court

166 It is apparent from their arguments that in essence the defendant institutions merely deny that the applicants have suffered economic loss that is not the result of their own decisions.

167 It follows that the Council and the Commission do not fundamentally dispute that the applicants have suffered actual and certain damage following the introduction of the United States increased customs duty on imports of batteries originating in the Community.

168 In particular, the very fact that the defendants accept that the distribution contract concluded by the applicants has the effect of placing the risk of variation of the customs duty on imports exclusively with the purchaser means that they cannot deny that the applicants must, at the very least, have necessarily suffered commercial damage by reason of the incontestable rise in the price of their products caused, on the United States market, by the sudden increase of the United States ad valorem import duty to 100%.

169 Moreover, the statistics adduced by the Commission bear out the applicants' contentions, since they unquestionably show an appreciable reduction in the total value of imports into the United States of lead-acid storage batteries originating in the Community.

170 To that extent, the Court finds that the condition requiring the applicants to have sustained actual and certain damage is satisfied.

The causal link between the damage suffered and the conduct of the defendant institutions

— Arguments of the parties

171 The applicants submit that it is enough for the damage suffered to result sufficiently directly from the Community institutions' conduct and that an absolutely immediate causal link is not required. In the present case, the increase in United States customs duty in fact results from the retention of a Community regime governing the import of bananas that is incompatible with WTO rules.

172 The United States authorities' intention to adopt retaliatory measures and the list of the products concerned were perfectly well known. It does not matter that any Community business might be affected and that the United States of America had the right to designate the sectors in question or to react with other options provided for or allowed by WTO rules.

173 The defendants deny that there is any causal link between the damage alleged and their conduct. The increased customs duty is the consequence not of their action but of a unilateral act of the United States of America, which resulted in the delimitation of the circle of Community businesses affected. The United States authorities could have chosen products other than batteries and they also exempted from their increased customs duty products originating in certain Member States of the Community. The level of the tariff increase was likewise set by the United States Government acting with entire freedom.

174 The Community cannot therefore be responsible for imposition of a disproportionate burden on the businesses concerned. Besides, the applicants' observations relating to the discrimination of which they claim to be victim show that there is no causal link between the defendants' conduct and the damage alleged.

175 Withdrawal of concessions by a WTO member is neither automatic nor obligatory. The procedure laid down in Article 22(1) and (2) of the DSU thus envisages the negotiation of compensation in the form of concessions as to market access where DSB recommendations or rulings are not implemented within a reasonable period of time.

176 Nor does any, even indirect, relationship exist between the COM for bananas and the applicants' decisions to pay the increased customs duty. No Community measure imposed upon them the obligation to export to the United States or to continue to export in the new circumstances or precluded the possibility of renegotiating the import price or of exporting their products elsewhere.

— Findings of the Court

177 The principles common to the laws of the Member States to which the second paragraph of Article 288 EC refers cannot be relied upon to found an obligation on the Community to make good every harmful consequence, even a remote one, of conduct of its institutions (see, by analogy, the judgments in Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 21, and Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359, paragraph 25, and the order in Case T-201/99 *Royal Olympic Cruises and Others* v *Council and Commission* [2000] ECR II-4005, paragraph 26).

178 The condition under the second paragraph of Article 288 EC relating to a causal link requires there to be a sufficiently direct causal nexus between the conduct of the Community institutions and the damage (*Dumortier and Others* v *Council*, cited in paragraph 177 above, paragraph 21, and judgment in Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, paragraph 118, upheld on appeal in Case C-472/00 P *Commission* v *Fresh Marine* [2003] ECR I-7541).

179 It is admittedly true that the United States of America was, at its request, simply authorised by the DSB, and not obliged, to withdraw concessions by way of an increase in its duty on imports of products originating in the Community. Even after obtaining that authorisation, the United States Government still had the option of seeking to settle the dispute between it and the Community without adopting retaliatory measures against the latter.

180 It was also by making a choice in the exercise of its discretion that the United States authorities decided to make batteries subject to their retaliatory measure, from which they themselves exempted batteries originating in certain Member States of the Community, and to set the rate of the increase in import duty imposed on the products concerned at 96.5%.

181 It is none the less the case that, were it not for the existence of the Community regime at issue governing the import of bananas and the finding by the DSB of its incompatibility with WTO rules, the United States of America would not have been able to seek or obtain from the DSB authorisation to suspend its tariff concessions on products originating in the Community in an amount up to the level of nullification or impairment resulting from retention of the Community regime at issue.

182 It was on the basis of the amount of damage suffered by the United States economy as a result of the Community regime governing the import of bananas held to be incompatible with WTO rules that the DSB determined the amount of trade up to which the United States authorities were authorised to suspend their tariff concessions in relation to the Community.

183 In those circumstances, the withdrawal of concessions in relation to the Community which took the form of the increased customs duties on imports is to be regarded as a consequence resulting objectively, in accordance with the normal and foreseeable operation of the WTO dispute settlement system accepted by the Community, from the retention in force by the defendant institutions of a banana import regime incompatible with the WTO agreements.

184 The unilateral decision by the United States of America to impose increased customs duty on imports of batteries originating in the Community is not therefore such as to break the causal link that exists between the damage which the imposition of that increased duty caused to the applicants and the defendants' retention of the banana import regime at issue.

185 The conduct of the defendant institutions necessarily led to adoption of the retaliatory measure by the United States authorities in compliance with the procedures established by the DSU and accepted by the Community, so that their conduct must be regarded as the immediate cause of the damage suffered by the applicants following imposition of the United States increased customs duty.

186 Even before the DSB, on 19 April 1999, authorised the United States of America to levy its increased import duties, the defendant institutions were not unaware that the retaliatory measures by the United States of America were imminent.

187 On 10 November 1998 the United States of America had published the provisional list of products originating in the Community on which it proposed to charge increased import duties, and on 21 December 1998 it confirmed that the duty was soon to apply at a rate of 100%.

188 From 3 March 1999, the date on which the requirement for Community exporters to provide a bank guarantee for 100% of the value of the imports covered was introduced, the defendants could no longer have been unaware of the firm intention of the United States of America to impose the increased customs duties. There could be no remaining doubt after the Trade Representative's press release of 9 April 1999 announcing the list of products subject to the increased duties.

189 The objections derived by the defendants from the lack of any relationship between the banana import regime at issue and the decision which they impute to the applicants to pay the increased customs duty, from the alleged lack of an obligation on them to continue selling their batteries on the United States market and from the supposed possibility of renegotiating the price of their products or exporting them to other markets are irrelevant as regards the causal link.

190 Such considerations, which concern only the measures which the applicants could have been prompted to adopt in order to avoid payment of the increased customs duty and reduce their commercial loss, cannot call into question the existence of the sufficiently direct causal link which has been found between the defendants' conduct and the damage suffered by the applicants following imposition of the increased duty.

191 It must therefore be accepted that the requisite direct causal link exists between the conduct of the defendant institutions with regard to banana imports into the Community and the damage suffered by the applicants by reason of imposition by the United States of the increased import duty.

The unusual and special nature of the damage suffered

— Arguments of the parties

192 The applicants submit that the damage suffered is unusual and special as a result of the twofold discrimination brought about by the defendant institutions' conduct.

193 First, the increased customs duty is imposed on the very specific circle of economic operators appearing on the special list drawn up by the United States authorities.

194 The applicants have been discriminated against vis-à-vis the other undertakings penalised by the retaliatory measures since they bear, by themselves, nearly 6% of the total sum of USD 191.4 million specified in the decision of the United States Government imposing the retaliatory measures.

195 The applicants consider themselves to have been discriminated against in any event not only vis-à-vis undertakings producing industrial batteries but also in relation to all Community undertakings since every one of them could potentially have been subjected to sanctions.

196 Second, the applicants state that the hazard to which a business is exposed when it is required suddenly to pay prohibitive duty on its exports as a result of a trade dispute that has arisen in a sector other than its field of activity cannot be regarded as a normal risk for an undertaking.

197 The applicants add that the interest in retention of certain rules of the COM for bananas cannot properly be classified as a Community objective of fundamental public interest whose importance would justify adverse consequences for certain businesses. It is not dismantling the COM for bananas that is at issue, but bringing it into line with the legal order of the WTO.

198 The defendant institutions reply that the conditions relating to unusual and special damage are not met in the present case. First, the applicants' position on the United States market could have been altered at any moment as a result of unilateral acts of the Member States or pursuant to agreements between the Community and the United States of America. Second, the circle of economic operators affected by the United States measures is not so limited that the damage to them can be considered unusual and special.

199 An individual would suffer unusual and special damage only if he were particularly harmed or harmed in a different way and much more seriously than all other economic operators (Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057, paragraph 28). The increase in United States duty, on the other hand, has affected to the same extent all exporters of batteries originating in the Community that were being imported into the United States.

200 While the Court of Justice has referred to a degree of responsibility resulting from disproportionate losses required to be borne by certain operators following legally adopted measures (*De Boer Buizen* v *Council and Commission*, cited in paragraph

157 above, paragraph 17), that, however, unlike the present case, concerned a measure which limited trade and was adopted by the Community. The undertakings in question could have obtained compensation only if they had suffered a disproportionate economic loss compared with other distributors of the same products.

201 The increase in United States import duty which occurred after five months' notice is not an event that is capable of being classified as unusual, not only because the WTO agreements and, even, from 1947, the GATT provide the possibility of altering duty pursuant to Article XXVIII of the GATT but also because various instruments to protect trade operate in an equivalent manner by means of increasing duty.

— Findings of the Court

202 In the case of damage which economic operators may sustain as a result of the activities of the Community institutions, damage is, first, unusual when it exceeds the limits of the economic risks inherent in operating in the sector concerned and, second, special when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators (see Case T-184/95 *Dorsch Consult* v *Council and Commission*, cited in paragraph 155 above, paragraph 80, and *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission*, cited in paragraph 89 above, paragraph 151).

203 It has not been established in the present case that the applicants suffered, as a result of the incompatibility of the Community regime governing the import of bananas with the WTO agreements, damage in excess of the limits of the risks inherent in their export operations.

204 It is true that, as stated in its preamble, the Agreement establishing the WTO is intended to establish an integrated multilateral trading system that incorporates the results of past trade liberalisation efforts.

205 Nevertheless, the possibility, which has come about in the present case, of tariff concessions being suspended as provided for by the WTO agreements is among the vicissitudes inherent in the current system of international trade. Accordingly, the risk of this vicissitude has to be borne by every operator who decides to sell his products on the market of one of the WTO members.

206 As the applicants have themselves noted, the arbitrators' decision of 9 April 1999 emphasised that the temporary nature attributed to the suspension of concessions by Article 22(1) of the DSU indicates that suspension is intended to induce the WTO member proceeded against to comply with the recommendations and rulings of the DSB.

207 In addition, it is clear from Article 22(3)(b) and (c) of the DSU, an international instrument which was publicised appropriately so as to ensure that Community operators were aware of it, that the complaining member of the WTO may seek to suspend concessions or other obligations in sectors other than that in which the panel or Appellate Body has found a violation by the member concerned, whether under the same agreement or another WTO agreement.

208 The applicants are therefore wrong in contending that the possibility of retaliatory measures being implemented by a non-member State as a result of a dispute which has arisen in a sector quite different from theirs cannot be considered to be a normal risk.

209 It follows that the risks to which the marketing by the applicants of their batteries on the United States market could thereby be exposed are not to be regarded as beyond the normal hazards of international trade as currently organised.

210 Indeed, the applicants themselves observed in their pleadings that the tariff concessions which had been negotiated with the United States of America in the form of the original import duty at the reduced rate of 3.5% were not immutable.

211 Therefore, in the circumstances of the present case, the damage suffered by the applicants cannot be classified as unusual.

212 Such a finding is sufficient to preclude any entitlement to compensation on this basis. It is thus unnecessary for the Court to rule on the condition requiring special damage.

213 Accordingly, the applicants' claim for compensation founded on the rules governing non-contractual Community liability in the absence of unlawful conduct will be dismissed.

214 It follows from all the foregoing reasoning that the action must be dismissed in its entirety as unfounded.

Costs

215 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.

216 Since the applicants have been unsuccessful, they will be ordered to bear, in addition to their own costs, the costs incurred by the Council and the Commission, in accordance with the applications made to that effect by both defendant institutions.

217 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs.

218 The Kingdom of Spain will therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Grand Chamber)

hereby:

1. Dismisses the action;

2. **Orders the applicants to bear, in addition to their own costs, the costs incurred by the Council and the Commission;**

3. **Orders the Kingdom of Spain to bear its own costs.**

Vesterdorf Lindh Azizi

Pirrung Legal García-Valdecasas

Tiili Cooke Meij

Vilaras Forwood

Delivered in open court in Luxembourg on 14 December 2005.

E. Coulon B. Vesterdorf

Registrar President

Table of contents