JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

6 March 2003 *

In Case T-56/00,

Dole Fresh Fruit International Ltd, established in San José (Costa Rica), represented by B. O'Connor, Solicitor, with an address for service in Luxembourg,

applicant,

v

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

and

Commission of the European Communities, represented initially by P. Oliver and C. Van der Hauwaert, acting as Agents and, subsequently, L. Visaggio and K. Fitch, acting as Agents, with an address for service in Luxembourg,

defendants,

* Language of the case: English.

APPLICATION for compensation for the damage allegedly suffered by the applicant by reason of the introduction of the export licence scheme by 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) and by Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No 1442/93 (OJ 1995 L 49, p. 13),

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

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 September 2002

gives the following

Judgment

Legal framework

1 Title IV of 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) replaced the various national systems with a common system of trade with third countries.

2 Under the first paragraph of the original version of Article 17 of Regulation No 404/93:

'Any importation of bananas into the Community shall be subject to the submission of an import licence 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.'

3 Article 18(1) of the original version of Regulation No 404/93 provided for a tariff quota of two million tonnes (net weight) to be opened each year for imports of third-country bananas from non-ACP States ('third-country bananas') and non-traditional imports of bananas from ACP States ('non-traditional ACP

bananas'). Under that quota, imports of third-country bananas were subject to a levy of ECU 100 per tonne and non-traditional ACP bananas to a zero duty.

4 Article 19(1) of Regulation No 404/93 subdivided the tariff quota opened as follows: 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).

5 Article 20 of Regulation No 404/93 gave the Commission responsibility for adopting detailed rules for the implementation of Title IV.

6 The Commission accordingly adopted Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6).

7 On 19 February 1993 the Republic of Colombia, the Republic of Costa Rica, the Republic of Guatemala, the Republic of Nicaragua and the Republic of Venezuela requested the Commission to open consultations under Article XXII:1 of the General Agreement on Tariffs and Trade (GATT) in relation to Regulation No 404/93. The consultations were unsuccessful and therefore in April 1993 those States initiated the dispute-settlement procedure provided for in Article XXIII:2 of the GATT.

8 On 18 January 1994 the panel set up under that procedure submitted a report which concluded that the import system introduced by Regulation No 404/93 was incompatible with the GATT rules. The report was not adopted by the parties to the GATT.

9 On 28 and 29 March 1994 the Community reached an agreement with the Republics of Colombia, Costa Rica, Nicaragua and Venezuela, known as the Framework Agreement on Bananas ('the Framework Agreement').

10 Point 1 of the second part of the Framework Agreement sets the basic overall tariff quota at 2 100 000 tonnes for 1994 and at 2 200 000 tonnes for 1995 and subsequent years, without prejudice to any increase due to enlargement of the Community.

11 Point 2 lays down the percentages of that quota allocated to Colombia, Costa Rica, Nicaragua and Venezuela, respectively. Those States receive 49.4% of the total quota, while the Dominican Republic and the other ACP States are granted 90 000 tonnes for non-traditional imports, the balance being allocated to other third countries.

12 Point 6 provides in particular:

'The supplying countries with country quotas may deliver special export certificates for up to 70% of their quota, which, in turn, constitute a prerequisite

for the issuance, by the Community, of certificates for the importation of bananas from said countries by Category A and Category C operators.

Authorisation to deliver the special export certificates shall be granted by the Commission in order to make it possible to improve regular and stable trade relations between producers and importers and on the condition that the export certificates will be issued without any discrimination among the operators.'

13 Point 7 fixes the in-quota customs duty at ECU 75 per tonne.

14 Points 10 and 11 provide:

'This agreement will be incorporated into the Community's Uruguay Round Schedule.

This agreement represents a settlement of the dispute between Colombia, Costa Rica, Venezuela and Nicaragua and the Community on the Community's banana regime. The parties to this agreement will not pursue the adoption of the GATT panel report on this issue.'

15 Points 1 and 7 of the Framework Agreement were incorporated in Schedule LXXX to GATT 1994, which lists the Community customs concessions. GATT

1994 in turn constitutes Annex 1A to the Agreement establishing the Word Trade Organisation ('the WTO'). An annex to Schedule LXXX reproduces the Framework Agreement.

16 On 22 December 1994 the Council unanimously adopted Decision 94/800/EC 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).

17 In accordance with Article 1(1) of that decision, the Agreement establishing the WTO and also the Agreements in Annexes 1, 2 and 3 to that Agreement, of which GATT 1994 is one, have been approved on behalf of the European Community with regard to that portion of them which falls within the competence of the Community.

18 On 22 December 1994 the Council adopted Regulation (EC) No 3290/94 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105). The regulation includes Annex XV relating to bananas, which provides that Article 18(1) of Regulation No 404/93 is to be amended so that, for 1994, the tariff quota is fixed at 2 100 000 tonnes and, for the following years, at 2 200 000 tonnes. In the framework of that tariff quota, imports of third-country bananas are to be subject to a customs duty of ECU 75 per tonne.

19 On 1 March 1995 the Commission adopted Regulation (EC) No 478/95 on additional rules for the application of Regulation No 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation No 1442/93 (OJ 1995 L 49, p. 13). Regulation No 478/95 lays down the measures necessary for implementation, no longer on a transitional basis, of the Framework Agreement.

20 Article 1(1) of Regulation No 478/95 provided:

'The tariff quota for imports of bananas from third countries and non-traditional ACP bananas referred to in Articles 18 and 19 of [Regulation No 404/93] shall be divided into specific shares allocated to the countries or groups of countries referred to in Annex I...'

21 Annex I contained three tables: the first sets out the percentages of tariff quota reserved to the Latin American States in the Framework Agreement; the second divides the quota of 90 000 tonnes of non-traditional ACP bananas and the third provides for all the other third countries to receive 50.6% of the total quota.

22 Article 3(2) of Regulation No 478/95 provided:

'For goods originating in Colombia, Costa Rica or Nicaragua, the application for an import licence of Category A or C, as referred to in Article 9(4) of [Regulation No 1442/93], shall also not be admissible unless it is accompanied by an export licence currently valid for a quantity at least equal to that of the goods, issued by the competent authorities...'.

23 By judgment given on 10 March 1998 in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, the Court of Justice annulled the first indent of Article 1(1) of Council Decision 94/800 to the extent that the Council thereby approved the conclusion of the Framework Agreement, in so far as the latter exempts Category B operators from the export licence system for which it provides.

24 In that judgment the Court of Justice held that, with regard to that exemption, the plea alleging breach of the principle of non-discrimination laid down in the second subparagraph of Article 34(2) EC was well founded (paragraph 72). It reached that conclusion after finding, first, that Category B operators benefited, in the same way as Category A and C operators, from the tariff quota increase and the concomitant lowering of customs duties under the Framework Agreement and, second, that the restrictions and differences in treatment to which Category A and C operators were subject as a result of the banana import regime set up by Regulation No 404/93 also applied to the part of the quota corresponding to that increase (paragraph 67).

25 The Court of Justice considered that, in those circumstances, in order to justify recourse to a measure such as the one at issue in this case, it was for the Council to demonstrate that the balance between the various categories of operators established by Regulation No 404/93 and disturbed by the increase in the tariff quota and the concomitant lowering of customs duties, could have been restored only by granting a substantial advantage to Category B operators and, thus, at the cost of introducing a new difference in treatment detrimental to the other categories of operators (paragraph 68). It considered that, in the case in point, the Council's statement that that balance had been disturbed, and the mere assertion that exemption of Category B operators from the export licence system was justified by the need to restore that balance, had not established that to be the case (paragraph 69).

26 In its judgment of 10 March 1998 in Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, the Court of Justice, having in essence followed reasoning identical to that followed in *Germany* v *Council*, ruled:

'[Regulation No 478/95] is invalid to the extent to which Article 3(2) thereof imposes only on Category A and C operators the obligation to obtain export licences for bananas from Colombia, Costa Rica or Nicaragua' (point 2 of the operative part).

27 On 28 October 1998, the Commission adopted 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). Under Article 31 of Regulation No 2362/98, Regulation No 478/95 was repealed with effect from 1 January 1999.

Facts and procedure

28 The applicant is a company forming part of the Dole group. The group is engaged worldwide in the production, treatment, distribution and marketing of, in particular, fresh fruit and vegetables, including bananas.

29 The applicant claims that between 1995 and 1998 it marketed in the Community bananas from Columbia, Costa Rica, Nicaragua and Venezuela through its commission agents Comafrica SpA ('Comafrica') and Dole Fresh Fruit Europe Ltd & Co. ('DFFE'), which were registered in Italy and Germany, respectively, as Category A operators. It states that it had to obtain export licences for that purpose.

30 By application lodged at the Registry of the Court of First Instance on 14 March 2000, the applicant brought this action for damages.

31 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, invited the applicant to answer certain questions in writing. It did so within the period prescribed.

32 The parties presented oral argument and replied to questions put by the Court at the hearing on 12 September 2002.

Forms of order sought

33 The applicant claims that the Court should:

— declare the action admissible;

— order the Council and the Commission to compensate it for the loss suffered by reason of the adoption of Council Decision 94/800 and Regulation No 478/95;

— order that the damages should bear interest at an appropriate rate;

— order the Council and/or the Commission to pay the costs.

34 The Council and the Commission contend that the Court should:

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

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

35 Although they have not raised a formal plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance, the Council and the Commission challenge the admissibility of the application on the ground that the applicant has not satisfied the requirements of Article 19 of the EC Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

36 They submit that the applicant has not adduced sufficient evidence of the existence and extent of the alleged loss or the existence of a causal link between the unlawful conduct complained of and that loss. More specifically, they complain that it has given no indication of the authorities who sold the export licences, the companies which purchased them, the dates of the transactions and the actual use made of the licences. They submit that the applicant has not provided sufficient proof of its legal situation or of its legal and commercial relations with Comafrica, DFFE and other companies belonging to the Dole group.

37 The applicant asserts that the statements in its application, particularly in annex 4 thereto, prove to the requisite legal standard that those two conditions necessary for the Community to incur non-contractual liability have been fulfilled. In its reply, it gives some details of its legal situation and its links with other companies in the Dole group.

Findings of the Court

38 Under Article 19 of the EC Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, an application is required to state the subject-matter of the proceedings and to contain a summary of the pleas in law on which the application is based.

39 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, for the basic legal and factual particulars relied on to be indicated, at least in summary form, coherently and intelligibly in the application itself (order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20; and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29).

40 In order to satisfy those requirements, an application seeking compensation for damage allegedly caused by a Community institution must set out the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that 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 et Fils* v *Council and Commission*, cited above, paragraph 30).

41 In the present case, the application makes it quite clear that the applicant's complaint concerns the adoption by the Council and the Commission, respectively, of Decision 94/800, Article 1 of which was partially annulled by the Court of Justice in *Germany* v *Council*, and of Article 3(2) of Regulation No 478/95, which was declared invalid by the Court of Justice in *T. Port.*

Furthermore, the application clearly states that the applicant suffered loss inasmuch as between 1995 and 1998 it paid the sum of USD 91 705 271 in order to obtain export licences for bananas originating in Columbia, Costa Rica, Nicaragua and Venezuela. Finally, the application states that it purchased those licences because, under the Framework Agreement and Article 3(2) of Regulation No 478/95, the category of operators to which its commission agents, Comafrica and DFFE, belonged was required to produce those licences as a precondition for the issuance by the Community of licences to import bananas from those countries.

42 The applicant has, accordingly, given a sufficient description of the nature and extent of the alleged damage and of the reasons for which it considers there to be a causal link between the unlawful conduct alleged against the Council and the Commission and that damage. The objections raised by those institutions against the evidence adduced by the applicant relate to assessment of the merits of the application and must, therefore, be considered under that head.

43 It follows that the application satisfies the formal requirements of Article 19 of the EC Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance and that it must be declared admissible.

Substance

44 The Community's non-contractual liability under the second paragraph of Article 288 EC depends on the coincidence of a set of conditions as regards the unlawfulness of the acts alleged against the Community institution, the fact of damage and a causal link between the alleged conduct of the institution and the wrongful act complained of (Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraph 42; and Case T-168/94 *Blackspur and Others* v *Council and Commission* [1995] ECR II-2627, paragraph 38).

Arguments of the parties

45 As regards the condition that there be unlawful conduct, the applicant claims, in the first place, that the introduction of the export licence scheme by the Framework Agreement, as approved by Decision 94/800 and by Article 3(2) of Regulation No 478/95, constitutes a breach of a rule of law for the protection of individuals.

46 The applicant relies on the breach of the principle of non-discrimination found by the Court of Justice in *Germany* v *Council* and *T. Port.*

47 It asserts that, according to settled case-law, that principle is a rule of law for the protection of individuals (Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] II-279, paragraph 92).

48 In its reply, the applicant adds that the Council and the Commission acted in breach of the Community's international obligations in the framework of the WTO. Those obligations constitute a 'superior rule of law', breach of which is sufficient to establish the Community's non-contractual liability to the applicant.

49 In the second place, the applicant submits that the breach in the present case is sufficiently serious.

50 First, the applicant observes that the principle of non-discrimination occupies a particularly important place among the rules of Community law intended to protect the interests of individuals (Joined Cases 241/78, 242/78 and 245/78 to 250/78 *DGV and Others* v *Council and Commission* [1979] ECR 3017, paragraph 10).

51 Second, it maintains that the breach of that principle in this case affects a limited, ascertainable and clearly-defined group of economic operators (*DGV and Others* v *Council and Commission*, cited above; Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091; and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061). Decision 94/800 and Regulation No 478/95 affected only Category A and C operators registered with the competent authorities of the Member States who had imported bananas from Columbia, Costa Rica, Nicaragua or Venezuela into the Community during the period when the export licences were required.

52 Third, the applicant states that the damage which it has suffered goes beyond the bounds of the economic risk inherent in the banana trade. In this connection it observes that the export licence system meant that the price which Category A and C operators had to pay for bananas from the third countries concerned was some 33% more than that paid by Category B operators. In addition, the applicant disagrees with the argument that the third countries concerned could have shared their respective national quotas among their own operators or introduced an export licence system unilaterally. Those countries would not have been able to check which category of operators bananas were intended for and they were concerned that there would be a shift in trading patterns to other Latin American countries.

53 Fourth, the applicant contends that the breach of the principle of non-discrimination in this case could not be justified by an important general interest

taking precedence over the individual interests of Category A and C operators. Referring to paragraph 68 of the judgment in *Germany* v *Council* and paragraphs 87 and 88 of the *T. Port* judgment, the applicant observes that the clear difference in treatment to the detriment of Category A and C operators could not be justified by the need to restore an alleged competitive imbalance between the different categories of operators. It adds that the Court of Justice observed that one of the objectives of Regulation No 478/95 was to provide financial aid for third countries which were parties to the Framework Agreement, but the Court also ruled that that general interest could not take precedence over the individual interests of Category A and C operators, mainly because that aim could not 'be achieved by the imposition of a financial burden on only some of the economic operators importing bananas from those countries' (*Germany* v *Council*, paragraph 71).

54 Fifth, the applicant maintains that the defendants' error relates to a normative act and is one 'which reasonable institutions could not make'.

55 Sixth, the applicant considers that the defendant institutions cannot find support in the Opinion of Advocate General Elmer in *Germany* v *Council*, since his reasoning was not followed by the Court of Justice. It states that the Court found that the Framework Agreement had not resulted in any disadvantage for Category B operators. In addition, it cannot be concluded from Advocate General Elmer's observation that the difference in treatment in question was 'quite reasonable' that it was not a sufficiently serious breach of a rule of law. That would amount to suggesting, quite improperly, that the authority of an Advocate General may be greater than that of the Court.

56 Referring to the judgments in *Germany* v *Council* and *T. Port*, the Council and the Commission admit that the conduct of which the applicant complains was unlawful and constituted a breach of a rule of law. However, they deny that the rule in question had a protective function and that the breach was sufficiently serious.

57 In the first place, the Council and the Commission observe that, in *Germany* v *Council* and *T. Port*, the Court found that the principle of non-discrimination was breached in relation to Category A and C operators. However, the applicant does not belong to either category.

58 In the second place, they consider that the submission that they acted in breach of the Community's international obligations in the framework of the WTO must be ruled inadmissible under Article 48(2) of the Rules of Procedure. In any case, that argument is irrelevant because the WTO agreement and its annexes are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (see Case C-149/96 *Portugal* v *Council* [1999] I-8395, paragraph 47).

59 In the third place, the Council and the Commission contend that they did not manifestly and gravely disregard the limits on their broad discretion.

60 First, they submit that the fact that a measure is — even manifestly — incompatible with the principle of non-discrimination is not sufficient to give rise to non-contractual liability on the part of the Community. It cannot be inferred from the particular importance of that principle in Community law that any breach of the principle must necessarily be characterised as 'sufficiently serious' within the meaning of the case-law.

61 Second, the Council and the Commission submit that there is no justification for the applicant's claim that the breach of the principle of non-discrimination affected a limited and clearly-defined group of operators, namely those in

Categories A and C, since it belongs to neither of those categories. Furthermore, the Commission denies that the group in question is 'limited and clearly defined', as in 1996, for example, there were 704 operators in Category A and 2 981 in Category C and the composition of those categories constantly changed. The Council also considers that the applicant's references to *DGV and Others* v *Council and Commission*, *Dumortier Frères and Others* v *Council* and *Mulder and Others* v *Council and Commission*, are irrelevant to the present case. In the first two cases the number of operators concerned was extremely small, in contrast to the present case. In *Mulder and Others* v *Council and Commission*, the Court of Justice did not use the criterion of the number of operators to determine the seriousness of the alleged breach.

62 Third, the Council and the Commission consider that the alleged damage does not go beyond the bounds of the economic risks inherent in the banana trade. The introduction of the export licence system was intended to allow the third countries concerned to share their respective national quotas among their own operators and that, in any case, those countries could have introduced such a measure unilaterally. With regard to the matters raised by the applicant to cast doubt on those assertions (see paragraph 52 above), the Council submits that those countries could have set up appropriate control measures and fixed the price of the export licences at such a level that 'the additional revenues generated by the sale of the licences would outweigh the hypothetical risk of a loss of exports in favour of other exporting countries'. The Council and the Commission add that the third countries which were parties to it were not obliged by the Framework Agreement to introduce an export licence system and that Venezuela had refrained from doing so.

63 Fourth, the Council and the Commission state that the introduction of the export licence system was part of a 'package' negotiated with certain Latin American countries in order to settle a trade dispute within the framework of the GATT. They add that the Community had to fulfil its obligations under the Lomé

Convention, particularly the requirement not to treat the traditional banana-exporting ACP countries less favourably than in the past with regard to access to the Community market and marketing conditions.

64 The Council and the Commission go on to state that the obligation to obtain export licences, imposed on Category A and C operators alone, was intended to counterbalance the advantages accruing to them from the other provisions of the Framework Agreement, namely the increase in the overall tariff quota and the reduction in customs duties. The Council explains that the benefit to Category B producers from those other provisions was limited because it consisted only in the possibility, for each operator, to obtain approximately 10% additional Category B import licences and to import, on the basis of the licences, bananas from third countries at a price which was approximately ECU 25 less than before. The Council reproduces paragraphs 72 to 74 of the Opinion of Advocate General Elmer in *Germany* v *Council* and states that, on the other hand, the Framework Agreement resulted in considerable disadvantage to Category B traders. The significant increase in the tariff quota and the substantial reduction in import duties to which third-country bananas were subject had a negative effect on the competitiveness of Community bananas and traditional ACP bananas. Thus, on the one hand, the increase in the tariff quota led to an increase in the overall supply and consequently exerted downward pressure on market prices. This had mainly affected Community bananas and traditional ACP bananas which, for a variety of reasons, are the most expensive on the Community market. On the other hand, the reduction in customs duty on imports of third-country bananas in the framework of the tariff quota had substantially reduced the 'levelling of prices'. Category B operators had been principally affected by this deterioration in their competitiveness because their access to the market for third-country bananas was restricted by Regulation No 404/93 to 30% of the overall quota.

65 The Council and the Commission agree with Advocate General Elmer's observation, in paragraph 74 of his Opinion in *Germany* v *Council*, that the introduction of the export licence system was based on 'quite reasonable' considerations. Those considerations reflect important and legitimate general

interests of the Community and the Community institutions had a broad discretion to strike a balance between those interests and the particular interests of certain groups of banana traders. They accept that, in *Germany* v *Council* and *T. Port*, the Court of Justice did not follow the Advocate General's Opinion, but state that it based its findings on the fact that the Council had not provided the Court with sufficient evidence to show that the balance between the different categories of operators had actually been disturbed. Therefore it cannot be inferred from those judgments that the Council and the Commission had completely disregarded the principle of non-discrimination. The Commission considers that the difference of opinion between the Advocate General and the Court of Justice in the abovementioned cases confirms that the legal issues were substantial and difficult and that the infringement on the part of the institutions cannot be described as manifest and serious.

66 As regards the requirement of damage, the applicant claims that it suffered damage as a result of having to purchase export licences in Colombia, Costa Rica, Nicaragua and Venezuela so as to be able to import bananas into the Community from those countries using Category A import licences. With regard to the assessment of the damage, the applicant refers to annex 4 to its application, which indicates the amounts paid from 1995 to 1998 for the export licences in each of the third countries concerned, giving a total amount of USD 91 705 271. The applicant moreover rejects the significance of the figures in the table produced by the Council in its defence and denies that it was able to pass on to the final consumer the cost of obtaining export licences.

67 The Council and the Commission submit that the applicant has not shown that it has suffered damage by reason of the introduction of the export licence system. They dispute the calculation of the damage in annex 4 to the application, arguing essentially that the increase in the tariff quota and the reduction in customs duty provided for by the Framework Agreement largely offset the costs imposed on Category A and C operators by that system, that the applicant was able to pass on the cost of the certificates to the customers of its group and that, in any event, those costs could be passed on to the final consumer.

68 With respect to the requirement of a causal link, the applicant argues that the damage it has suffered is a direct consequence of Decision 94/800, in so far as the Council thereby approved the conclusion of the Framework Agreement, and of Regulation No 478/95. Those measures compelled the applicant, as Comafrica and DFFE were Category A operators, to obtain export licences in Columbia, Costa Rica, Nicaragua and Venezuela in order to be able to import bananas into the Community. The applicant states that in practice it had no alternative but to import from those countries.

69 The Council and the Commission maintain that the applicant has not established a direct causal link between the unlawful conduct in which it complains they have engaged and the loss alleged.

Findings of the Court

70 The Court recalls, by way of preliminary point, that if one of the three conditions for establishing the non-contractual liability of the Community (see paragraph 44 above) is not met, the application must be dismissed in its entirety and it is not necessary to examine the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81).

71 In the present case, it is appropriate to examine the first condition, that of unlawful conduct. With regard to that condition, the case-law requires it to be shown that there has been a sufficiently serious breach of a rule of law protecting individuals (see, to that effect, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42; and Case T-210/00 *Biret et Cie* v

Council [2002] ECR II-47, paragraph 52). As to the condition that the breach must be sufficiently serious, the decisive test, particularly in a situation where the Community institution in question has broad discretion, is whether that institution manifestly and gravely disregarded the limits of its discretion (*Mulder and Others* v *Council and Commission*, cited above, paragraph 12; and *Bergaderm and Goupil* v *Commission*, cited above, paragraphs 40 and 43).

72 In the present case, the existence of a breach of a rule of law must be considered to be established because in *Germany* v *Council*, the Court of Justice annulled the first indent of Article 1(1) of Council Decision 94/800 to the extent that the Council thereby approved the Framework Agreement, in so far as the latter exempts Category B operators from the export licence system for which it provides and, in *T. Port*, the Court declared invalid Article 3(2) of Regulation No 478/95.

73 Likewise, as regards the requirement that there be a breach of a rule of law protecting individuals, it must be noted that, in those two cases, the Court of Justice ruled that the provisions at issue had been adopted in breach of the principle of non-discrimination, which is a general principle of Community law for the protection of individuals.

74 The applicant's argument that the Council and the Commission acted in breach of the Community's international obligations in the framework of the WTO was advanced for the first time only in the reply and must therefore be considered to be a new plea; accordingly, it must be dismissed as inadmissible under Article 48(2) of the Rules of Procedure. This argument is, in any event, completely irrelevant. It is settled case-law that the WTO Agreement and its annexes are not of such a nature as to create rights for individuals on which they may rely before the courts and that any infringement of them will not give rise to non-contractual liability on the part of the Community (*Biret et Cie* v *Council*, cited above, paragraph 71, and the case-law cited therein).

75 Given the broad discretion which the institutions enjoyed in the present case by virtue of the international dimension and the complex economic assessments involved in the introduction or amendment of a Community import scheme for bananas, the Court must therefore examine whether the Council and the Commission, in adopting the provisions at issue here, manifestly and gravely disregarded the limits of their discretion.

76 First, the export licence system was one of four aspects of the Framework Agreement, the three others being an increase of 200 000 tonnes in the basic overall tariff quota, a lowering of ECU 25 per tonne in the in-quota customs duty and the allocation of specific national quotas to third countries which were parties to the Framework Agreement. That agreement aimed to end a dispute between certain third countries and the Community which was affecting the entire system introduced by Regulation No 404/93 for importing bananas into the Community. It was the result of complex and delicate international negotiations in which the Community had to reconcile divergent interests. The Community had to take into account not only the interests of Community producers, but also its obligations to ACP States under the Lomé Convention and its international obligations under the GATT.

77 Next, the justification given for the exemption of the Category B operators from the export licence system was principally the need to restore the competitive balance between them and the Category A and C operators which Regulation No 404/93 was intended to establish (see paragraph 64 above). Although this justification was held by the Court of Justice in *Germany* v *Council* and *T. Port*, not to have been sufficiently established, it cannot, however, be held to be manifestly unreasonable. The question of the extent to which the increase of 200 000 tonnes of overall tariff quota and the lowering of ECU 25 per tonne in the in-quota customs duty affect the parameters of competition on the banana market and, more particularly, the objective pursued by Regulation No 404/93, involves an especially complex economic assessment. The same holds true for the question of whether the measures taken to restore that balance are appropriate

and necessary, since that balance is an objective the legitimacy of which, on any view, cannot be open to challenge. Moreover, the fact that, in the abovementioned cases, Advocate General Elmer and the Court of Justice reached diametrically opposite conclusions on the justification for the exemption offers a good illustration of how the incorrectness of the assessment made by the Council and the Commission was by no means manifest.

78 Moreover, contrary to what the applicant argued at the hearing, there is nothing to show that the disputed measure was adopted with the intention of placing an unwarranted burden on Category A and C operators.

79 Lastly, the measure affected very broad categories of operators, namely Category A and C operators (see, by analogy, Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209, paragraph 7). The parties thus agree that, in 1996 for example, there were 704 Category A operators and 2 981 Category C operators.

80 Moreover, even if the alleged damage were to be held to be established, it could not be viewed as going beyond the bounds of the economic risk inherent in the banana trade (see, to this effect, *HNL* v *Council and Commission*, cited above, paragraph 7). Although the Court did state in paragraph 61 of *Germany* v *Council* and in paragraph 80 of *T. Port*, that the export licence system meant that the price which Category A and C operators had to pay for bananas from the third countries concerned was some 33% more than that paid by Category B operators, the applicant expressly acknowledged at the hearing that it had been able to 'absorb' the cost of obtaining the export licences and 'continue to make a certain profit'.

81 It follows from all of the foregoing that it has not been shown that the principle of non-discrimination has been infringed in the present case in a sufficiently serious way.

82 As the applicant has failed to establish that there was a manifest and grave disregard of the limits of the discretion which the defendant institutions enjoyed in the present case, the application must be dismissed as unfounded and it is not necessary to examine the other conditions under which the Community may incur non-contractual liability or to rule on the claim for interest.

83 For the sake of completeness, however, the Court finds that the approach taken in the present case by the applicant in its attempt to establish the existence and extent of the damage alleged cannot be accepted.

84 The applicant's written submissions and its statements at the hearing indicate that it bases its application on the sole fact that it incurred costs in obtaining the export licences, and that it equates its loss with those costs. Thus, in annex 4 to the application it merely indicated, for each of the four Latin American States concerned and for the years 1995 to 1998, the amounts it allegedly paid to purchase those licences.

85 Even if it is assumed that the correctness of those amounts could not be disputed, one could not rule out the possibility that all or part of the corresponding costs were ultimately borne by operators other than the applicant, which would mean that the applicant had not suffered such a loss. Thus, in the present case, the applicant was obliged to concede, following observations made by the Commis-

sion in the light of the invoices annexed to the reply and following questions put by the Court (see paragraph 31 above), that it had resold some of the export licences in question to customers of Comafrica and DFFE in the Community. At the hearing, it thus reduced its claim for damages from USD 91 705 271 to USD 26 773 547.

86 Furthermore, even if established, the mere fact that the applicant had to incur costs in acquiring export licences, which it did not then pass on to customers of its group, does not necessarily mean that it sustained a corresponding loss. In particular, it would be necessary to take account of the effects on the market of other measures under the Framework Agreement, especially the increase of 200 000 tonnes in the tariff quota and the lowering of ECU 25 per tonne in the in-quota customs duty, as well as the opportunities the operators had to pass on part of the acquisition costs through their own resale prices.

87 It follows that the applicant has fallen far short of proving that the second condition for establishing non-contractual liability on the part of the Community (see paragraph 44 above) has been satisfied.

Costs

88 In accordance with Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Council and the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application;**

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

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 6 March 2003.

H. Jung
Registrar

J.D. Cooke
President