JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

3 February 2005 *

In Case T-19/01,

Chiquita Brands International, Inc., established in Trenton, New Jersey (United States),

Chiquita Banana Co. BV, established in Breda (Netherlands),

and

Chiquita Italia, SpA, established in Rome (Italy),

represented by C. Pouncey, solicitor, and L. Van Den Hende, avocat, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented initially by C. Van der Hauwaert and C. Brown, then by L. Visaggio, C. Brown and M. Niejahr, and finally by L. Visaggio and C. Brown, acting as Agents, assisted by N. Khan, barrister, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

ACTION for compensation in respect of loss allegedly suffered by reason of the adoption and maintaining in force of Commission Regulation (EC) No 2362/98 of 28 October 1998, laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32),

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

composed of P. Lindh, President, R. García-Valdecasas, J.D. Cooke, P. Mengozzi and M.E. Martins Ribeiro, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 12 February 2004,

gives the following

Judgment

Background

1. *Regulation No 404/93*

1 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) implemented, in Title IV, with effect from 1 July 1993, a common regime for trade with third countries in place of the various national regimes. A distinction was drawn between 'Community

bananas' harvested in the Community, 'third-country bananas' originating from third countries other than the African, Caribbean and Pacific (ACP) countries, 'traditional ACP bananas' and 'non-traditional ACP bananas'. 'Traditional ACP bananas' and 'non-traditional ACP bananas' referred to quantitities of bananas exported by the ACP countries which, in the former case did not exceed the quantities laid down in the Annex to Regulation No 404/93, and in the latter case did exceed those quantities.

2 Under the first paragraph of Article 17 of Regulation No 404/93, the importation of bananas into the Community is subject to the submission of an import licence. That licence is issued by the Member States at the request of any party concerned, irrespective of his place of establishment within the Community, without prejudice to the special provisions made for the implementation of Articles 18 and 19 of that regulation.

3 Article 19(1) of Regulation No 404/93 broke down the tariff quota instituted by Article 18, opening it as to 66.5% to the category of operators who had marketed third country and/or non-traditional ACP bananas (Category A); 30% to the category of operators who had marketed Community and/or traditional ACP bananas (Category B); and 3.5% to the category of operators established in the Community who had started marketing bananas other than Community and/or traditional ACP bananas from 1992 (Category C).

2. *Regulation No 1442/93*

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

5 Article 3(1) of Regulation No 1442/93 defined as 'operators' in Category A and Category B for the purposes of Articles 18 and 19 of Regulation (EEC) No 404/93 economic agents or any other entity which had engaged in one or more of the following activities on their own account:

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

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

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

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

'The competent authorities of the Member States shall draw up separate lists of operators in Categories A and B and the quantities which each operator has marketed in each of the three years prior to that preceding the year for which the tariff quota is opened, broken down according to economic activity as described in Article 3(1). Operators shall register themselves and shall establish the quantities they have marketed by submitting individual written applications on their own initiative in a single Member State of their choice.'

7 According to Article 5(1) of Regulation No 1442/93, the competent authorities of the Member States were to establish each year 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 according to the economic activity of the operator in accordance with Article 3(1) of that regulation. That average was termed the operator's 'reference quantity'. Article 5(2) provided that the quantities marketed were to be multiplied by weighting coefficients depending on the economic activity as referred to in Article 3(1) of Regulation No 1442/93.

8 When the weighting coefficients were used, a given quantity of bananas could not, in the calculation of reference quantities, be taken into account for a total amount exceeding that quantity, irrespective of whether it had been processed at the three stages corresponding to the abovementioned activities by the same operator or by two or three different operators. According to the third recital of that regulation, the purpose of the coefficients was to take account of the scale of business concerned and of the commercial risks incurred and to correct the negative effects of recounting the same quantities of products at different stages of marketing.

3. *Regulation No 1637/98*

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

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

'...

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

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

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

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

11 Concerning the allocation of tariff quotas for third-State bananas and non-traditional ACP bananas, Article 18(4) of Regulation No 404/93, as amended by Regulation No 1637/98, provided:

'Should there be no reasonable possibility of securing agreement of all WTO contracting parties with a substantial interest in the supply of bananas, the Commission may under the [Management Committee] procedure set out in Article 27 allocate the tariff quotas provided for in paragraphs 1 and 2 and the traditional ACP quantity between those States with a substantial interest in the supply.'

12 Article 19 of Regulation No 404/93, as amended by Regulation No 1637/98, was worded as follows:

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

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

Where necessary, other suitable methods may be adopted.

2. The method adopted shall as appropriate take account of the supply requirements of the Community market and of the need to safeguard its equilibrium.'

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

'The Commission shall adopt provisions to apply this Title under the procedure set out in Article 27. Their scope shall include:

...

(c) terms of issue and period of validity of import licences;

...

(e) measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article 228 of the Treaty.'

4. *Regulation No 2362/98*

14 On 28 October 1998, the Commission adopted Regulation (EC) No 2362/98 laying down detailed rules for the implementation of Council Regulation (EEC) No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32). That

regulation entered into force on 1 January 1999. By agreement, Regulation No 404/93, as amended by Regulation No 1637/98 and thus supplemented by the implementation measures defined by Regulation No 2362/98 is also referred to below as 'the 1999 regime'.

15 According to the last subparagraph of Article 1 and the Annex to Regulation No 2362/98, the tariff quotas (2 200 000 tonnes and 353 000 tonnes) referred to in Article 18(1) and (2) of Regulation No 404/93 are allocated amongst the principal supplier countries as follows:

Ecuador:	26.17%
Costa Rica:	25.61%
Colombia:	23.03%
Panama:	15.76%
Other:	9.43%

16 It is important to note the following differences between the 1993 regime and the 1999 regime:

(a) the 1999 regime no longer differentiates according to the functions carried out by the operators;

(b) the 1999 regime takes account of the quantities of imported bananas;

(c) the import licences under the 1999 regime are managed without reference to the origin (ACP or third countries) of the bananas;

(d) the tariff quotas and the portion attributed to new operators were increased under the 1999 regime.

17 Article 2 of Regulation No 2362/98 provided inter alia that the tariff quotas and the traditional ACP bananas referred to in Article 18(1) and (2) and Article 16, respectively, of Regulation No 404/93, as amended by Regulation No 1637/98, were to be made available as follows:

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

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

18 Article 4(1) of Regulation No 2362/98 stated that each traditional operator registered in a Member State in accordance with Article 5 was to receive, for each year and for all the origins listed in Annex I, a single reference quantity based on the quantities of bananas actually imported during the reference period. According to Article 4(2) of Regulation No 2362/98, for imports carried out in 1999, the reference period was to be made up of the years 1994, 1995 and 1996.

5. *Regulation No 216/2001*

19 The Council adopted Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2).

20 Article 18 of Regulation No 404/93 thus amended provides for the opening of three tariff quotas (A, B and C) for the importation of bananas orginating in all third countries.

21 Article 19(1) of Regulation No 404/93 provides that import licences for third-country bananas are to be issued to operators taking account of 'traditional trade flows ("traditionals/newcomers") and/or ... other methods'.

6. *Regulation No 896/2001*

22 The rules for applying Title IV of Regulation No 404/93 thus amended were defined by Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6). They applied as from 1 July 2001, in accordance with Article 32 of Regulation No 896/2001 ('the 2001 regime').

23 Under Regulation No 896/2001, the tariff quotas 'A' and 'B' are no longer allocated among supplier countries.

24 That regulation further provides that import certificates are to be issued to traditional operators having previously imported bananas from third States and/or non-traditional ACP bananas on the basis of their primary imports during the period between 1994 and 1996. Similarly, for traditional operators who had imported traditional ACP bananas, import certificates are to be allocated to them on the basis of the average of their primary imports of traditional ACP bananas during the same three-year period.

7. *Summary of the 'banana' dispute at the World Trade Organisation (WTO)*

25 On 8 May 1996, a panel was established to examine the complaints of Ecuador, Guatemala, Honduras, Mexico and the United States of America against the Community concerning the compatibility of the 1993 regime with WTO rules (European Communities — Regime for the importation, sale and distribution of bananas; WT/DS27, 'Bananas III').

26 On 22 May 1997, the panel issued its reports, including the one in the case between the United States of America and the Community (WT/DS27/R/USA, 'the Panel Report of 22 May 1997'), which was challenged by the parties.

27 On 25 September 1997, the WTO's Dispute Settlement Body ('DSB') adopted the Appellate Body Report of 9 September 1997 (WT/DS27/AB/R, 'the Report of the Appellate Body of 9 September 1997') and the Panel Reports, as modified by the Appellate Body Report ('the DSB ruling of 25 September 1997').

28 The Appellate Body Report of 9 September 1997 concludes inter alia:

'(e) ... the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities is inconsistent with Article XIII:1 of the GATT 1994;

(f) ... the tariff quota reallocation rules of the Banana Framework Agreement are inconsistent with Article XIII:1 of the GATT 1994, and modifies the Panel's finding by concluding that the Banana Framework Agreement tariff quota reallocation rules are also inconsistent with the chapeau of Article XIII:2 of the GATT 1994;

(n) the [Community] activity function rules and the [Banana Framework Agreement] export certificate requirement are inconsistent with Article I:1 of the GATT 1994;

(u) ... the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with Articles II and XVII of the [General Agreement on Trade in Services];

(v) the allocation to ripeners of a certain portion of the Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates is inconsistent with Article XVII of the General Agreement on Trade in Services.'

29 According to the minutes of the DSB meeting of 16 October 1997 (document WT/DSB/M/38, of 20 November 1997, p. 3):

'The representative of the European Communities reiterated his statement made at the DSB meeting on 25 September. At that meeting he had stressed the Communities' strong attachment to the DSU, its basic principles and rules. Under

Article 21.3 of the DSU, the Communities had the obligation to inform the DSB of their intentions on the implementation of the DSB's recommendations. He confirmed that the Communities would fully respect their international obligations with regard to this matter. When designing the present regime, the Communities' objectives had been to support their own banana producers and to meet their international obligations, especially their most-favoured-nation commitments under the WTO Agreement and, with regard to the ACP countries, under the Lomé Convention. These objectives remained unchanged.

The Communities had initiated a process which would enable them to examine all options for compliance. In view of the internal decision-making process, it was not in a position, at this stage, to anticipate or to prejudge the results of this process. The Community wished to draw the attention of Members to the extreme complexity of this matter. The Appellate Body had recognised that the legislative task of the Communities was difficult as they would have to respect the requirements of the Lomé Convention while simultaneously designing a single market for bananas. Therefore, the Communities, while intending to act expeditiously, would require a reasonable period of time in which to examine all the options to meet their international obligations.'

30 On 7 January 1998, at the end of the arbitration proceedings provided for in Article 21.3.c of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes ('the DSU'), an arbitrator gave the Community a 'reasonable period of time', from 25 September 1997 to 1 January 1999, to implement the DSB ruling of 25 September 1997 (document WT/DS27/15: Arbitration under Article 21.3.c of the DSU, arbitrator's decision of 7 January 1998, paragraph 20).

31 The United States, taking the view that, by adopting the 1999 regime, the Community had not fully removed the incompatibilities with its obligations under the GATT 1994 and the GATS that had been established in the DSB ruling of 25

September 1997, on 14 January 1999 requested the DSB, in accordance with Article 22 of the DSU, to authorise suspension, in relation to the Community and its Member States, of tariff concessions and related obligations under the GATT 1994. The United States estimated the amount of the suspension to be USD 520 million. Since the Community objected to the level of suspension proposed by the United States, the matter was referred for arbitration under Article 22.6 of the DSU.

32 Thus on 9 April 1999, the arbitrators found that the level of nullification and impairment suffered by the United States in Bananas III was USD 191.4 million per year (WT/DS27/ARB ruling; 'the arbitrators' ruling of 9 April 1999'). Accordingly, the arbitrators found that suspension by the United States, in relation to the Community and its Member States, of tariff concessions and related obligations under the GATT 1994 up to a maximum level of USD 191.4 million per year would be compatible with Article 22.4 of the DSU.

33 Moreover, on 6 April 1999, in a parallel procedure under Article 21.5 of the DSU, the panel dealing with a complaint from Ecuador concerning the implementation by the Community of recommendations of the DSB in Bananas III circulated its report to the parties to the dispute (WT/DS27/RW/ECU, 'Panel Report of 6 April 1999'). In its conclusions, the panel found that the 1999 regime was, in several respects, incompatible with certain WTO provisions. More specifically, the panel found:

— that the reservation of the quantity of 857 700 tonnes for traditional ACP imports under the 1999 regime 'is inconsistent with paragraphs 1 and 2 of Article XIII of the GATT [1994]';

— that the country-specific allocations to Ecuador as well as to the other substantial suppliers were not consistent with the requirements of Article XIII:2 of the GATT [1994];

— that the level of 857 700 tonnes for duty-free traditional ACP imports could be considered to be required by the Lomé Convention, but that 'it is not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention requires a collective allocation for traditional ACP suppliers'. Therefore, duty-free treatment of imports in excess of an individual ACP State's pre-1991 best-ever export volumes was not required by Protocol 5 to the Lomé Convention, so that, in the absence of any other applicable requirement of the Lomé Convention, those excess volumes were not covered by the Lomé waiver and the preferential tariff thereon was therefore inconsistent with Article I:1 of the GATT [1994] (report WT/DS27/RW/ECU, paragraph 6.161).

34 With respect to the GATS, the Panel found, first, that under the 1999 regime 'Ecuador's suppliers of wholesale services are accorded de facto less favourable treatment in respect of licence allocation than EC/ACP suppliers of those services in violation of Articles II and XVII of the GATS, and, second, that the criteria for acquiring "newcomer" status under the revised licensing procedures accord to Ecuador's service suppliers de facto less favourable conditions of competition than to like EC service suppliers in violation of Article XVII of the GATS' (report WT/DS27/RW/ECU, paragraph 6.163).

35 Since the Community did not appeal against the findings, that Panel Report was adopted on 6 May 1999 (minutes of the DSB of 6 May 1999, WT/DSB/M/61 of 30 June 1999).

36 On 8 November 1999, Ecuador, acting pursuant to Article 22 of the DSU, requested the DSB to authorise the suspension, as regards the Community and 13 of its Member States, of tariff concessions and related obligations under the agreement on trade-related aspects of intellectual property rights ('TRIPS'), the GATS and the GATT 1994 up to a level of USD 450 million.

37 Since the Community disputed the level of suspension proposed by Ecuador, on 19 November 1999 the matter was referred to arbitration pursuant to Article 22.6 of the DSU.

38 In a decision circulated on 24 March 2000, the arbitrators found that the level of nullification and impairment suffered by Ecuador was USD 201.6 million per year and authorised that State to suspend concessions under the GATT 1994, the GATS and the TRIPS Agreement up to that amount.

39 On 11 April 2001, the United States and the Community reached a memorandum of understanding on bananas, whereby they 'identified 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 of understanding 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 higher duties which they were authorised to levy on Community imports by the arbitrators' ruling of 9 April 1999 (document WT/DS27/58). The United States 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 be 'premature to take this item off the DSB agenda' (document WT/DS27/59 — G/C/W/270 document of 2 July 2001).

Procedure

40 By application lodged with the Registry of the Court of First Instance on 25 January 2001, Chiquita Brands International, Chiquita Banana Co. and Chiquita Italia, three companies belonging to the Chiquita group of companies, one of the world's largest producers and distributors of bananas (hereinafter 'the applicant') jointly brought the present action.

41 By letter of 29 June 2001, subsequent to the Commission's lodging of its defence, the applicant requested the Court to ask the parties, by way of measures of organisation of procedure:

— to concentrate their observations on the principle of Community liability (existence of an unlawful act, damage and a causal link between those two elements), reserving the question of assessment of an exact amount for a later stage of the proceedings; and

— to reserve the submission of evidence of the amount of the damage for a later stage in the proceedings.

42 By letter of 13 July 2001, the Commission supported this suggestion, whilst stating that it intended to continue contesting both the admissibility and the merits of the action.

43 On 25 September 2001, acting pursuant to Article 64(1) of the Rules of Procedure, the Court decided to ask the parties to concentrate their arguments in the reply and rejoinder on the admissibility of the action and the issue of Community liability.

44 At the request of the Commission, the Court, by letter of 25 October 2001, stated that the proceedings would be divided into two stages: 'The court will first rule upon the admissibility of the action on the basis on which it was brought in the Application and its annexes and, subject to that issue, will rule on the issue of liability so far as that involves the issues of the existence of an alleged illegal act or conduct on the part of the Defendant.' Therefore, in this judgment, the Court will rule on the admissibility of the action and as to whether, in this case, there has been an unlawful act or course of conduct by the Community.

45 By letter of 5 February 2003, the Commission requested that these proceedings be suspended until final judgment in Case C-377/02 *Léon van Parys*. The Court of First Instance did not accede to that request.

46 Pursuant to Article 14 of the Rules of Procedure, and on a proposal by the Fifth Chamber, the Court of First Instance decided, having heard the views of the parties in accordance with Article 51 of the Rules of Procedure, to refer the case before an increased number of judges.

47 On hearing the Report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure.

48 The parties presented oral argument and replied to the questions of the Court of First Instance at the hearing on 12 February 2004.

Forms of order sought

49 The applicant claims that the Court should:

— order the Community to pay compensation for the losses arising from the application of Regulation No 2362/98 to the applicant, provisionally assessed at EUR 564.1 million, plus interest at 8% per annum;

— order the Commission to pay the costs.

50 The Commission contends that the Court should:

— dismiss the action as inadmissible, or, in the alternative, as unfounded;

— order the applicant to pay the costs.

Admissibility

1. *Arguments of the parties*

51 Whilst not formally raising an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, the Commission submits that the action is inadmissible. It argues essentially that the application does not comply with Article 44(1)(c) and (e) of the Rules of Procedure, according to which the application must state, inter alia, 'the subject-matter of the proceedings and a summary of the pleas in law on which the application is based' and 'where appropriate, the nature of any evidence offered in support'.

52 It argues that the application does not satisfy the requirements of the Rules of Procedure whereby an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution by the applicant may be identified, the reasons why the applicant considers there is a causal link between the conduct and the damage which he claims to have suffered, and the nature and extent of that damage (Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 73). That irregularity is all the more serious, it maintains, since the applicant is seeking compensation for loss of earnings, a heading of damage which, by its nature, is subject to a particularly strict standard of proof (Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245; Case 74/74 *CNTA* v *Commission* [1975] ECR 533). The applicant is claiming an extremely large sum while providing by way of justification only a few laconic explanations. The EUR 543.6 million loss of earnings claimed is based on the difference between the applicant's actual sales and those which it could have made in the absence of Regulation No 2362/98.

53 The Commission maintains that the applicant has not offered even the beginnings of proof of the damages it alleges. On that point, the circumstances of this case are distinct from those in Case T-1/99 *T. Port* v *Commission* [2001] ECR II-465, in which the applicant had at least communicated precise figures concerning the price of the import licences which it had obtained and the bank interest which it had been obliged to pay.

54 The Commission points out in that respect that, as was held in paragraph 37 of the judgment in *T. Port*, the application 'must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information'. Moreover, in accordance with Article 44(1)(e) and Artice 48(1) of the Rules of Procedure, any evidence supporting the claim should have been submitted with the application.

55 In this case, the application contains no proof of the existence and cause of the alleged damage, although the applicant proposes, in paragraph 146 of its application, to supply further information, 'at a later time in these proceedings'. Since it is implicit in that statement that the applicant is already in possession of the evidence in question, there is no good reason to justify the delay in submitting it for the purposes of Article 48(1) of the Rules of Procedure.

56 The Commission finds these failings particularly flagrant given that the applicant is the world's largest banana growing and distribution company and has considerable means. The alleged losses have already been used as the basis of a claim by the United States of America before WTO bodies, in which the applicant, though not a party to those proceedings, provided more information than in the present action.

57 The applicant cannot cover the irregularities in its application by referring to WTO decisions, namely the arbitrators' ruling of 9 April 1999 and the Panel Report of 6 April 1999. Besides being non-binding, those decisions have no relevance to the regularity or otherwise of the application.

58 The applicant argues that the application is admissible and meets the criteria in *Automec*, paragraph 73, and *T. Port*, paragraph 37.

59 First, the applicant argues that it has clearly identified the two aspects of the Commission's conduct in relation to Regulation No 2362/98 which it claims are unlawful, namely the system for the distribution of import licences for bananas and the division into country allocations of the import quotas open to Latin American bananas.

60 Secondly, it states that it has also explained in its application the causal link between that unlawfulness and the damage suffered.

61 Thirdly, it specified in paragraph 155 of the application the various heads of damage for which it seeks compensation. For the period from 1 January 1999 until 31 December 2000, it was a loss of earnings of EUR 543.6 million and non-recurring costs of EUR 20.5 million

62 The applicant further rejects the Commission's argument in which it appears to be suggesting that claims for compensation for loss of earnings are subject to stricter admissibility criteria than those set out above.

63 Given the multitude of disputes to which the common organisation of the markets in bananas has given rise, the Commission cannot claim that it is not able to understand the explanations in the application concerning the damage claimed.

2. *Findings of the Court*

Conformity of the application with Article 44(1)(c) of the Rules of Procedure

64 Under Article 44(1)(c) of the Rules of Procedure, every application must state the subject-matter of the proceedings and contain a summary of the pleas in law on which it is based. That statement must be sufficiently clear and precise to enable the

defendant to prepare its 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 (order of 28 April 1993 in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20, and judgment in Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29).

65 In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons why the applicant considers there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (*Dubois*, paragraph 30; Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission* [2003] ECR II-2195, paragraph 26).

66 However, a claim for an unspecified form of damage is not sufficiently concrete and must therefore be regarded as inadmissible (Case 5/71 *Zuckerfabrik Schoeppenstedt* v *Council* [1971] ECR 975, paragraph 9; *Automec*, paragraph 73; Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, paragraph 181).

67 In this case, the applicant has set out, in paragraphs 142 to 154 of the application, the nature of the various heads of damage in respect of which it seeks compensation and the methods used to determine their amount. It has stated, in a sufficiently detailed manner, the circumstances on which it relies in order to establish the reality and the certainty of the damage claimed, and its extent.

68 Concerning the reality and the certainty of the damage, the applicant has stated that the 1999 regime has profoundly affected its business and its results. It has stated in particular that that damage is clearly reflected in its capitalisation, which, since the adoption of the 1993 regime, has diminished by more than 96%. It states that, between 1999 and 2000, its capitalisation fell from USD 625 million to 79.2 million, a reduction of 87%. Since Chiquita Brands International Inc. is a company quoted on the stock exchange, that is public information that is widely disseminated, particularly in the press.

69 As regards the extent of that damage and the quantification of the damages sought, the applicant has made a distinction between the loss of earnings suffered and the costs which it has incurred. In relation to the loss of earnings, it has referred to the method followed by the WTO arbitrators in order to quantify the loss suffered by the United States of America and Ecuador by reason of the incompatibility of the 1993 regime with WTO rules, an incompatibility which also applied to the 1999 regime. On the basis of those factors and its turnover during the years 1999 and 2000, the applicant has made a calculation in order to determine the turnover it would have achieved, were it not for the incompatibility of the 1999 regime with WTO law. It argues that that loss of earnings is equal to the difference between the profits which it would have made on that hypothetical turnover and the profits actually made in 1999 and 2000. At the conclusion of that calculation, the applicant puts that loss of earnings at EUR 543.6 million. In relation to the extraordinary expenses referred to, the applicant has stated that these are costs relating to staff reductions in 1999, excess transport capacity in 1999 and 2000 and legal fees. The applicant calculates those costs at EUR 20.5 million.

70 The explanation of the nature and extent of the damage which the applicant has given in its application therefore satisfies the provisions of Article 44(1)(c) of the Rules of Procedure. That enables the Commission to defend itself and the Court to exercise its power of judicial review.

Conformity of the application with Article 44(1)(e) of the Rules of Procedure

71 It is apparent from the wording of Article 44(1)(e) of the Rules of Procedure, and more particularly from the expression'where appropriate', that the application does not necessarily have to contain offers of evidence. The only sanction concerning offers of evidence is that they may be rejected on account of delay if they are submitted for the first time, and without justification, at the reply or rejoinder stage (Article 48(1) of the Rules of Procedure).

72 Under Article 43(4) of the Rules of Procedure, '[t]o every pleading there shall be annexed a file containing the documents relied on in support of it, together with a schedule listing them'. The case-law shows that non-compliance with that obligation may entail the inadmissibility of the action if it is of such a kind as to hamper the other parties in the preparation of their arguments (Case T-293/01 *Ineichen* v *Commission* [2003] ECR-SC I-A-83 and II-441, paragraph 29 et seq.).

73 In this case, the Commission has submitted a particularly detailed defence, which shows that it has not in any way been hampered by the failure to lodge documents with the application.

74 The Commission's criticisms concerning evidence of the existence of damage therefore go to the merits of the dispute and not to its admissibility (see, to that effect, *Hameico Stuttgart*, paragraph 32).

75 The action is therefore admissible.

Merits

76 It is settled case-law that, for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a series of conditions must be met, namely the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question (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; Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20). Where any one of those conditions is not met, the application must be dismissed in its entirety without its being necessary to examine the other preconditions for such liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81; Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

77 As regards the examination of the compensation claims in the light of the first of those conditions, namely that there be unlawful conduct, the case-law requires a sufficiently serious breach to be established of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). As regards the requirement that the breach be sufficiently serious, the decisive test for finding it fulfilled is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a

sufficiently serious breach (Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* [2001] ECR II-1975, paragraph 134; Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie* v *Council and Commission* [2004] ECR II-521, paragraph 71).

1. *Summary of the pleas in law*

78 The applicant argues that, by adopting and maintaining in force the provisions of Regulation No 2362/98 concerning the distribution of import licences and the allocation of tariff quotas between certain Latin American countries, the Commission committed a number of serious breaches of rules of law protecting, or conferring rights upon, individuals in such a way as to render the Community liable under Article 235 EC.

79 Concerning the distribution of import certificates for bananas from third countries, the applicant argues that the 1993 regime established a mechanism designed to weaken the competitive position of large undertakings which, like itself, are integrated vertically and specialised in trading in bananas from Latin America. The 1993 regime allocated those licences to certain operators whose business was not the importation of third-country bananas. Community or ACP banana traders thus had 30% of the licences intended for the importation of third-country bananas. Similarly, ripeners received a certain quantity of those licences. Thus the 1993 regime encouraged importers of third-country bananas to buy the licences of the ripeners and the ACP and Community banana traders. Importers of third-country bananas were led to transfer a part of their resources to their competitors, the value of those licences being about EUR 200 per tonne of bananas. That regime further allowed certain operators, hitherto specialised in trade in ACP bananas, to import Latin American bananas directly and enter into direct competition with the applicant.

80 The changes arising from the 1999 regime made that situation worse. The applicant notes that Regulation No 2362/98 no longer reserved 30% of the licences for ACP or Community banana importers, but worked in accordance with the so-called 'single pot' system. Under that system, import licences for ACP and third-State tariff quotas were managed jointly. Licences were allocated to operators by reference to the quantity of bananas actually imported during the period of validity of the 1993 regime (the period between 1994 and 1996, referred to as the 'reference period'), whatever their origin. Apart from the fact that it was based on a reference period affected by the illegalities established by the WTO ruling of 25 September 1997, that system had the practical consequence of increasing the demand amongst operators traditionally specialising in trade in ACP or Community bananas for third-country import licences. Correspondingly, the quantity of bananas which the applicant could import reached a level lower than the reference quantity which it could claim on the strength of the volume of its previous imports.

81 Concerning the allocation of tariff quotas into national sub-quotas, the applicant states that the major source of its banana imports is Panama. It states that the 1993 regime reserved 49.40% of third-country tariff quotas for the signatories of the arrangement concluded on 28 and 29 March 1994 between the Community and the Republics of Colombia, Costa Rica, Nicaragua and Venezuela ('the Framework Agreement'), to which Panama was not party. After the WTO ruling of 25 September 1997 found that allocation incompatible with Article XIII of the GATT 1994, the 1999 regime modified the allocation of the tariff quota into national sub-quotas. The share reserved for Panama was then fixed at 15.76 %. The applicant argues that that allocation by country is unjustified. It also claims that it is arbitrary, since Colombia and Costa Rica enjoyed quota allocations higher than the market share that they could expect in the absence of quantitative restrictions on trade. Whatever the motive for that allocation by country, the applicant emphasises that it is based on trade which took place during the period in which the 1993 regime applied. As was determined by the Panel Report of 6 April 1999, the choice of that reference period had the consequence of perpetuating the instances of discrimination arising from the 1993 regime and identified by the WTO ruling of 25 September 1997.

82 In order to demonstrate the unlawfulness of the Commission's conduct, the applicant makes four pleas in law, which may be summarised as follows. The first alleges infringement of WTO rules. The second alleges an exceeding of the mandate which the Council conferred on the Commission for the implementation of Regulation No 1637/98. The third alleges infringements of general principles of Community law. The fourth alleges infringement of the principles of good faith and legitimate expectations in international law.

2. *The first plea, alleging infringement of WTO rules*

Interpretation of the Nakajima case-law

Arguments of the parties

83 The applicant argues that Regulation No 2362/98 is incompatible with WTO rules, that incompatibility having been established by the Panel Report of 6 April 1999. It states that, in this plea, it is not seeking directly to invoke an infringement of WTO law. Since the latter has no direct effect, an action for non-contractual liability directly based on an infringement of WTO law would be bound to fail (Case T-30/99 *Bocchi Food Trade International* v *Commission* [2001] ECR II-943, paragraph 56; Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, paragraph 51; Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981, paragraph 51).

84 The applicant submits that this plea is based on settled case-law according to which the Community courts may review the legality of a measure drawn up in the light of WTO rules, including the GATT, 'where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community

measure refers expressly to the precise provisions of the WTO Agreements' (Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 49; see also Case C-352/96 *Italy* v *Council* [1998] ECR I-6937, ('*Italy* v *Council (Rice)*'), paragraph 19; and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973 ('*Germany* v *Council (Bananas)*'), paragraph 111). The origin of that principle can be traced back to Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069; '*Nakajima*').

85 For the purpose of interpreting the principle arising from the *Nakajima* judgment, as subsequently set forth and implemented by the Court of Justice and the Court of First Instance ('the *Nakajima* case-law'), the applicant examines in turn its raison d'être, the conditions for applying it, and the relevance of the judgment in *Portugal* v *Council*, referred to above.

86 As regards, first, the raison d'être of the *Nakajima* case-law, the applicant submits that the underlying idea is to allow judicial review of WTO rules where the Community legislature has decided to implement obligations arising from those rules, so that the fact that they lack direct effect becomes irrelevant. The Community courts do not review the compatibility of Community measures with WTO rules but evaluate them in relation to the basic decision to execute an obligation under WTO rules. The applicant emphasises that 'in such cases the option of invoking GATT provisions is not based on the direct effect of those provisions but on the fact that there is a Community act which has implemented them or at least expressed the intention of implementing them' (Opinion of Advocate General Tesauro in Case C-53/96 *Hermès* [1998] ECR I-3603, I-3606, footnote 45).

87 The applicant further considers that the *Nakajima* case-law must be viewed in the general perspective of the direct effect of international agreements in the Community legal order, which is an effect that the GATT and the WTO Agreements do not have (Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219; *Portugal* v *Council*).

88 That situation does not exclude all judicial review of the compatibility of Community acts with GATT rules and WTO agreements. On the contrary, the *Nakajima* case-law permits a strictly limited, but essential, judicial review for the protection of the fundamental right to effective judicial protection (Opinion of Advocate General Jacobs in Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, I-7084; 'the *Biotechnologies* case')).

89 As regards, secondly, the conditions for applying the *Nakajima* case-law, the applicant maintains that there are two of them; first, the intention of the Community to comply, and, second, a 'particular obligation' under the WTO Agreements.

90 The applicant explains the first of those conditions by reference to the fact that, where it appears that the Community intended to comply with WTO rules, the concerns which led the Court to deny direct effect to WTO agreements become irrelevant. The Community can never be forced to apply WTO law against its will, and the *Nakajima* case-law does not in any way call that principle into question.

91 The obligation under WTO law with which the Community intended to comply must also constitute a 'particular obligation'; that obligation must be 'sufficiently clear and precise' for the court to be able to apply it.

92 Relying on the foregoing, the applicant challenges four rival interpretations which limit the conditions of application of the *Nakajima* case-law.

93 First, it is incorrect as a matter of law to limit the application of the *Nakajima* case-law to those circumstances where the Community act in question refers explicitly to a specific GATT or WTO provision. The applicant considers that such an interpretation confuses the circumstances in *Nakajima* with those in Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, which actually concerned an explicit reference to provisions of the GATT or the WTO Agreements. The condition for applying *Nakajima* is 'the intention to implement a particular obligation' under the GATT or WTO Agreements. The applicant observes that, in the *Nakajima* judgment, the Community act in question did not refer to a specific GATT provision.

94 The applicant acknowledges that the case-law sometimes refers to *Nakajima* and *Fediol* together, when it refers to the rule that it is possible for the Court to review the compatibility of a Community measure with the GATT and WTO Agreements, despite their lack of direct effect. The fact remains, however, that those two judgments refer separately to each of the conditions for applying that rule (see the Opinion of Advocate General Saggio in *Portugal* v *Council*, footnote 20).

95 The applicant argues that the idea that the application of the *Nakajima* case-law may be made subject to there being an express reference to provisions of the GATT or WTO Agreements is absurd. In its submission, judicial review cannot depend on a purely formal aspect that is entirely in the hands of the institution concerned. Such an approach would be incompatible with the rule of law.

96 Secondly, it argues, it is legally incorrect to limit the application of the *Nakajima* case-law to cases where the GATT or WTO obligation is formulated in a positive manner.

97 To begin with, such an approach would be artificial because 'positive' obligations can be formulated in the form of a prohibition, such as the principles of equality of treatment and non-discrimination. The applicant then observes that Articles II:1 and XVII of the GATS as well as Article XIII of the GATT 1994, relevant to this case, all contain 'positive' obligations. Lastly, such a limitation is incompatible with the *Nakajima* judgment, which concerned the compatibility of Community anti-dumping legislation with Article 1 of the Agreement on Implementation of Article VI of the GATT, approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 1; 'the 1979 Anti-Dumping Code'). That provision contains a 'negative' obligation prohibiting the contracting parties from imposing anti-dumping duties contrary to the 1979 Anti-Dumping Code.

98 Thirdly, the applicant submits, it is incorrect as a matter of law to limit the application of the *Nakajima* case-law to cases where the obligation under the GATT or the WTO Agreements has been incorporated or transposed into the Community measure in question. Such an interpretation is not supported by any case-law of the Court of Justice or the Court of First Instance. It concedes that, in the anti-dumping cases, the 1979 Anti-Dumping Code was transposed into Community law. It disagrees, however, that that alone supports the general proposition that the *Nakajima* case-law is applicable only where the Community measure in question transposes a GATT or WTO norm. That proposition is contradicted by *Italy* v *Council(Rice)*, in which the Court of Justice applied the *Nakajima* case-law even though the Community had not transposed Article XXIV:6 of the GATT into Community law.

99 Fourthly, it is incorrect as a matter of law to limit the application of the *Nakajima* case-law to cases where GATT- or WTO-compatibility is merely one of the objectives pursued by the Community measure in question. Because those cases are extremely rare, the applicant maintains that such an interpretation would render the *Nakajima* case-law meaningless. It argues that the rule is applicable even where the

measure in question pursues several contradictory objectives, in which case the only limit on the court is not to change the balance struck by the legislator.

100 Thirdly, the applicant maintains that its interpretation of the *Nakajima* case-law is not affected by the judgment in *Portugal* v *Council*. In that judgment, the Court rejected the argument that WTO agreements should have direct effect on grounds of legal policy. It considered that to allow such an argument would amount to unilaterally cutting off the Community's 'scope for manoeuvre' within the WTO, without any other contracting party entering into a reciprocal undertaking towards the Community.

101 The applicant considers that the *Nakajima* case-law would be rendered meaningless if it were made subject to the reciprocity condition highlighted in *Portugal* v *Council*. It argues that the whole point about the *Nakajima* case-law is that, by definition, it concerns only cases in which the Community no longer has any 'scope for manoeuvre', having decided to implement GATT or WTO rules.

102 The applicant considers that there is no need to fear such an interpretation giving rise to an avalanche of actions each time the Community does not comply with a decision of the DSB, as those actions remain subject to the condition that the Community should have clearly decided to implement an obligation under WTO agreements. The circumstances in which the Community judicature could apply the *Nakajima* case-law are therefore limited. In practice, they would involve only those situations where the Council had clearly decided to implement a WTO dispute settlement ruling, but the implementation of that ruling in the Community legal order turned out to be inconsistent with the Council's objective.

103 In that respect, the applicant insists on circumstances differentiating the present case from the 'Beef hormones' dispute (Appellate Body Report of 16 January 1998, WT/DS26/AB/R WT/DS48/AB/R, adopted by the DSB on 13 February 1998) submitted to the WTO. In that dispute, the Community had clearly decided not to amend its legislation in order to comply with decisions taken at the conclusion of the WTO's dispute settlement procedure. Failing a negotiated solution as to the amount of compensation, the Community decided to bear retaliatory measures by the successful party, the United States of America. In this case, the Community did not decide to maintain in force the aspects of the common organisation of the market in bananas declared incompatible with its WTO obligations. On the contrary, it clearly indicated that it intended to comply with the decisions taken by the WTO's dispute settlement bodies.

104 The Commission rejects that interpretation of the *Nakajima* judgment. It submits that, despite the monist nature of the Community legal order, the case-law has consistently rejected the doctrine of direct effect for WTO agreements (*International Fruit Company* and *Portugal* v *Council*). A DSB report can be taken into account for the purposes of reviewing the compatibility of a Community norm with a WTO rule only if the obligation underlying that rule has direct effect (Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 20).

105 The Commission also challenges the applicant's interpretation of the conditions for applying the *Nakajima* case-law.

106 Contrary to the applicant's assertion, the first of those conditions is not the intention 'to comply' with, but rather the intention 'to implement' a particular obligation (*Portugal* v *Council*, paragraph 49). Those expressions are not identical; 'comply' has a much broader meaning than 'implement'. There will be situations where a State or

the Community may intend to comply with certain obligations but where it cannot be said to be implementing them.

107 The Commission challenges the interpretation of the second condition, concerning the requirement that there be a 'particular obligation'. In its submission, 'particular' obligation should be construed in contrast with a 'general' obligation.

108 The Commission considers that, because of the restrictive nature of those conditions, examples of application of the *Nakajima* case-law are rare. Such examples primarily concern actions brought against anti-dumping regulations (Case C-188/88 *NMB* v *Commission* [1992] ECR I-1689; Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1999] ECR II-1381; *NMB France and Others* v *Commission* [1996] ECR II-427; Joined Cases T-33/98 and T-34/98 *Petrotub and Republica* v *Council* [1999] ECR II-3837, paragraph 105). The only example of application of the *Nakajima* case-law outside the anti-dumping field is *Italy* v *Council (Rice)*. All other attempts to apply the *Nakajima* case-law have failed (Case C-317/99 *Kloosterboer Rotterdam* [2001] ECR I-9863; *Germany* v *Council (Bananas)*, *Portugal* v *Council*; *Bocchi Food Trade International* v *Commission*; *Cordis* v *Commission*; and Case T-52/99 *T. Port* v *Commission*).

109 According to the Commission, for the *Nakajima* case-law to apply, four conditions must be met.

110 First, the 'particular obligation' in question must be a positive obligation to act in a certain manner. The GATT Anti-Dumping Codes are an example of that type of obligation. A recommendation or ruling by the DSB cannot be a 'particular

obligation' because it imposes merely a general obligation to make measures WTO-consistent. It is for the contracting party in question to determine the measures intended to ensure compliance of its legal order with WTO rules.

111 Second, the *Nakajima* case-law applies only when the Community measure in question incorporates or transposes into the Community legal order a 'particular obligation' assumed in the WTO context. That interpretation flows directly from the expression 'implement'.

112 Third, for the *Nakajima* case-law to apply, it is also necessary that the Community legislature should not be pursuing several conflicting objectives.

113 Fourth, the *Nakajima* case-law also requires that the Community measure in question make express reference to the particular WTO legal obligations it is intended to implement.

Findings of the Court

114 Having regard to their nature and general scheme, the WTO Agreement and its annexes are not, in principle, among the rules in the light of which the Court of Justice and the Court of First Instance will review the legality of acts of the Community institutions (*Portugal* v *Council*, paragraph 47). Those texts are not of such a kind as to create in favour of individuals rights which they may use before a court by virtue of Community law (see, to that effect, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 44).

115 It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the agreements included in the annexes to the WTO Agreement, that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules (*Portugal* v *Council*, paragraph 49).

116 The applicant relies exclusively on the first of those exceptions. It claims that, by adopting Regulation No 1637/98, the implementing measures for which were defined by Regulation No 2362/98, the Community intended to implement a particular obligation assumed in the WTO context for the purposes of the case-law flowing from the *Nakajima* judgment.

117 The rule arising from the *Nakajima* judgment is designed, exceptionally, to allow individuals, in an indirect manner, to plead infringement by the Community or its institutions, of GATT rules or WTO agreements. As an exception to the principle that individuals may not directly rely on WTO provisions before the Community judicature, that rule must be interpreted restrictively.

118 It should be noted in that respect that, so far as actions by individuals are concerned, the Court of Justice and the Court of First Instance have not applied the *Nakajima* principle in a context other than that of indirectly reviewing the compliance of anti-dumping basic regulations with the provisions of the 1979 and 1994 Anti-Dumping Codes (Agreement on implementation of Article VI of the GATT 1994; Council 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, Annex 1 A).

119 The Court of Justice and the Court of First Instance have, on a number of occasions, examined pleas concerning the compatibility of anti-dumping regulations with the Anti-Dumping Codes (Case C-105/90 *Goldstar* v *Council* [1992] ECR I-677, paragraph 31 et seq.; *NMB* v *Commission*, paragraph 23; *NTN Corporation* v *Council*, paragraph 65; and *NMB France and Others* v *Commission*, paragraph 99) and have twice upheld such pleas (Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 52 et seq.; Case T-256/97 *BEUC* v *Commission* [2000] ECR II-101, paragraph 63 et seq.).

120 However, outside that particular context of anti-dumping disputes, the Court of Justice and the Court of First Instance have declined to apply the *Nakajima* case-law. They have also declined to review the legality of a Community act in the light of the provisions of the WTO Agreements in the context of actions by individuals challenging certain aspects of the common organisation of the market in bananas (order of 2 May 2001 in Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159; judgments in *Cordis* v *Commission*; *Bocchi Food Trade International* v *Commission*; and Case T-52/99 *T. Port* v *Commission*), and of Community legislation concerning the administration of hormonal substances to farm animals (judgments in Case T-174/00 *Biret International* v *Council* [2002] ECR II-17, and Case T-210/00 *Biret et Cie* v *Council* [2002] ECR II-47).

121 It should be noted that in the anti-dumping area the relevant GATT and WTO agreements imposed a direct obligation on each of the contracting parties to adapt their national legislation so as to reflect the content of those agreements. The 1979 Anti-Dumping Code, in an Article 16(6)(a), headed 'National legislation' required the contracting parties to take 'all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Party in question' (Decision 80/271). Article 18(4) of the 1994 Anti-Dumping Code contains similar provisions.

122 In order to comply with those obligations, the Council amended the legislation applicable to anti-dumping procedures. Thus, after the adoption of the 1979 Anti-Dumping Code, the Council adopted Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1979 L 339, p. 1). It is apparent, in particular from the preamble (third and fourth recitals) to that regulation, that Community rules defending against dumped imports had to be amended in the light of the agreements which emerged from the multilateral trade talks concluded in 1979 at the end of the Tokyo Round, the Council considering it 'essential, in order to maintain the balance of rights and obligations which these agreements sought to establish, that the Community take account of their interpretation by the Community's major trading partners, as reflected in legislation or established practice'. The preamble to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1), the compatibility of which with the 1979 Anti-Dumping Code was challenged in *Nakajima,* contained identical provisions and also stated that the common rules for protection against dumped or subsidised imports 'were adopted in accordance with existing international obligations', in particular those arising from Article VI of the GATT and the 1979 Anti-Dumping Code.

123 Similarly, following the conclusion of the 1994 Anti-Dumping Code, the Community amended its internal rules concerning anti-dumping procedures by successively adopting Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community (OJ 1994 L 349, p. 1) and then Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1). The preamble to Regulation No 3283/94 indicated that, following the conclusion of multilateral trade negotiations in 1994 'it [was] appropriate to amend the Community rules in the light of [those] new Agreements' (third recital). The preamble states that, in order to maintain 'the balance of rights and obligations which the GATT Agreement establishes', it is 'essential that the Community takes account of their interpretation by [its] major trading partners' (fourth recital). It further emphasises that 'in view of the extent of

the changes [arising from the 1994 Anti-Dumping Code] and to ensure an adequate and transparent implementation of the new rules, it is appropriate to transpose the language of the new agreements into Community legislation to the extent possible' (fifth recital). Those provisions were maintained in the preamble to Regulation No 384/96, which was the relevant regulation in *Petrotub and Republica*.

124 The applicant rightly argues that application of the *Nakajima* case-law is not, *a priori*, limited to the area of anti-dumping. It is capable of being applied in other areas governed by provisions of the WTO Agreements where those agreements and the Community provisions whose legality is in question are comparable in nature and content to those just referred to above concerning the Anti-Dumping Codes of the GATT and the anti-dumping basic regulations which transpose them into Community law.

125 Therefore, the condition for applying the *Nakajima* case-law to the effect that the Community measure whose legality is challenged must have been adopted for the purpose of 'implementing a particular obligation assumed in the context of the WTO Agreements' requires, in particular, that that measure specifically transposes prescriptions arising from the WTO Agreements into Community law.

126 As for the question whether, as the applicant claims, the judgment in *Italy* v *Council (Rice)* negates that interpretation of the *Nakajima* case-law, this Court considers that it does not. The case which gave rise to that judgment concerned a Community regulation made pursuant to bilateral agreements concluded with non-member States following negotiations on the basis of Article XXIV:6 of the GATT. Under those agreements, the Community undertook to open tariff quotas for rice in favour of those non-member States. The regulation at issue in that case ((Council Regulation (EC) No 1522/96 of 24 July 1996 opening and providing for the

administration of certain tariff quotas for imports of rice and broken rice (OJ 1996 L 190, p. 1)) was thus concerned with transposing rules arising from bilateral agreements concluded following negotiation in the context of the GATT. It was thus designed to implement a 'particular obligation assumed in the context of the GATT' (*Italy* v *Council (Rice)*, paragraph 20).

127 It is in the light of those factors that the Court must assess whether the *Nakajima* case-law is applicable in this case.

The application of the Nakajima case-law in this case

Arguments of the parties

128 The applicant argues that the conditions for applying the case-law are met in this case, and insists in that respect on the differences between this case and that which gave rise to the judgment in *Bocchi Food Trade International.*

129 First, the applicant maintains that the condition for applying *Nakajima* concerning 'the intention to comply' with WTO rules is satisfied. It argues that when, in 1998, the Community decided to amend the 1993 regime, its intention was to comply with decisions issued by WTO bodies.

130 As evidence of the Community's intention, the applicant adduces the following factors.

131 First, the applicant argues that, on 16 October 1997, the Community stated during a meeting of the DSB of the WTO that it would 'comply fully with its international obligations regarding that question'.

132 Second, the applicant cites the preamble to Council Regulation No 1637/98, which states:

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

Whereas 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 common organisation of the market in bananas'.

133 Third, Article 20(e) of Regulation No 404/93, as amended by Regulation No 1637/98, requires the Commission to adopt 'measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article 228 of the Treaty'.

134 Fourth, the applicant points out that WTO agreements are agreements concluded by the Community on the basis of Article 300 EC.

135 Fifth, the applicant states that, in its explanatory memorandum accompanying the proposal which led to the adoption of Regulation No 1637/98, the Commission stated:

'(1) The [DSB] of the [WTO] has found in a decision that some of the import provisions of the common market organisation for bananas infringe GATT and GATS rules. The infringements concern import licences, the present allocation of the tariff quota and other aspects of the Framework Agreement on bananas, including the granting of export licences in signatory countries and certain quantities set for traditional imports from ACP States.

(2) Other aspects of the [common organisation of the market in bananas] are not questioned. These include the size of the tariff quota and both the quota and non-quota tariff rates bound in our GATT commitments, the preference for traditional imports and the preferential tariff treatment for non-traditional imports from the ACP countries, and the aid scheme for Community producers.

(3) The Council should therefore be requested to amend Regulation (EEC) No 404/93 to bring it into line with our international commitments in the framework of the WTO and the Fourth Lomé Convention while maintaining support for Community growers and an adequate supply to the market which respects the interests of consumers.'

136 Sixth, the applicant relies on the order of the Court of First Instance of 15 September 1999 in Case T-11/99 *Van Parys and Others* v *Commission* [1999] ECR II-2653, paragraph 6), in which the Court held that:

'After the [DSB] of the WTO had declared a number of aspects of that regime for importation of bananas into the Community incompatible with WTO rules, [Regulations Nos 1637/98 and 2362/98] were established, in particular in order to remedy these incompatibilities.'

137 Seventh, on 10 November 1998, Mr Santer, the President of the Commission, wrote to President Clinton, concerning Regulations Nos 1637/98 and 2362/98:

'Following the ruling of the WTO Appellate Body, the European Union has taken steps to bring its import regime into conformity with the WTO rules by 1 January 1999.'

138 Eighth, the applicant states that, on 27 January 1999, Mr L. Brittan, then the Commissioner for Competition, replying to written question P-4069/1998 by Yvonne Sandberg-Fries MEP (OJ 1999 C 182, p. 188), said:

'The Community implemented the recommendations of the WTO Dispute Settlement Body of 25 September 1997 in the bananas case by taking the necessary measures to bring the Community banana regime into conformity with WTO rules. On 20 July 1998, the Council adopted [Regulation No 1637/98]. On 28 October 1998, the Commission adopted [Regulation No 2362/98]. These measures were taken well within the reasonable period of time for implementation, which expired on 1 January 1999.'

139 Ninth, the applicant refers to the Commission's statements in its explanatory memorandum of 10 November 1999 annexed to a proposal for an amendment to Regulation No 404/93 (COM(1999) 582 of 10 November 1999), according to which:

'Following a ruling adopted by the [DSB] of the [WTO] in 1997, on 20 July 1998 the Council adopted [Regulation No 1637/98], in order to bring those elements of the import regime found to be incompatible with WTO rules into line with our WTO obligations whilst also respecting the Community's other objectives.'

140 Tenth, the applicant argues that, in a memorandum of 10 November 1999, lodged by the Community in the case of 'United States — Measures on the importation of certain products originating in the European Communities' which gave rise to the report of Special Group WT/DS165/R of 17 July 2000, the Community stated:

'3. The Council of the European Union adopted [Regulation No 1637/98]. Regulation No 1637/98 entered into force on 31 July 1998, and was applicable as from 1 January 1999. Making use of the delegated powers attributed to it by the Council, the European Commission adopted [Regulation No 2362/98]. It entered into force on 1 November 1998 and was applicable in its entirety as from 1 January 1999.

4. The modifications introduced by these regulations created a completely new set of rules addressing specifically those elements of the previous banana regime which were found to be incompatible with WTO rules both with respect to GATT and to GATS.'

141 Eleventh, the applicant points out that, in a public document of 5 May 2000 concerning the banana dispute, the Commission stated:

'Pascal Lamy stressed that the EU had a single policy on this issue which is to abide by the WTO ruling.'

142 Secondly, concerning the condition for applying *Nakajima* relating to the existence of a 'particular obligation' assumed in the context of the WTO Agreements, the applicant considers that this is also satisfied. After the various WTO dispute settlement procedures, the Community's obligations under WTO law in relation to the granting of import licences and the allocation of Latin American quotas were clear and well known. The Community, and the Commission in particular, cannot claim to have entertained any doubts as to the incompatibility of the provisions of the common organisation of the market in bananas with WTO rules.

143 In that respect, the applicant submits that, in the circumstances of this case, where the Community intended to comply with a dispute settlement decision adopted by WTO bodies, that decision enables identification of the 'particular obligation' on which the second condition under the *Nakajima* case-law depends. Whilst a decision issued under WTO dispute settlement procedures is not in itself sufficient for the *Nakajima* case-law to apply, the applicant argues that, where the latter is applicable, a dispute settlement decision taken by the WTO constitutes an important guide to interpretation for the Community judicature called upon to apply WTO law. It would, however, be excessive to take the view, on the basis of paragraph 20 of the judgment in *Atlanta*, that the Community judicature may take such a decision into account only if it is based on a provision of the WTO Agreements having direct effect. That interpretation, the applicant submits, is closely connected with the fact that, in *Atlanta*, the applicant was pleading that the WTO Agreements had direct effect.

144 The applicant further considers that the provisions of the WTO Agreements infringed by Regulation No 2362/98 are clearly identified. They are Article XIII:2 of the GATT 1994 and Articles II and XVII of the GATS. In that regard, it emphasises that the Commission clearly identified those provisions in the explanatory memorandum which it annexed to the draft of Regulation No 1637/98, as has already been stated. Similarly, the applicant points out that, in a document 7163/98 of 2 April 1998 entitled 'Progress Report', the Council expressly referred to 'the fundamental requirement of preventing any *de facto* discrimination and any discrimination in law'. According to the applicant, the expression '*de facto* discrimination' refers directly to rulings of the Appellate Body and the 1997 Panel.

145 The applicant also points out that Article 18(4) of Regulation No 404/93, as amended by Regulation No 1637/98, is directly inspired by Article XIII:2 of the GATT 1994, to the extent that it even qualifies for the 'incorporation requirement' which the Commission finds amongst the conditions for applying the *Nakajima* case-law.

146 Thirdly, the applicant considers that the judgment in *Bocchi Food Trade International* does not call into question the application of the *Nakajima* case-law in this case. It recalls that, in that judgment, the Court of First Instance held in paragraphs 63 and 64:

'In that regard, 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 the precise provisions of the annexes to the WTO Agreement, that it is for the Court of Justice and the Court of First Instance to review the legality of the Community measure in question in the light of the WTO rules (see *Portugal* v *Council*, paragraph 49).

Neither the reports of the WTO Panel of 22 May 1997 nor the report of the WTO Standing Appellate Body of 9 September 1997 which was adopted by the [DSB] on 25 September 1997 included any special obligations which the Commission intended to implement, within the meaning of the case-law, in Regulation No 2362/98 (see with regard to the GATT 1947, *Nakajima*, paragraph 31). The regulation does not make express reference either to any specific obligations arising out of the reports of WTO Bodies, or to specific provisions of the agreements contained in the annexes to the WTO Agreement.'

147 The applicant observes that, in paragraph 63 of that judgment, the Court of First Instance repeated the *Nakajima* and *Fediol* formulas, referring to the intention of the Community. In paragraph 64, it referred only to the absence of intention on the part of the Commission, having apparently had no other question referred to it. While acknowledging that, in *Bocchi*, the Court probably came to the right conclusion concerning the Commission's intention, the applicant argues that, in this case, it is not the Commission's intention that is at issue but that of the Community; the latter, unlike the Commission, undoubtedly intended to comply with obligations under WTO law when it adopted Regulation No 1637/98.

148 The applicant points out that, in paragraph 104 of its defence in this action, the Commission expressly acknowledged that 'it was the Community's intention to put in place a banana regime respecting all its WTO obligations'.

149 The applicant further argues that the applicant in *Bocchi* invoked not the *Nakajima* argument but the principle *nemini licet venire contra factum proprium*, and that it was not put forward until the oral hearing. The applicant in that case submitted no evidence on the intention of the Community. The Court of First Instance was not, therefore, in a position to take a definitive stance on that question, whereas, in the

present case, the applicant maintains that it has produced evidence at the hearing allowing that question to be determined.

150 The Commission rejects those arguments. In adopting the 1999 regime, the Community intended to comply with its obligations assumed in the context of the GATT and the WTO rather than to 'implement' them.

151 The Commission argues that Regulation No 2362/98 makes no express reference to particular obligations under the GATT or the WTO Agreements, as identified by the Court of First Instance in paragraph 64 of its judgment in *Bocchi*.

152 The Commission submits that the *Nakajima* case-law is not applicable when the case involves Community measures taken in order to comply with a DSB ruling. Following the adoption of a DSB or Panel ruling or recommendation, the DSU leaves the unsuccessful party with a range of options (compensation; suspension of concessions; agreement), and it also does so in the case of a Panel 'implementation' ruling. The DSU favours negotiated solutions. Applying the *Nakajima* case-law in such a situation would be tantamount to denying the unsuccessful party any margin of discretion. The opposite party would hardly be motivated to negotiate a mutually acceptable solution if it knew that its operators could obtain compensation or the annulment of the measures in question by bringing an action before the Community courts. Allowing direct effect for WTO agreements to contest the validity of Community measures would render nugatory the options provided for by the DSU (*Portugal* v *Council*, paragraphs 38 to 40).

153 Moreover, when the Community has offered compensation or when concessions have been suspended, the overall balance of concessions agreed to in the WTO Agreements is re-established. Awarding damages in that case would, in effect, lead to the Community 'paying' twice for the same inconsistency with WTO rules.

154 Furthermore, the interpretation advocated by the applicant ignores the absence of reciprocity between the Community and the other WTO contracting parties, an issue highlighted by the Court of Justice in *Portugal* v *Council*. It notes in particular that the United States of America has failed to comply with several Panel and DSB rulings (DS/136 United States — Anti-Dumping Act of 1916, DS/160 United States — Section 110(5) of the Copyright Act and DS/108 United States — Foreign Sales Corporation), without Community operators being able to bring actions for compensation before American courts.

155 The Commission maintains that the judgment in *Bocchi* clearly states, with respect to Regulation No 2362/98, that the Panel and DSB reports did not include any particular obligations. That approach was confirmed in the order of the Court of Justice in *OGT Fruchthandelsgesellschaft*.

Findings of the Court

156 In order to determine whether the Community measure whose legality is being challenged was adopted in order to 'implement a particular obligation assumed in the context of the WTO', within the meaning of the *Nakajima* case-law, it is necessary to examine separately, first, the specific characteristics of that measure and secondly those of the relevant provisions of the WTO Agreements relied on.

157 In this case, neither the Community provisions, the legality of which the applicant is challenging, nor the provisions of the WTO Agreements which it alleges are infringed support the conclusion that there was an intention to implement a particular obligation assumed in the context of the WTO, for the purposes of the *Nakajima* case-law.

158 As regards the WTO Agreements, the applicant claims that the Community has infringed Article XIII of the GATT 1994 and Articles II and XVII of the GATS, such infringement having been found by the DSB ruling of 25 September 1997 in relation to the 1993 regime and subsequently by the Panel ruling of 6 April 1999 and the arbitrators' ruling of 9 April 1999 in relation to certain provisions of the 1999 regime contained in Regulation No 2362/98.

159 However, those provisions of the GATT 1994 and the GATS contain no characteristics such as would support the conclusion that the *Nakajima* case-law applies. Article XIII of the GATT 1994 ('Non-discriminatory Application of Quantitive Restrictions'), and Articles II ('Most-Favoured-Nation Treatment') and XVII ('National Treatment') of the GATS lay down principles and obligations which, by their wording, their nature and their scope are general in character. Those provisions thus clearly differ from those of the 1979 and 1994 Anti-Dumping Codes. In that respect, it is sufficient to recall, for example, that the preambles to Regulations Nos 3283/94 and 384/96 emphasised that the 1994 Anti-Dumping Code 'contains new and detailed rules, in particular, with regard to the calculation of dumping, procedures for initiation and the subsequent investigation, including the establishment and treatment of the facts, the imposition of provisional measures, the imposition and collection of anti-dumping duties, the duration and review of anti-dumping measures and the public disclosure of information relating to anti-dumping investigations'.

160 Moreover, neither the GATT 1994 nor the GATS imposes an obligation on its signatories to make an adaptation of their national law equivalent to that required by Article 16(6)(a) of the 1979 Anti-Dumping Code and Article 18(4) of the 1994 Anti-Dumping Code.

161 Even if the applicant's line of argument could be interpreted as seeking to rely on infringement by the Community of its obligation to implement the recommendations or rulings of the DSB, it cannot be accepted. Even though the Commission considers — having regard to international law — that the DSU requires the losing party to bring a measure declared incompatible by a DSB ruling into compliance with the WTO Agreements, that obligation to ensure the conformity of internal measures with international undertakings arising from the WTO Agreements is undoubtedly of a general character, which contrasts with the rules of the Anti-Dumping Codes. Therefore, it cannot be relied on for the purposes of applying the *Nakajima* case-law.

162 Moreover, without it being necessary to enquire what the possible consequences as regards compensating individuals would be of non-implementation by the Community of a DSB ruling finding a Community measure incompatible with WTO rules, a question which the applicant has not expressly raised independently of that concerning the application of the *Nakajima* case-law, it is sufficient to point out that the DSU does not establish a mechanism for the judicial resolution of international disputes by means of decisions with binding effects comparable with those of a court decision in the internal legal systems of the Member States. The Court of Justice has held that, interpreted in the light of their subject-matter and purpose, the WTO Agreements do not prescribe the appropriate legal means for ensuring that they are applied in good faith in the legal order of the contracting parties. The Court has stated that, despite the strengthening of the mechanism for resolving disputes resulting from the WTO Agreements, that mechanism nevertheless accords considerable importance to negotiation between the parties (*Portugal* v *Council*, paragraph 36). The Court added in paragraphs 37 to 40:

'Although the main purpose of the mechanism for resolving disputes is in principle, according to Article 3(7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO), to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that understanding provides that where the immediate withdrawal of the measures is impracticable compensation may be granted on an interim basis pending the withdrawal of the inconsistent measure.

According to Article 22(1) of that Understanding, compensation is a temporary measure available in the event that the recommendations and rulings of the [DSB] provided for in Article 2(1) of that Understanding are not implemented within a reasonable period of time, and Article 22(1) shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO Agreements in question.

However, Article 22(2) provides that if the member concerned fails to fulfil its obligation to implement the said recommendations and rulings within a reasonable period of time, it is, if so requested, and on the expiry of a reasonable period at the latest, to enter into negotiations with any party having invoked the dispute settlement procedures, with a view to finding mutually acceptable compensation.

Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent 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 that memorandum of entering into negotiated arrangements even on a temporary basis.'

163 That conclusion cannot be confined to cases where the reasonable period laid down by Article 21.3 of the DSU for implementing DSB recommendations or rulings has not yet expired.

164 Even at the expiry of that period and after the introduction of measures under Article 22 of the DSU to make compensation or suspend concessions, that agreement continues to reserve an important place for negotiation between the parties. In that respect, it is important to note that Article 21.6 of the DSU expressly provides that 'unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after

six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved'. Similarly, where the DSB authorises the suspension of concessions or other obligations, Article 22.8 of the DSU provides that, in accordance with Article 21.6 of the DSU, 'the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings. That provision also provides that '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'.

165 In this case, the dispute which gave rise to the DSB ruling of 25 September 1997 and the Panel Report of 6 April 1999, and then to the authorisation to suspend concessions to the detriment of the Community, was still pending and on the DSB's agenda on the date when this action was brought (see paragraph 39 above).

166 The Community judicature cannot therefore review the legality of the Community measures in question without depriving Article 21.6 of the DSU of its effectiveness, particularly in the case of an action for compensation under Article 235 EC, for as long as the question of implementing the recommendations or rulings of the DSB is not resolved, including, as provided in Article 22.8 of the DSU, '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' (see, by analogy, Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 62, and Case C-94/02 P *Biret* v *Council* [2003] ECR I-10565, paragraph 65).

167 So far as concerns the characteristics of Regulation No 2362/98, the evidence submitted by the applicant together with the Commission's written and oral statements indicate that when adopting the 1999 regime, of which Regulation No 2362/98 forms part, the Community intended to comply with its obligations assumed under the WTO Agreements, following the DSB ruling of 25 September 1997 (Case T-254/97 *Fruchthandelsgesellschaft Chemnitz* v *Commission* [1999] ECR II-2743, paragraph 26). However, those factors do not show that the Community intended to implement obligations assumed in the context of the WTO Agreements within the meaning of the *Nakajima* case-law.

168 The circumstances of the adoption of Regulation No 2362/98 cannot be compared with those of the adoption of the anti-dumping basic regulations to which the *Nakajima* case-law applied. Regulation No 2362/98 does not transpose into Community law rules arising from a WTO agreement for the purpose of maintaining the balance of the rights and obligations of the parties to that agreement. Thus the Court of First Instance held that 'neither the reports of the WTO Panel of 22 May 1997 nor the report of the WTO Standing Appellate Body of 9 September 1997 which was adopted by the DSB on 25 September 1997 included any special obligations which the Commission intended to implement, within the meaning of the [*Nakajima*] case-law' (*Bocchi*, paragraph 64).

169 Moreover, the provisions of Regulation No 2362/98 challenged by the applicant, which concern the distribution of import licences and the allocation of national tariff sub-quotas, do not reflect a series of new and detailed rules arising from the WTO Agreements, but introduce measures for managing tariff quotas adopted in the context of the common organisation of the market in bananas. The Court has indeed held that 'the common organisation of the market in bananas, as introduced by Regulation No 404/93 and subsequently amended, is not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of [the] GATT' (order in *OGT Fruchthandelsgesellschaft*, paragraph 28).

170 In the light of the above, the Court holds that, in adopting the 1999 regime, and Regulation No 2362/98 in particular, the Community did not intend to implement a particular obligation assumed in the context of the WTO Agreements within the meaning of the *Nakajima* case-law. Therefore, the applicant is not in a position to plead infringement by the Community of its obligations under the WTO Agreements.

171 It follows that in its first plea in law the applicant has not demonstrated the existence of illegal conduct capable of rendering the Community liable.

3. *The second plea in law, claiming infringement of the mandate conferred by the Council on the Commission to implement Regulation No 1637/98*

Arguments of the parties

172 According to the applicant, the Commission exceeded the limits of the mandate conferred upon it by the Council for the implementation of Regulation No 1637/98. By adopting that regulation, the Council undoubtedly intended to implement obligations arising from the WTO Agreement. The applicant recalls in that respect that Article 20 of Regulation No 404/93, as amended by Regulation No 1637/98, provides:

'The Commission shall adopt provisions to apply this Title under the procedure set out in Article 27. Their scope shall include: ... (e) measures needed to ensure the respect for obligations stemming from agreements concluded by the Community under Article 228 [of the EC Treaty (now Article 300 EC)].'

173 As regards the distribution of import licences, the Commission, acting pursuant to its implementing powers under Article 19 of Regulation No 404/93, as amended by Regulation No 1637/98, disregarded the intention of the Council, which was to ensure the compatibility of the common organisation of the market in bananas with the WTO Agreements. The Commission merely applied superficial touch-ups to the 1993 regime whilst maintaining the import licence distribution system largely intact. Those minor modifications were declared incompatible with WTO law by the Panel Report of 6 April 1999.

174 As regards the country allocations of the quotas, the applicant maintains that the Commission likewise disregarded the wishes of the Council, thereby exceeding the limits of its mandate. The applicant argues that, in Article 18(4) of Regulation No 404/93, as amended by Regulation No 1637/98, the Council implicitly referred to the abovementioned provisions of Article XIII:2(d) of the GATT 1994, which contemplates two situations where a WTO Member may divide a tariff quota into national sub-quotas, namely by agreement with the States in question or, unilaterally, on the basis of a 'representative period'. The Community is not obliged to introduce national sub-quotas, contrary to what the Commission stated in the second recital in the preamble to Regulation No 2362/98, according to which, if it is unable to reach an agreement with the four main banana-supplying States, 'the Commission is therefore obliged to allocate the tariff quotas'. As for the representative character of the reference period, the applicant essentially argues that the Commission could not ignore the fact that the years 1994 to 1996 were inappropriate, having been held unrepresentative by the DSB ruling of 25 September 1997.

175 The applicant also considers that the Commission failed to inform the Council of its intentions, a matter of which several delegations complained during the preparatory work for Regulation No 2362/98. It argues that the participation of the Banana Management Committee in the adoption process for Regulation No 2362/98 is not equivalent to the Council's agreement.

176 The applicant further argues that the mandate of the Council, of which it alleges violation, constitutes a rule of law designed to protect individuals which, if breached, can render the Community liable. It acknowledges that the rule that the Commission must remain within the limits of its mandate when exercising powers delegated to it is designed to protect the institutional balance between the Commission and the Council (Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937). However, it states that it is invoking that rule not *in abstracto* but in the light of the wording of the terms of the mandate from the Council set out in Regulation No 1637/98. That wording shows that the Council's aim was to set up a regime compatible with WTO rules. That mandate was thus designed directly to improve the situation of the applicant, that is to say the protection of the rights of individuals.

177 The Commission objects that it did not exceed the limits of its implementing powers when it adopted Regulation No 2362/98. It acted in accordance with Article 27 of Regulation No 404/93, after having duly notified the Council of Agriculture Ministers of June 1998.

178 It argues that Article 18(4) of Regulation No 404/93 provides that the tariff quota is to be allocated among supplier countries. That article provides explicitly that 'the Commission may allocate the tariff quotas' unilaterally in the absence of agreement with the third countries. The seventh recital of Regulation No 1637/98 states that 'for the purpose of subdividing the tariff quotas ... a single criterion should be used for determining those producer States with a substantial interest'. The fact that the Council authorised the Commission to negotiate with supplier countries and adopted directives for that purpose contradicts the applicant's argument.

179 It argues that this plea is, in any event, irrelevant because the applicant acknowledges in paragraph 156 of the reply that the Commission could introduce country allocations.

180 Finally, the Commission maintains that the mandate of the Council and the allocation of competences between the latter and the Commission does not constitute a rule 'for the protection of individuals', as the Court held in *Vreugdenhil*, paragraphs 20 and 21. There is therefore no question, in its submission, of the Community being liable in accordance with this plea.

Findings of the Court

181 As to the question whether, in adopting Regulation No 2362/98, the Commission exceeded the limits of the competence delegated to it by the Council, it should be noted that the aim of the system of the division of powers between the various Community institutions is to ensure that the balance between the institutions provided for in the Treaty is maintained and not to protect individuals. Consequently, a failure to observe the balance between the institutions cannot on its own be sufficient on its own to render the Community liable to the traders concerned (*Vreugdenhil*, paragraphs 20 and 21).

182 In any event, in accordance with what has been held above in relation to the first plea, the Court must reject the claims whereby the applicant is seeking to rely directly on incompatibility with the WTO Agreements found in relation to certain provisions of Regulation No 2362/98. Since the *Nakajima* case-law is not applicable in this case, the applicant is not entitled to rely on the incompatibility with the WTO Agreements of the rules for distributing import licences and allocating national quotas.

183 Moreover, as to whether the Commission violated the terms of the mandate conferred upon it by the Council, first by virtue of Article 18(4) of Regulation No 404/93, as amended by Regulation No 1637/98, for the allocation of national tariff sub-quotas, and, second, by virtue of Article 19(1) and Article 20 of that regulation,

for the adoption of detailed rules for managing tariff quotas and, in particular, the distribution of import licences, it should be noted that, in accordance with the wording of the fourth indent of Article 211 EC, the Commission, in order to ensure the proper functioning and development of the common market, is required to exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter. In accordance with consistent case-law, it follows from the Treaty context in which that article must be placed and also from practical requirements, that the concept of implementation must be given a wide interpretation. Since only the Commission is in a position to keep track of agricultural market trends and to act quickly whenever necessary, the Council may confer on it wide powers in that sphere. Consequently, the limits of those powers must be determined by reference, amongst other things, to the essential general aims of the market organisation (Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraph 30; Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 54).

184 The Court of Justice has thus held that, in matters relating to agriculture, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council (*Netherlands* v *Commission*, paragraph 31; *Germany* v *Commission*, paragraph 55).

185 In this case, the Council required the Commission to adopt measures for managing tariff quotas in accordance with the method based on taking account of traditional trade flows (Article 19(1) of Regulation No 404/93, as amended by Regulation No 1637/98). At the same time, the Council required the Commission to take 'measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article [300 EC]'. The applicant has not established that the Commission manifestly exceeded the discretion conferred upon it by the Council when it sought to reconcile those objectives by enacting measures for distributing import licences and allocating national quotas.

186 As for the regularity of the procedure for adopting Regulation No 2362/98, the applicant has not demonstrated the existence of substantive irregularities. On the contrary, it is clear from Commission documents, particularly the Minutes of the 96th Banana Management Committee of 16 October 1998, that the committee referred to in Article 27 of Regulation No 404/93 was consulted with a view to adopting Regulation No 2362/98.

187 It follows that, in the second plea, the applicant has not proved the existence of unlawful conduct capable of rendering the Community liable.

4. *The third plea, alleging infringements of general principles of Community law*

188 This plea is divided into three parts, alleging breach, respectively, of the principle of non-discrimination, the principle of freedom to pursue a trade and the principle of proportionality.

The first part, concerning the principle of non-discrimination

Admissibility

— Arguments of the parties

189 The Commission considers that this first part, as set out in the application, does not comply with the requirements of Article 44(1)(c) of the Rules of Procedure. The

applicant does not state what the alleged discrimination consists of but merely refers to its description of the 1993 regime. Therefore, the Commission maintains, this part of the applicant's argument is inadmissible.

190 The applicant maintains that this part is admissible because the application does satisfy the requirements of Article 44(1)(c) of the Rules of Procedure. It submits that it has clearly explained the differences in treatment between operators under the 1993 regime in paragraphs 25 to 28 of the application and, in paragraphs 66 to 99 of the application, the aggravation of that discrimination under the 1999 regime.

— Findings of the Court

191 In accordance with Article 44(1)(c) of the Rules of Procedure, the Court of First Instance requires, for an action to be admissible, that the application itself must show, at least in summary form but in a coherent and comprehensible manner, the essential elements of fact and law on which the action is based.

192 In this case, the applicant has stated (paragraph 95 of the application) that infringement of the principle of non-discrimination 'clearly flows from the fact that the banana regime was set up to discriminate against the applicant and to substantially reduce the scale of the applicant's business in the EC'. The applicant has also referred expressly to paragraphs 25 to 28 of its application, which contain not only a description of the 1993 regime but also a critique arguing that the purpose of that regime was, essentially, to weaken the economic position on the banana market of large multinational companies in general and the applicant in particular. The applicant has also clearly stated (see, in particular, paragraphs 66 to 98 of the application) that, far from amending the 1993 regime in order to eliminate

the incompatibilities with WTO law found by the DSB in its ruling of 25 September 1997, the 1999 regime, and Regulation No 2362/98 in particular, only perpetuated the defects which affected the previous regime. Consequently, the wording of the application is sufficiently clear and precise to allow the Commission to prepare its defence and the Court to rule on this first limb.

193 Therefore, the passages of the application dealing with that first limb comply with the requirements of Article 44(1)(c) of the Rules of Procedure, so that the Commission's arguments must be rejected.

194 The first limb of the third plea is therefore admissible.

Merits

— Arguments of the parties

195 The applicant argues in effect that, once it became clear that the tariff quotas were sufficient to promote Community and ACP bananas, the Community should have reformed the 1993 regime as regards the distribution of import licences, described as 'burdensome' and 'onerous' aspects by Advocate General Gulmann in his Opinion in *Germany* v *Council (Bananas)*. By adopting the 1999 regime, however, the Commission opted for a regime which increased both the economic advantages conferred on operators of the former Category B and the burdens on the former primary importers of the former Category A, such as the applicant (see the summary of pleas above).

196 The applicant considers that an infringement of the principle of non-discrimination follows directly from the aim pursued by the common organisation of the market in bananas. The 1999 regime merely prolonged the 1993 regime, the avowed aim of which was substantially to reduce the applicant's business in the Community to the benefit of Community operators.

197 In *Germany* v *Council (Bananas)*, the Court of Justice found that the 1993 regime could potentially infringe the principle of non-discrimination. It did not so find in that case, however, having held that the 1993 regime had struck an acceptable balance between the interests of the different categories of operators concerned. In paragraph 74 the Court found that the difference in treatment of operators was 'inherent in the objective of integrating previously compartmentalised markets'. The Court confirmed that reasoning in paragraphs 63 to 65 of its judgment in Case C-122/95 *Germany* v *Council* [1998] ECR I-973.

198 In the present case, the applicant argues, the situation is different. The 1999 regime was adopted five years after integration of the markets following the creation in 1993 of the common organisation of the market in bananas. During that period, the Community and ACP operators were able to benefit from the competitive advantage conferred on them. It follows that the fundamental justification used by the Court of Justice in *Germany* v *Council (Bananas)* to rule out discrimination ceased to exist in the present case as of the time the 1999 regime was introduced.

199 The applicant submits that simply to transpose the analysis in *Germany* v *Council (Bananas)* to the circumstances of the present case would be tantamount to holding that the difference in operators' situations found by the Court of Justice in *Germany* v *Council (Bananas)* under the 1993 regime continued to exist under the 1999 regime. That further presupposes that the 1999 regime is a de facto continuation of the 1993 regime. The applicant observes, however, that the Commission contends, on the contrary, that the 1999 regime is completely different from the 1993 regime. If that is so, the applicant argues, it is not possible to transpose the findings of the judgment in *Germany* v *Council (Bananas)* to the 1999 regime.

200 The applicant submits that it is, in any event, obvious that the operators were not in the same situation before the 1993 regime and under the 1999 regime. The market has changed profoundly since *Germany* v *Council (Bananas)*. Before 1993, those operators who would later form Category B were not able, in certain countries, to import Latin American bananas without restrictions. In *Germany* v *Council (Bananas)*, the Court of Justice found that they could be treated differently because of that disadvantageous situation. The advantages thus granted to them had a profound effect on the market. Under the 1993 regime, many Category A operators acquired Category B operators in order to obtain access to their import licences. Conversely, some Category B operators sought to broaden their business in Latin American bananas by buying up Category A operators.

201 The applicant rejects the argument that the fossilisation of the 1993 regime could not be not discriminatory because some primary importers in Category A had acquired Category B operators and thereby access to import licences. That argument was already rejected, in the context of the WTO, by the arbitrators' ruling of 9 April 1999 (paragraph 5.69). That reaction by primary importers was the normal and direct consequence of the discriminatory measures imposed on them.

202 Lastly, the applicant submits that the reasons which led the Court of First Instance to reject the plea against Regulation No 2362/98 on grounds of discrimination in *Bocchi* are not applicable to this case. That case concerned alleged discrimination arising between small undertakings and multinationals. Since that aspect is unrelated to this case, the applicant considers that *Bocchi* is irrelevant on this point.

203 The Commission rejects those claims. It submits that the case-law has already clearly shown that restrictions on the right to import third-country bananas are inherent in the common organisation of the market in bananas and rejected pleas that the 1993 and 1999 regimes were discriminatory (*Germany* v *Council (Bananas)*, paragraph 82; *Bocchi*, paragraph 81).

204 The Commission rejects the distinction which the applicant is seeking to draw between the situation which prevailed at the time of *Germany* v *Council (Bananas)* and the situation in this case. It also denies the relevance in this case of the opinion of Advocate General Gulmann in *Germany* v *Council (Bananas)*.

205 As regards the relevance of the WTO rulings on the discriminatory nature of the 1999 regime, the Commission submits that the very concept of 'discrimination' in WTO law is not identical with that practised in Community law. Differential treatment that is merely an automatic consequence of different treatment of third-country imports cannot be regarded as discriminatory (Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 25).

— Findings of the Court

206 The line of argument to the effect that the 1999 regime was designed to favour Community operators specialising in trading in bananas of Community or ACP origin to the detriment of the applicant cannot be accepted.

207 As for the alleged discrimination between, on the one hand, operators trading Latin American bananas and, on the other, those trading Community or ACP bananas, it should be noted that, even if the position of those categories of operators could have been affected in different ways by Regulation No 2362/98, that would not constitute discriminatory treatment to the extent that such a difference in treatment appears to be inherent in the objective of integrating markets in the Community (see, to that effect, *Germany* v *Council (Bananas)*, paragraph 74; *Bocchi*, paragraph 75).

208 Before the creation of the common organisation of the markets in bananas, the situation of those two categories of operators was not comparable. In the words of the Court of Justice, 'the banana sector at Community level was characterised by the coexistence of open national markets, which were themselves moreover governed by different regimes, and protected national markets'. Thus, according to the Court:

'On the open national markets economic operators were able to obtain supplies of third-country bananas without quantitative restrictions. On the German market importers were even exempt from customs duties within a quota which was adjusted regularly on the basis of the Banana Protocol. On the protected national markets, by contrast, economic operators marketing Community and traditional ACP bananas were ensured the possibility of disposing of their products without being exposed to competition from suppliers of more competitive third-country bananas. ... [The] selling price of Community and ACP bananas was in fact appreciably higher than that of third-country bananas' (*Germany* v *Council (Bananas)*, paragraphs 70 to 72).

209 Although those categories of economic operators were affected in a different way by the 1993 regime, the Court held that 'such a difference in treatment appears to be inherent in the objective of integrating previously compartmentalised markets, bearing in mind the different situations of the various categories of economic

operators before the establishment of the common organisation of the market'. The Court also held that 'Regulation [No 404/93] is intended to ensure the disposal of Community production and traditional ACP production, which entails the striking of a balance between the two categories of economic operators in question' (*Germany* v *Council (Bananas)*, paragraph 74).

210 The applicant effectively argues that the circumstances that led the Court to such a conclusion no longer obtained in relation to the adoption of the 1999 regime, the objective of integrating the open and the protected markets having by then been largely attained. It cites in that respect a statement by the Commission that 'the fundamental objectives of the market organisation have in the main been achieved, in particular the fusion of several national markets into a single market, the quantitative balance in market supply, fair prices for consumers and for Community and ACP producers' (Special Report No 7/2002 on the sound financial management of the common organisation of markets in the banana sector, together with the Commission's replies (OJ 2002 C 294, p. 1, at page 27; 'the report of the Court of Auditors'). It also cites a study by the firm of Arthur D. Little of 22 June 1995, ordered by the Commission ('the Arthur D. Little report').

211 It is true that following the creation of the common organisation of the market in bananas and during the five years in which the 1993 regime remained in force the Community market in bananas went through major changes, as is shown both by the Commission's statements appearing in the report of the Court of Auditors and by the Arthur D. Little report. The latter (pages 46 and 47) points out in particular that 'the establishment of the common organisation of the markets in bananas has allowed decompartmentalisation of national markets and brought about an explosion of intra-Community trade' and, in addition, 'allowed Latin American bananas to penetrate traditionally protected countries by removing import restrictions and giving category B operators the possibility of importing dollar bananas'. As for the aim of the common organisation of the markets to promote bananas of Community and ACP origin, the same report notes that their production

'makes a start on penetrating Northern Europe' and that that phenomenon of 'increased intermixing by origin of imports into each country marks another chapter in the emergence of a genuine single market'.

212 However, those developments in the banana sector arising from the common organisation of the markets implemented by Regulation No 404/93 cannot call into question the legislative choices made at the time when the 1999 regime was adopted and, in particular, the different treatment reserved for each category of operators. Even if the detailed rules for the functioning of the common organisation of the markets arising from the 1993 and 1999 regimes differ, the objectives of integrating national markets and disposing of Community and ACP bananas remain. The provisions of Regulation No 1637/98 did not alter those objectives but were limited, in relation to the regime for trade with third countries (Title IV of Regulation No 404/93), to reformulating the detailed rules for their functioning. Therefore, under the 1999 regime, the different treatment of specialised traders in Latin American bananas and specialised traders in Community and ACP bananas remains inherent in the objectives of the common organisation of the market in bananas. In such circumstances, the different treatment reserved for the different categories of operators does not constitute an infringement of the principle of non-discrimination capable of rendering the Community liable.

213 As for the applicants' arguments based on instances of discrimination found in the arbitrators' ruling of 9 April 1999 with regard to certain provisions of Regulation No 2362/98, it follows from the assessments made in relation to the first plea that the applicant cannot rely on infringement of the rules of the WTO Agreements, since the conditions for applying the *Nakajima* case-law are not met in this case. In any event, the Commission rightly argues that the instances of discrimination found by the arbitrators concern, first, the treatment reserved for banana distributors established outside the Community in relation to their competitors established within the Community and, second, the allocation of national tariff sub-quotas among certain Latin American countries. These are not, therefore, situations capable of falling within the ambit of the Community principle of equal treatment (see, to that effect, *Faust*, paragraph 25).

214 The Court therefore holds that, given the wide margin of discretion which it had, the Commission did not commit an infringement of the principle of non-discrimination capable of rendering the Community liable.

215 This first limb of the plea must therefore be dismissed.

The second limb, concerning the freedom to pursue a trade

Arguments of the parties

216 The applicant submits that the violation of the principle of the freedom to pursue a trade follows directly from the objective pursued by the common organisation of the banana market. In *Germany* v *Council (Bananas)*, the Court of Justice found, in paragraph 87 of its judgment, that the 1993 regime did not infringe that principle. The applicant submits, however, that the situation at the time of the facts giving rise to that judgment of the Court of Justice is different from that existing under the 1999 regime.

217 The applicant further insists that, in *Germany* v *Council (Bananas)*, the Court of Justice also relied on a balance of interests test to rule on the plea of a violation of the principle of the freedom to pursue a trade. The Court examined 'whether the restrictions introduced by [the 1993 regime] corresponded to objectives of general Community interest and did not impair the very substance of that right'.

218 It submits that the objectives of the 1999 regime are, first, the promotion of Community and ACP bananas and, second, the compatibility with WTO rules of the common organisation of the market in bananas. Under the 1999 regime, neither the system of distribution of import licences nor the country allocation advances those objectives. They do, however, restrict the applicant's freedom to pursue a trade more severely than did the previous regime. It follows that, in the light of the assessments by the Court of Justice in paragraphs 82 to 86 of *Germany* v *Council (Bananas)*, Regulation No 2362/98 upsets the balance between the Community's general interest and the applicant's specific interest.

219 The Commission rejects these allegations. It submits that the applicant entirely ignores the market integration objective pursued by the 1999 regime. Similar pleas have already been rejected in the case-law (*Germany* v *Council (Bananas)*, paragraph 82; Case T-521/93 *Atlanta and Others* v *European Community* [1996] ECR II-1707, paragraphs 62 to 64).

Findings of the Court

220 The Court of Justice has held that the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organisation of the market, provided those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (Case 265/87 *Schraeder* [1989] ECR 2237, paragraph 15). Accordingly, the Court has already held that the restriction imposed by Regulation No 404/93 on the freedom of traditional traders in third-country bananas to pursue their trade or business corresponds to objectives of general Community interest and does not impair the very substance of that right (*Germany* v *Council (Bananas)*, paragraph 87).

221 As this Court has held in its examination of the first limb of this plea, the 1999 regime pursues, without altering them, the general interest objectives of Regulation No 404/93, namely to integrate national markets and to provide an outlet for Community and ACP bananas. In the light of those objectives, the Court finds that the change in economic conditions resulting from the entry into force of the common organisation of the market in bananas, which the applicant relies upon, does not support the conclusion that there has been an intolerable interference with the latter's rights which are incompatible with the aforesaid objectives of general interest.

222 Moreover, under the 1999 regime, in order to comply with its general obligations assumed in the context of the WTO, the Community, while preserving the method of traditional trade flows known as 'traditionals/newcomers' (Article 19(1) of Regulation No 404/93, as amended by Regulation No 1637/98), removed the categories and functions by reference to activity of operators and, in addition, increased the quantity of licences available for new entrants.

223 The second limb of this plea must therefore be dismissed as unfounded.

The third limb, concerning the principle of proportionality

Arguments of the parties

224 The applicant maintains that, according to the judgment in *Germany* v *Council (Bananas)*, Regulation No 2362/98 can be invalidated as breaching the principle of proportionality only if the measures it implements are 'manifestly inappropriate' with regard to the objective pursued. In this case, it argues, Regulation No 2362/98 is

manifestly inappropriate with regard to the objectives of the 1999 regime, which are, first, compatibility with WTO rules, and, second, the promotion of ACP and Community bananas. The distribution systems for the licences and the country allocation system were found by the WTO to be incompatible with the GATT 1994 and the GATS. In addition, those measures have favoured Community and ACP bananas less than they have certain Community traders, who have been able to benefit from the granting of import licences. Therefore, the applicant argues, Regulation No 2362/98 infringes the principle of proportionality.

225 The Commission maintains that this argument is closely linked to the plea alleging incompatibility with WTO law, and therefore irrelevant. It adds that the 1999 regime does not violate the principle of proportionality. That regime forms part of a policy aimed at favouring Community and ACP banana production. Both the rules for the distribution of import licences and those for country allocations pursue that objective.

Findings of the Court

226 The Court rejects at the outset the applicant's arguments based on incompatibility of Regulation No 2362/98 with the WTO Agreements, as already held in relation to the first plea.

227 It should further be recalled that, in order to establish whether a provision of Community law complies with the principle of proportionality, it is necessary to assess whether the means which it employs are suitable for the purpose of achieving the desired objective and whether or not they go beyond what is necessary to achieve it (Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 30).

228 In matters concerning the common agricultural policy the Community legislature has a broad discretion commensurate with the political responsibilities given to it by Articles 34 and 37 EC. The Court has held that the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. The Court's judicial review must be limited especially if, in establishing a common organisation of the market, the Council is required to reconcile divergent interests and thus to select options within the context of the policy choices which are its own responsibility (*Germany* v *Council (Bananas)*, paragraphs 89 and 90).

229 As regards the definition of the detailed rules for applying the trade regime with third countries, and more particularly as regards the management of tariff quotas, the Commission sought, when adopting Regulation No 2362/98, to reconcile the objectives inherent in the common organisation of the market in bananas with compliance with the Community's international commitments under the WTO Agreements and the Lomé Convention, while at the same time acceding to the wish of the Council to see the management of tariff quotas carried out by applying the method based on taking account of traditional trade flows (Article 19 of Regulation No 404/93, as amended by Regulation No 1637/93).

230 In this case, the applicant merely denounces the provisions of Regulation No 2362/98 governing the distribution of import certificates and the allocation of national tariff sub-quotas as manifestly inappropriate, without demonstrating that these measures are manifestly inappropriate to attaining the objective sought and that they exceed what is necessary in order to attain it.

231 As the applicant has not proved that these measures are manifestly inappropriate, this third limb of the plea must be dismissed.

232 It follows that, in the third plea, the applicant has not demonstrated the existence of unlawful conduct of such a kind as to render the Community non-contractually liable.

5. *The fourth plea, alleging infringement of the principles of good faith and of the protection of legitimate expectations in international law*

Arguments of the parties

233 The applicant claims that, by adopting and maintaining in force Regulation No 2362/98, the Commission violated the principle of good faith in public international law. It refers to Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, Vol. 788, p. 354), which states: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' The Community clearly failed to live up to that principle in the Bananas III dispute.

234 The Community, by its declarations and observations, clearly stated on several occasions that it intended to implement in good faith the rulings and recommendations of the DSB (see WTO, Status Report by the European Communities: documents WT/DS27/17 of 13 July 1998; WT/DS27/17/add. 1 of 9 September 1998; WT/DS27/17/Add. 2 of 9 October 1998 and WT/DS27/17/Add. 3 of 13 November 1998; minutes of the meeting of the DSB of 22 January 1998, document WT/DSB/M/41 of 26 February 1998).

235 These declarations do not hold up to scrutiny, however. The applicant submits that the 1999 regime does not aim to remedy the flaws found by the WTO in the 1993 regime. Far from complying with the WTO rulings, the Community sought to utilise

cosmetic changes to cover up a fossilisation of the illegal situation resulting from the 1993 regime. Such conduct, in itself, constituted an infringement of the principle of good faith. Using stalling tactics, the Community sought to escape from its obligations under WTO law and use the complexity of its own regime to mislead its trading partners in the WTO.

236 There is nothing to contradict these allegations. First, with respect to the country allocations, the Commission cannot maintain that it acted in good faith. The applicant refers to its earlier discussion of how the failure of the negotiations commenced with four Latin American countries did not in any way oblige the Commission to adopt, pursuant to Regulation No 2362/98, a system of country allocations equivalent to the system of sub-quotas in place under the 1993 regime.

237 Second, the fact that the Community participated in the arbitration proceedings and the implementation of the rulings in the Bananas III dispute is not proof of good faith. It was simply the exercise by the Community of its defence rights. The applicant observes in this regard that the Community did not find it necessary to appeal against the Panel Report of 6 April 1999, which found the 1999 regime incompatible with WTO rules.

238 Third, the procedure initiated by the Commission under Article 21.5 of the DSU which gave rise to the Panel Report of 12 April 1999 (WT/DS27/RW/EEC) is not relevant to this case or, at the very least, is not proof of the Community's good faith. The applicant states that that procedure essentially asked for the 1999 regime to be found WTO-compatible unless and until a ruling to the contrary was made under the DSU. The applicant states that that procedure did not directly concern the WTO-compatibility of the 1999 regime. The Panel was not in a position to grant

that request because the Community had not provided sufficient evidence to enable a ruling to be given. A reading of its report shows clearly, however, that the Commission was reluctant to discuss the WTO-compatibility of the 1999 regime.

239 The applicant adds that the Community's behaviour amounted to abuse of procedure. Despite the weakness of its legal position, the Community continued to deny its obligations by affirming that its regulations were WTO-compatible with the superficial amendments that had been made. This stance forced a number of WTO members to bring DSB procedures, thereby giving rise to unnecessary tensions.

240 Lastly, the applicant submits that its plea of violation by the Community of the principle of good faith in international law is well founded, referring to Case C-162/96 *Racke* [1998] ECR I-3655 ('*Racke*') and Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39 and makes two remarks on the relevance of that case-law.

241 The applicant ackowledges that, according to *Racke*, individuals may rely on rules of international law only where there are 'manifest errors of assessment concerning the conditions of applying these rules'. It maintains that, in this case, there was indeed such a manifest error of assessment on the part of the Commission at the time it adopted Regulation No 2362/98, as evidenced by the arguments developed under the first plea. Its next error was not to withdraw the 1999 regime following the definitive adoption of the Panel Report of 6 April 1999, which confirmed that the 1999 regime was incompatible with WTO rules.

242 The applicant further argues that the fact that both *Racke* and *Opel Austria* relate to international agreements capable of having direct effect does not affect their relevance to this case. Those judgments, like the judgment in *Nakajima*, involved

situations where the Community had made a commitment to respect an obligation under international law. The Court of Justice found that, even where the agreements in question did not have direct effect, the obligation under international law could have repercussions on the legal position of traders, which the institutions could not ignore. In *Racke*, the Court held that, although the Community had the authority unilaterally to suspend an international agreement with direct effect, it could not act in defiance of the *rebus sic stantibus* principle without violating the legitimate expectations of those traders (see, in particular, paragraphs 86 to 90 of the Opinion of Advocate General Jacobs in *Racke*, and paragraph 47 of the judgment in that case).

243 The applicant claims that its interpretation of *Racke* and *Opel Austria* has been confirmed by the Court of Justice in the *Biotechnologies* judgment. In paragraph 54 of that judgment, the Court held:

'Even if, as the Council maintains, the [Convention on Biological Diversity signed in Rio de Janeiro on 5 June 1992, approved on behalf of the European Community by Council Decision 93/626/EEC of 25 October 1993 (OJ 1993 L 309, p. 1)] contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement [see *Racke*, paragraphs 45, 47 and 51].'

244 The applicant submits that the cornerstone of that case-law is that it gives effect, in a limited manner and by way of exception, to international instruments which, in principle, may not be relied on by individuals either because they have not yet entered into force (*Opel Austria*), or because, although in force, they have been suspended (*Racke*), or because they do not by their nature have direct effect (*Nakajima*). The *Nakajima* case-law is, the applicant submits, merely a specific application of the general principle underlying *Racke* and *Opel Austria*.

245 The Commission does not accept those arguments. The applicant cannot invoke the principle of *pacta sunt servanda* because, first, the Community acted in good faith without committing manifest errors of assessment and, second, the applicant was not in a position to entertain any legitimate expectations and has no directly effective rights which could be affected by the alleged breach of that principle.

Findings of the Court

246 The applicant pleads infringement by the Community of the principle *pacta sunt servanda*, which is a fundamental principle of any legal order, and of international law in particular. Applied in international law, that principle, codified in Article 26 of the Vienna Convention, requires that every treaty bind the parties and be carried out by them in good faith.

247 That line of argument thus merges with the line of argument developed under the first plea, as the applicant is claiming non-performance by the Community of its obligations under the WTO Agreements. The Court therefore holds that, for the reasons set out in its examination of the first plea, this argument cannot succeed. In this case, the applicant has not demonstrated that the conditions for applying the *Nakajima* case-law are satisfied.

248 Even if this plea could be interpreted as seeking to demonstrate that, without infringing its obligations under the WTO Agreements, the Community nevertheless acted without good faith, it must be rejected. The principle of Article 26 of the Vienna Convention is a principle of international law on which the applicant cannot rely in this case, given that the international agreement whose performance in good faith it questions does not have direct effect.

249 First of all, the applicant cannot rely on the case-law derived from the judgment in *Opel Austria*. That is not relevant here, since the judgment in that case concerned not the *pacta sunt servanda* principle but Article 18 of the Vienna Convention, which forbids the binding character of international agreements from being evaded by measures adopted just before the entry into force of an agreement which would be incompatible with the fundamental principles of that agreement.

250 Nor can the applicant rely on the judgment in *Racke*. There, the Court of Justice held (paragraph 51) that 'an individual relying in legal proceedings on rights which he derives directly from an agreement with a non-member country may not be denied the possibility of challenging the validity of a regulation which, by suspending the trade concessions granted by that agreement, prevents him from relying on it, and of invoking, in order to challenge the validity of the suspending regulation, obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations'. In this case, however, the applicant is not relying on rules of customary international law which, by way of exception from the *pacta sunt servanda* principle, govern the termination and suspension of treaty relations by reason of a fundamental change in circumstances. Moreover, unlike the international agreement at issue in *Racke* (paragraph 34), the provisions of the WTO Agreements are not designed in principle to confer upon individuals rights on which they may rely before the courts.

251 Finally, the *Biotechnologies* judgment must also be dismissed here as irrelevant. In that case, the plea alleging breach of international law was directed 'not so much at a direct breach by the Community of its international obligations, as at an obligation imposed on the Member States by the [directive in question] to breach their own obligations under international law, while [that directive] itself claims not to affect those obligations' (*Biotechnologies*, paragraph 55).

252 In any event, this plea is incorrect on the facts. Contrary to what the applicant claims, the Community cannot be regarded as having acted in bad faith following the DSB ruling of 25 September 1997. The Community repealed the 1993 regime after

that DSB ruling in order to comply with its general obligations assumed within the framework of the WTO Agreements. By Regulation No 1637/98, the Council expressly entrusted the Commission with the task of adopting the detailed rules for applying the trade regime with third countries, such rules to include, according to Article 20(e) of Regulation No 404/93 as amended by Regulation No 1637/98, 'measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article [300 EC]'. The Commission was thus prevailed upon to define new detailed rules for managing tariff quotas and allocating import licences, in the context of Regulation No 2362/98.

253 In the WTO context, the Community subsequently undertook negotiations with its trading partners, who were parties to the Bananas III dispute, with a view to finding a mutually agreed solution in accordance with the provisions of Article 3.6 of the DSU. In the preamble to Regulation No 216/2001, the Council thus states that:

'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 (EEC) No 404/93 and to take account of the conclusions of the special group set up under the dispute settlement system of the World Trade Organisation (WTO). 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. 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 General Agreement on Tariffs and Trade (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.'

254 Those circumstances do not support the conclusion that the Community did not act in good faith. Similarly, the availing of remedies provided for by the DSU cannot be treated as an abuse of procedure on the part of the Community.

255 Concerning, finally, the alleged infringement of the principle of the protection of legitimate expectations, the right to rely on that principle is open to any economic operator to whom an institution has given justified hopes (Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraph 48). In this case, the applicant has failed to demonstrate how the acts or conduct of the Community may legitimately have allowed it to entertain such hopes. As the applicant was not a party to the disputes between the Community and its trading partners concerning the 1993 and 1999 regimes, the exchanges which took place between the latter could not have given rise to such hopes.

256 Moreover, even if the Community is bound by a general obligation to implement recommendations or rulings by the DSB in a manner compatible with the WTO Agreements, such an obligation cannot be regarded as binding the Community as to the choice of form and the means to be used in order to attain such a result. On the contrary, by reason of the complexity of the provisions set out in those agreements and the imprecise nature of some of the concepts to which they refer, the principle codified in Article 26 of the Vienna Convention that international agreements are to be performed in good faith implies, on the part of the Community, a reasonable effort to adopt measures complying with the WTO Agreements, while leaving the Community with a choice as to the form, and as to the means of attaining that objective. The Court of Justice has held in that respect that'although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means' (*Portugal* v *Council*, paragraph 35). Given the margin of discretion which Community institutions have when choosing the necessary means for implementing their policy and giving effect to their international commitments, the applicant had no grounds for placing its legitimate expectations in an alteration of the 1993 regime that would meet its interests.

257 As the applicant has not demonstrated the existence of unlawful conduct of such a kind as to render the Community non-contractually liable, this plea must therefore be dismissed.

258 The applicant argues, lastly, that to dismiss this action would contravene the general principle of effective legal protection laid down by Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and by Community case-law (Case 222/86 *Heylens and Others* [1987] ECR 4097). It adds, however, that that principle is not the direct basis of its action, but rather it should guide the Court in its interpretation. The present action for damages is the only remedy which may seriously be envisaged in order to obtain judicial review, given that the Court has dismissed as inadmissible several actions for annulment and applications for interim relief brought against Regulation No 2362/98.

259 The Court notes that persons have a right under Community law to full and effective legal protection (order of the President of the Court of Justice of 29 January 1997 in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 36) and that provision has been made in the context of the Treaty for the establishment of a complete system of judicial protection against acts of Community institutions which are capable of having legal effects (Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 20). In this case, the applicant cannot establish any claim under those principles to have its action upheld. It has been in a position to use the legal means placed at its disposal. Therefore, there is no infringement here of the principle of effective legal protection.

260 It follows from the whole of the above that the condition regarding unlawfulness of the conduct of which the Community institution is accused is not met in this case. Therefore, the action must be dismissed as unfounded.

Costs

261 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. As the applicant has been unsuccessful, it must be ordered to pay the costs, as the Commission has pleaded.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay its own costs and those of the Commission.

Lindh García-Valdecasas Cooke

Mengozzi Martins Ribeiro

Delivered in open court in Luxembourg on 3 February 2005.

H. Jung — Registrar

P. Lindh — President

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