JUDGMENT OF THE COURT OF FIRST INSTANCE (Grand Chamber)

14 December 2005 *

In Case T-383/00,

Beamglow Ltd, established in St Ives, Cambridgeshire (United Kingdom), represented by D. Waelbroeck, lawyer, with an address for service in Luxembourg,

applicant,

v

European Parliament, represented by R. Passos and K. Bradley, acting as Agents, with an address for service in Luxembourg,

Council of the European Union, represented by S. Marquardt and M. Bishop, acting as Agents,

and

Commission of the European Communities, represented by P. Kuijper, C. Brown and E. Righini, acting as Agents, with an address for service in Luxembourg,

defendants,

* Language of the case: English.

supported by

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

intervener,

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

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

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

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 26 May 2004,

gives the following

Judgment

Legal context

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

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

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

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

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

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

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

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

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

7 Article 3(7) of the DSU states:

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

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

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

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

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

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

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

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

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

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

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

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

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in

which the panel or Appellate Body has found a violation or other nullification or impairment;

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

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

...

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

...

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorisation to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to

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

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

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

...'

Facts

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

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

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

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

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

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

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

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

24 The preamble to Regulation No 1637/98 states:

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

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

...

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

...'

25 On 28 October 1998 the Commission adopted Regulation (EC) No 2362/98 laying down detailed rules for the implementation of Regulation No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32). This regulation contains the body of provisions necessary for implementation of the new regime governing trade in bananas with third countries, including the transitional measures justified by the imminence of the entry into force of its implementing rules.

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

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

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

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

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

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

32 By decision of 9 April 1999 the arbitrators, first, found that several provisions of the new import regime under the COM for bananas were contrary to provisions of the WTO agreements and set the level of nullification or impairment suffered by the

United States of America at USD 191.4 million per year, and second, held that the suspension by that country of the application to the Community and its Member States of tariff concessions and related obligations under the GATT 1994 covering trade in a maximum amount of USD 191.4 million per year would be consistent with Article 22(4) of the DSU.

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

34 By press release of 9 April 1999, the United States Trade Representative ('the Trade Representative') announced the list of products whose import was subject to 100% customs duty. The products listed, originating in Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden or the United Kingdom, included 'folding cartons, boxes and cases of non-corrugated paper or paperboard'. It was stated that the Trade Representative would publish the determination imposing the 100% duty in the *Federal Register* and intended to make imposition of the duty effective as from 3 March 1999.

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

36 It is apparent from the section of that decision concerning the 'effective date' that the Trade Representative 'determined that, effective April 19, 1999, a 100% ad

valorem rate of duty [would] be applied to the articles that are entered, or withdrawn from warehouse, for consumption on or after March 3, 1999'.

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

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

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

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

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

42 The preamble to Regulation No 216/2001 states:

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

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

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

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

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

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

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

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

45 The United States of America suspended application of the increased customs duty with effect from 30 June 2001. From 1 July 2001 its import duty on folding cartons, boxes and cases originating in the Community was reduced to its initial rate.

46 Statistics produced by the Commission at the Court's request show that the total c.i.f. (cost, insurance, freight) value of imports into the United States of folding cartons, boxes and cases originating in the Community amounted to USD 27 932 045 in 1998, USD 16 645 665 in 1999, USD 9 531 023 in 2000 and, finally, USD 18 444 637 in 2001.

47 Beamglow Ltd produces folding boxes made of printed and decorated paperboard. These boxes are intended as packaging for products such as cosmetics and fragrances and fall within the product category 'folding cartons, boxes and cases of non-corrugated paper or paperboard' concerned by the increased customs duty.

Procedure

48 By application lodged at the Registry of the Court of First Instance on 22 December 2000, the applicant brought the present action claiming compensation for the damage alleged to result from the increased duty.

49 By document lodged at the Court Registry on 20 March 2001, the Parliament raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance.

50 On 8 June 2001, the applicant lodged its written comments on that objection.

51 By order of the President of the Fourth Chamber of 12 June 2001, the Kingdom of Spain was granted leave to intervene in support of the forms of order sought by the defendants.

52 A decision on the objection of inadmissibility raised by the Parliament was reserved to the final judgment by order of 16 October 2001.

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

54 The case was reassigned to the First Chamber, Extended Composition, on 3 October 2002, pursuant to the decision of the Court of First Instance of 4 July 2002 on the composition of chambers and the assignment of cases to them.

55 When the Judge-Rapporteur initially designated could no longer act as a result of ceasing to hold office, the President of the Court appointed a new Judge-Rapporteur, by decision of 18 December 2002.

56 On 1 April 2004 the Court, after hearing the parties, decided to refer the present case and five related cases to the Grand Chamber of the Court.

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

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

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

Forms of order sought

60 The applicant claims that the Court should:

— order the defendants jointly and severally to pay compensation to the applicant in the sum of GBP 1 299 632;

— in the alternative, order the defendants to present to the Court within a reasonable period of time after the date of the judgment figures as to the amount of the compensation agreed between the parties or, in the absence of agreement, order the parties to present to the Court within the same period their conclusions with detailed figures;

— order that interest at the annual rate of 8% or any other appropriate rate to be determined by the Court be paid on the compensation payable, as from the date of the judgment;

— order the Community, represented by the Parliament, the Council and the Commission, to bear the costs;

— adopt such further measures as might reasonably be found necessary.

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

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

— order the applicant to pay the costs.

Admissibility

62 The defendants contest the admissibility of the action in three respects. It is submitted (i) that Beamglow's action for compensation is inadmissible in so far as it is brought against the Parliament; (ii) that the application does not comply with the requirements of Article 44(1)(c) of the Rules of Procedure; and (iii) that the Court lacks jurisdiction to rule on the present action.

Inadmissibility of the action in so far as it is brought against the Parliament

63 The Parliament pleads that the action is inadmissible in its regard. First, Beamglow's lawyer is not empowered to act against it, having failed to produce, on the date when the application was lodged, an authority to act designating the Parliament as a defendant institution. Second, the application is not supported by any evidence capable of establishing liability which the Community could incur by reason of the Parliament's conduct.

64 The Court considers it expedient first to examine the second plea of inadmissibility put forward by the Parliament.

Arguments of the parties

65 The Parliament submits that the application does not in any way establish how the Parliament could have rendered the Community liable. In any event, the Parliament cannot be considered responsible for the alleged damage given its lack of competence to decide the terms of the Community agricultural legislation at issue or to adopt measures capable of causing, preventing or mitigating the alleged damage. The resolutions adopted by the Parliament were merely a reflection of the exercise of its general power of debate.

66 The applicant replies that the damage suffered by it is due to failures at every stage in the process for changing the Community regime governing the import of bananas and, consequently, to the part played by all the institutions involved, including the Parliament.

67 According to the applicant, the Parliament was consulted before the adoption of Regulations No 404/93 and No 1637/98 which were declared incompatible with the WTO agreements. The Parliament possessed, but failed to exercise, the right to submit any appropriate proposal on matters which it considered to require a Community act. Finally, various opinions, resolutions and interventions of the Parliament stressed the need to prevent the disastrous effects of the WTO rules for the producer regions of the Community.

Findings of the Court

68 Where, as here, proceedings are brought in respect of its non-contractual liability, the Community is represented before the Community courts by the institution or institutions responsible for the matters supposedly at the origin of the damage alleged.

69 In particular, an applicant seeking compensation is justified in bringing his action against the Community, as represented by the Commission and the Council, where, in accordance with the third subparagraph of Article 43(2) of the EC Treaty (Article 43 is now, after amendment, Article 37 EC), the former has proposed, and the latter adopted, the Community agricultural legislation whose unlawfulness is claimed to be at the origin of the damage alleged (Joined Cases 63/72 to 69/72 *Werhahn and Others* v *Council* [1973] ECR 1229, paragraphs 7 and 8).

70 The above provision does not confer any decision-making power on the Parliament and allows it to act only as a consultative organ in the course of the procedure for adoption by the Council alone of regulations, directives and decisions relating to the common agricultural policy.

71 The opinion which the Parliament gave on that basis concerning the proposal submitted to it that led to Regulation No 1637/98 was not therefore in any way binding.

72 The same is true of the opinions and resolutions which the Parliament should, if appropriate, have adopted in favour of businesses operating in sectors other than the banana sector. Not being binding, such resolutions could not have given rise to a legitimate expectation that the Council and the Commission would comply with them (Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523, paragraph 59) or, consequently, have created obligations to that effect for those two institutions (see, to this effect, the order of the Court of Justice of 29 October 2004 in Case C-18/04 P *Krikorian and Others* v *Parliament and Others*, not published in the ECR, paragraph 33).

73 In those circumstances, both the adoption of Council Regulation No 1637/98 and of Commission Regulation No 2362/98 which were found by the DSB to be incompatible with the WTO agreements and the alleged failure to bring the import regime at issue into conformity with the agreements must be regarded as falling within the competence of the Council and the Commission alone.

74 It does not therefore appear that the Parliament could have contributed to creating any non-contractual liability which the Community might incur as a result of the Community regime governing the import of bananas being incompatible with the WTO agreements.

75 Accordingly, the objection of inadmissibility raised by the Parliament should be upheld and the action dismissed as inadmissible in so far as it is brought against the Parliament, without there being any need to rule on the plea of inadmissibility concerning the unavailability, on the date when the action was brought, of an authority from Beamglow empowering its lawyer to proceed against the Parliament.

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

Arguments of the parties

76 The Council and the Commission contend that the application is inadmissible in that it alleges in the alternative that they adopted unlawful legislative measures and that they were guilty of an omission, with the result that they are not in a position to submit a proper defence. Nor does the application demonstrate the existence or the nature of the damage complained of.

77 The applicant replies that the application sets out the approximate extent of the damage suffered and the evidence on the basis of which its nature and extent can be assessed, and that the evidence subsequently provided demonstrates plainly that the damage is real and certain.

Findings of the Court

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

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

80 As is apparent from its arguments, the applicant effectively contends that it has suffered damage because, first, the Community regime governing the import of bananas was not amended so as to bring it into conformity with the obligations entered into by the Community under the WTO agreements within the time-limit laid down by the DSB and, second, there were no Community measures protecting the applicant against the United States trade reprisals.

81 Contrary to the submissions made by the defendants, the application thus contains the evidence enabling the conduct of which the applicant accuses them and which it considers to be the cause of the damage to it to be identified.

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

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

Jurisdiction of the Court

Arguments of the parties

84 The Council and the Commission question whether the Court has jurisdiction to hear the present action for compensation. The imposition of increased customs duty arose from a decision of the Government of the United States of America and not from an act of a Community institution. The jurisdiction of the Community courts cannot be invoked on the basis of a mere allegation of harm supposedly resulting from an act or omission of a Community institution.

85 The Community courts cannot entertain an action for compensation brought against a Community institution where the act at the origin of the alleged damage has been committed autonomously by a State (Joined Cases 89/86 and 91/86 *Étoile commerciale and CNTA* v *Commission* [1987] ECR 3005, paragraphs 18 to 20).

86 The applicant responds that its action is directed not against the conduct of the United States authorities but against that of the Community, which caused the imposition of the increased duty and failed to protect the applicant against it.

Findings of the Court

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

88 In the present case, the applicant claims compensation for the damage allegedly suffered by it both by reason of the increase in the import duty imposed on its products by the authorities of the United States of America, in accordance with the authorisation granted by the DSB following the finding that the Community regime governing the import of bananas was incompatible with the WTO agreements, and because of the defendants' failure to adopt Community measures designed to protect against the United States trade reprisals.

89 The action is thus grounded on the Community's non-contractual liability which the applicant claims is incurred because the cause of its loss lies in the enactment by the Council and the Commission of legislation which was found by the DSB to be incompatible with the WTO agreements, without there being Community measures conferring protection.

90 The Court therefore has jurisdiction to hear, under Article 235 EC and the second paragraph of Article 288 EC, the present claim for compensation which, in contrast to the situation obtaining in *Étoile commerciale and CNTA* v *Commission*, cited in paragraph 85 above, on which the Commission relies, is not directed exclusively at a decision of a national body as the basis for liability.

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

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

93 Accordingly, the action will be declared admissible.

Substance

94 The applicant's claim for compensation is founded on the rules governing non-contractual liability of the Community for the unlawful conduct of its institutions. The applicant also relies on the non-contractual liability that the Community may incur even in the absence of such conduct (judgment in Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraph 59, upheld on appeal in Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 19 and 53).

Liability of the Community for unlawful conduct of its institutions

95 It is settled case-law that in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC for unlawful conduct of its institutions a number of conditions must be satisfied: the institutions' conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v

EEC [1982] ECR 3057, paragraph 16, Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30, and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20).

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

97 The unlawful conduct alleged against a Community institution must consist of a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42).

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

99 Where an institution has only a considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134, and Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission* [2004] ECR II-521, paragraph 71).

100 It is in the light of those observations that the applicant's claim for compensation will be examined.

Arguments of the parties

— The unlawful conduct of which the defendant institutions are accused

101 The applicant submits that, by failing to bring the Community regime governing the import of bananas into conformity with the WTO agreements, the defendants infringed the GATT 1994, the GATS and the DSB's recommendations and rulings.

102 The Community's failure to perform its obligations under the WTO agreements thwarted the applicant's legitimate expectations in respect of its sales and investments in the United States and infringed the principle of legal certainty.

103 The Community could have funded a policy of maintaining in place conditions favourable to trade in bananas with regard to its ACP partners either by financing it from the general budget by way of negotiated compensation under Article 22(2) of the DSU or by provoking the retaliatory measures imposed in the present case by the United States of America.

104 However, that shifting of the cost of protecting ACP banana producers onto other sectors was neither necessary nor appropriate. The Community should have taken precautions to avoid the applicant being asked to pay the price of the Community's decision to ignore its international obligations.

105 The Community's policy choice thus infringed the principle of proportionality, the applicant's fundamental right to pursue an economic activity and its right to property.

106 The defendants allege that the applicant has not proved the nature or substance of the alleged omission or the source of the duty to act which they are alleged to have breached.

107 WTO members act legally if, with a view to putting an end to the incompatibility of a measure with WTO rules as determined by the DSB, they restore the balance of their respective concessions, which has been upset by the measure at issue, by choosing one of the options made available by the DSU.

108 In the present case, the Community had no other choice but to comply with all its international obligations by opening negotiations and proposing amendments to the COM for bananas. Those amendments were incorporated into the revised COM for bananas by Regulation No 216/2001 and by Commission Regulation (EC) No 395/2001 of 27 February 2001 fixing certain indicative quantities and individual ceilings for the issuing of Community import licences for bananas for the second quarter of 2001 under the tariff quotas or as part of the quantity of traditional ACP bananas (OJ 2001 L 58, p. 11).

109 The protection of legitimate expectations applies only to situations and relationships lawfully created under Community law, which do not extend to any relationship between the applicant and its United States customers. The concessions exchanged by the members of the WTO cannot in any case found a legitimate expectation of permanent access to a given national market. The Community institutions have never given the applicant any specific assurance as to the manner in which the Community would comply with the DSB's rulings and recommendations.

110 It is not apparent how the principles of proportionality or of the protection of legitimate expectations, the applicant's right freely to pursue its economic activity or its right to property could have been infringed independently of a breach of WTO rules.

111 The applicant regards as disproportionate not the banana import regime itself but the decision to tolerate the suspension of concessions by the United States of America, when that was the only option available to the Community.

112 Finally, the applicant's freedom to pursue its economic activity was impeded by the suspension of tariff concessions by the United States of America, and not by the adoption of the COM for bananas.

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

113 The applicant submits that, inasmuch as the infringed rules of the GATT and the GATS reduce obstacles to trade between WTO members and thus allow undertakings to trade more freely, they confer rights on individuals, as do the recommendations and rulings of the DSB, which clarify the WTO agreements. This must also be accepted as regards the principles of the protection of legitimate expectations, legal certainty and proportionality, the applicant's right freely to pursue its economic activity and its right to property.

114 The Community courts may review the legality of a Community measure in the light of the WTO agreements where the Community intended, as in the present case, to implement a particular obligation assumed in the context of the WTO.

115 The defendants reply that, as is apparent from decisions of WTO bodies and from Community case-law, it is not possible to invoke the rules of the WTO or the recommendations of the DSB to establish the unlawfulness of an act or omission of a Community institution.

116 The question as to whether the provisions of the GATT and the GATS are capable of conferring rights on individuals is therefore irrelevant as the applicant cannot rely on those rights.

117 Nor can a DSB decision have more extensive effects within the Community legal order than the provisions of the WTO agreements on which it is based.

— The seriousness of the alleged breaches

118 The applicant submits that the WTO agreements imposed limits on the choices available to the Community for adjusting its banana import regime which were clearly exceeded by the Community. The repeated infringement of the WTO rules over a long period amounts to a manifest and grave disregard of the limits on the Community's discretion.

119 This results in a manifest and serious failure to fulfil the applicant's legitimate expectations and in a manifest and serious breach of the principle of proportionality, of the applicant's right freely to pursue its economic activity and of its right to property.

120 The Council and the Commission deny having manifestly and seriously exceeded the limits of their discretion in choosing to settle the dispute by adopting a new COM for bananas.

121 A WTO member is not obliged to apply *stricto sensu* findings of a panel or of the Appellate Body, but has at its disposal various methods for implementing them.

122 The panel which decided, pursuant to Article 21(5) of the DSU, that certain aspects of the banana import regime laid down by Regulations No 1637/98 and No 2362/98 were incompatible with WTO rules suggested three solutions for rendering the regime consistent with the rules, a fact which shows the extent of the Community's discretion and the difficulty of fashioning legislation compatible with WTO rules.

123 Since the Community cannot be held responsible for the acts of a sovereign non-member State, it cannot be considered to have seriously infringed the principles of proportionality and of the protection of legitimate expectations and the right to pursue an economic activity.

124 Exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests (Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 45).

Findings of the Court

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

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

126 In asserting that the defendants have breached WTO rules, the applicant relies on the principle *pacta sunt servanda*, which is one of the rules of law with which the Community institutions must comply when carrying out their functions, being a fundamental principle of all legal orders and particularly of the international legal order (Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 49).

127 However, the principle *pacta sunt servanda* cannot be asserted against the defendants in the present case since, in accordance with settled case-law, the WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions (judgment in Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47; order in Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159, paragraph 24; and judgments in Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 93, Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 53, and Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 52).

128 First, the Agreement establishing the WTO is founded on reciprocal and mutually advantageous arrangements which distinguish it from those agreements concluded between the Community and non-member States that introduce a certain asymmetry of obligations. It is common ground that some of the most important commercial partners of the Community do not include the WTO agreements among the rules by reference to which their courts review the legality of their rules of domestic law. To review the legality of actions of the Community institutions in the light of those rules could therefore lead to an unequal application of the WTO rules depriving the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners (*Portugal* v *Council*, cited in paragraph 127 above, paragraphs 42 to 46).

129 Second, to require the courts to refrain from applying rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of the DSU of entering into negotiated arrangements, even on a temporary basis, in order to arrive at mutually acceptable compensation (*Portugal* v *Council*, cited in paragraph 127 above, paragraphs 39 and 40).

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

131 It is only where the Community intends to implement a particular obligation assumed in the context of the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Court can review the legality of the conduct of the defendant institutions in the light of the WTO rules (see, as regards the GATT 1947, Case 70/87 *Fediol* v *Commission* [1989]

ECR 1781, paragraphs 19 to 22, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31, and, as regards the WTO agreements, *Portugal* v *Council*, cited in paragraph 127 above, paragraph 49, and *Biret International* v *Council*, cited in paragraph 127 above, paragraph 53).

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

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

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

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

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

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

137 None the less, the DSU in any event accords considerable importance to negotiation between WTO members which are parties to a dispute (*Portugal* v *Council*, cited in paragraph 127 above, paragraphs 36 to 40).

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

139 Where immediate withdrawal of the incompatible measure is impracticable, the DSU envisages, in Article 3(7), that the member harmed may be granted compensation or may be authorised to suspend the application of concessions or other obligations on an interim basis pending the withdrawal of the incompatible measure (see *Portugal* v *Council*, cited in paragraph 127 above, paragraph 37).

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

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

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

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

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

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

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

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

148 In those circumstances, to require courts to refrain from applying the rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded in particular by Article 22 of the DSU of entering into a negotiated arrangement even on a temporary basis (*Portugal* v *Council*, cited in paragraph 127 above, paragraph 40).

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

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

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

152 The Court notes in this regard that, as the United States of America has expressly stated, the memorandum of understanding of 11 April 2001 does not in itself constitute a mutually agreed solution for the purposes of Article 3(6) of the DSU and that the question of implementation by the Community of the DSB's recommendations and rulings was still included on 12 July 2001, that is to say after the present action had been brought, on the agenda of the meeting of the DSB.

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

154 Besides, as is apparent from the preamble to Regulation No 1637/98, the Council intended in the present instance to reconcile the Community's international commitments both under the WTO and to the other signatories of the Fourth Lomé

Convention, by utilising the various methods of dispute settlement defined by the DSU, whilst also safeguarding the objectives of the COM for bananas.

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

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

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

157 The COM for bananas, as established by Regulation No 404/93 and subsequently amended, cannot be regarded as referring expressly to specific provisions of the WTO agreements (see, to this effect, *OGT Fruchthandelsgesellschaft*, cited in paragraph 127 above, paragraph 28).

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

159 Thus, Regulation No 2362/98 contains no express reference to specific provisions of the WTO agreements (*Cordis* v *Commission*, cited in paragraph 130 above, paragraph 59, *Bocchi Food Trade International* v *Commission*, cited in paragraph 130 above, paragraph 64, and *T. Port* v *Commission*, cited in paragraph 130 above, paragraph 59).

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

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

162 The complaints advanced by the applicant based on breach of the principles of the protection of legitimate expectations, of legal certainty and of proportionality, and on infringement of its right to property and its right freely to pursue its economic

activity, all rest on the premiss that the conduct of which the defendant institutions are accused is contrary to WTO rules.

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

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

165 Finally, the applicant has established neither the nature nor the basis of the measures which it accuses the defendant institutions of not having adopted for its protection.

166 Omissions by the Community institutions can give rise to liability on the part of the Community only where the institutions have infringed a legal obligation to act under a provision of Community law (*Dubois et Fils* v *Council and Commission*, cited in paragraph 79 above, paragraph 56).

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

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

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

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

— Arguments of the parties

169 The applicant contends in effect that the policy choice adopted by the Community in favour of support for operators in the banana sector led to unequal treatment of private individuals in the discharge of public burdens, to the detriment of the particular category made up of the Community undertakings which were affected in a disproportionate manner by the increased duty on their imports into the United States.

170 The defendant institutions claim in essence that the Community courts have never before held the Community to be non-contractually liable in the absence of any

unlawful act by its institutions, and that in any event the conditions for the incurring of such liability are in no way met in the present case.

— Findings of the Court

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

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

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

174 When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met (see Case C-237/98 P *Dorsch Consult* v *Council and Commission*, cited in paragraph 94 above, paragraph 19).

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

The existence of actual and certain damage

— Arguments of the parties

176 The applicant states that it sustained serious losses in respect of its investments in the United States market, the remuneration of a United States distributor, legal fees and import duty paid.

177 In addition, the Community's unlawful action caused the applicant a considerable loss of profits due to the loss of certain contracts and a fall in its sales in comparison with its forecasts prior to the imposition of the United States sanctions.

178 The defendants state in response that the applicant has adduced no objectively verifiable evidence of its loss of existing business and its loss of profit.

179 The applicant fails to establish that it was not possible for it to compensate for its losses by increasing, for example, the price of its products or by redirecting its export policy. No explanation is provided concerning the measures that it could have adopted to mitigate its losses.

— Findings of the Court

180 The Council and the Commission do not fundamentally dispute that the applicant suffered actual and certain damage following the introduction of the United States increased customs duty on imports of folding cartons, boxes and cases originating in the Community.

181 In particular, in claiming that the applicant has not established that it was impossible to mitigate its losses by putting up its prices or redirecting its export policy and that it has provided no explanation concerning the measures that it could have taken to limit the damage to it, the defendants implicitly concede that the applicant must, at the very least, have necessarily suffered commercial damage by reason of the incontestable rise in the price of its products caused, on the United States market, by the sudden increase of the United States ad valorem import duty to 100%.

182 Moreover, the statistics adduced by the Commission bear out the applicant's contentions, since they indubitably show an appreciable reduction in the total value of imports into the United States of folding cartons, boxes and cases originating in the Community.

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

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

— Arguments of the parties

184 The applicant submits that the increase in United States import duty is the direct result of the conduct of the Community institutions since the United States of America merely exercised a right conferred upon it by the WTO agreements.

185 Since the Council and the Commission were aware of the consequences of their conduct, they cannot validly claim that the United States increased duty was not an objective and foreseeable consequence of that conduct.

186 The point is not whether or not the United States of America was under an obligation to impose increased duty or could choose how to do so, but only whether the institutions' conduct led it to impose those measures and created the conditions necessary for it to be able to adopt them. The matters left to the discretion of the United States of America were therefore not sufficient to break the causal chain.

187 The defendants point out that non-contractual Community liability cannot be relied upon to claim reparation for every harmful consequence, even one remote from the Community institutions' conduct.

188 Interposed between the increase in United States customs duty and the Community institutions' action lie several decisions adopted by the DSB and autonomous and unilateral decisions adopted by the United States of America. In other words, the action of the United States of America was not an objectively foreseeable consequence, in the normal course, of the Community's action.

189 It was far from clear that the United States Government would react to the panel reports by imposing the increased duties. The United States of America requested permission to suspend concessions even before it had been definitively established that Regulations No 1637/98 and No 2362/98 were incompatible with WTO rules.

190 The United States Government decided entirely independently to impose increased duty on the applicant's products and the Community was in no position to influence that choice. Likewise, the level of the duties imposed by the United States of America was decided independently by the United States Government.

191 Even assuming that the suspension of concessions by the United States of America could have been anticipated, it was certainly not foreseeable, within the meaning of Community case-law, that the United States of America would choose precisely the applicant's products for the purpose of imposing increased import duties.

— Findings of the Court

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

193 The condition under the second paragraph of Article 288 EC relating to a causal link requires there to be a sufficiently direct causal nexus between the conduct of the Community institutions and the damage (*Dumortier and Others* v *Council*, cited in paragraph 192 above, paragraph 21, and judgment in Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, paragraph 118, upheld on appeal in Case C-472/00 P *Commission* v *Fresh Marine* [2003] ECR I-7541).

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

195 It was also by making a choice in the exercise of its discretion that the United States authorities decided to impose increased customs duty on folding cartons, boxes and cases originating in the Community, from which they themselves exempted those originating in certain Member States of the Community, and to set the rate of increased import duty at 100% of the price of the products affected.

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

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

198 In those circumstances, the withdrawal of concessions in relation to the Community which took the form of increased customs duties on imports is to be regarded as a

consequence resulting objectively, in accordance with the normal and foreseeable operation of the WTO dispute settlement system accepted by the Community, from the retention in force by the defendant institutions of a banana import regime incompatible with the WTO agreements.

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

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

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

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

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

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

The unusual and special nature of the damage suffered

— Arguments of the parties

205 The applicant submits that the Court of Justice has already recognised that the Community has an obligation to ensure adequate compensation if a category of economic operators has to bear, as in the present case, a disproportionate part of the burden attributable to the implementation of a trade arrangement between the Community and a non-member State (*De Boer Buizen* v *Council and Commission*, cited in paragraph 171 above, paragraph 17).

206 The same applies where an individual has to bear, in the public interest, a financial burden which would not normally fall upon him (Case 267/82 *Développement and Clémessy* v *Commission* [1986] ECR 1907) and constitutes unusual and special damage (Joined Cases 9/71 and 11/71 *Compagnie d'approvisionnement and Grands Moulins de Paris* v *Commission* [1972] ECR 391, paragraphs 45 and 46, Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057, and Case C-237/98 P *Dorsch Consult* v *Council and Commission*, cited in paragraph 94 above, paragraph 18).

207 The defendants reply that the commercial risks to which Community exporters are exposed may be regarded as inherent in the WTO system itself and that there is no particular reason for the Community to take on the burden of those risks. In addition, the damage must concern a limited group of undertakings.

— Findings of the Court

208 In the case of damage which economic operators may sustain as a result of the activities of the Community institutions, damage is, first, unusual when it exceeds the limits of the economic risks inherent in operating in the sector concerned and, second, special when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators (see Case T-184/95 *Dorsch Consult* v *Council and Commission*, cited in paragraph 94 above, paragraph 80, and *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission*, cited in paragraph 99 above, paragraph 151).

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

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

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

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

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

214 It follows that the risks to which the marketing by the applicant of its folding paperboard boxes on the United States market could thereby be exposed are not to be regarded as beyond the normal hazards of international trade as currently organised.

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

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

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

218 It follows from all the foregoing reasoning that the action must be dismissed as unfounded and there is no need to rule on the applicant's claims in the alternative.

Costs

219 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.

220 Since the applicant has been unsuccessful, it will be ordered to bear, in addition to its own costs, the costs incurred by the Parliament, the Council and the Commission, in

accordance with the applications to that effect made by the three defendant institutions.

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

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

On those grounds,

THE COURT OF FIRST INSTANCE (Grand Chamber)

hereby:

1. **Dismisses the action as inadmissible in so far as it is brought against the Parliament;**

2. **Dismisses the remainder of the action as unfounded;**

3. **Orders the applicant to bear, in addition to its own costs, the costs incurred by the Parliament, the Council and the Commission;**

4. Orders the Kingdom of Spain to bear its own costs.

Vesterdorf Lindh Azizi

Pirrung Legal García-Valdecasas

Tiili Cooke Meij

Vilaras Forwood

Delivered in open court in Luxembourg on 14 December 2005.

E. Coulon B. Vesterdorf

Registrar President

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