ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

12 January 2007 *

In Case T-447/05,

Société des plantations de Mbanga SA (SPM), established in Douala (Cameroun), represented initially by P. Soler Couteaux and S. Cahn, and subsequently by B. Doré, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Clotuche-Duvieusart and L. Visaggio, acting as Agents,

defendant,

APPLICATION for the annulment of Commission Regulation (EC) No 2015/2005 of 9 December 2005 on imports during January and February 2006 of bananas originating in ACP countries under the tariff quota opened by Council Regulation (EC) No 1964/2005 on the tariff rates for bananas (OJ 2005 L 324, p. 5),

* Language of the case: French.

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

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: E. Coulon,

makes the following

Order

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), established common arrangements for the importation into the Community of bananas originating in third countries, applicable from 1 July 1993 to 31 December 2005. Those arrangements were based on the opening of tariff quotas the size of which were established so as to ensure Community market supplies, importations carried out under those quotas being subject to reduced customs duty or wholly exempt from duty. Bananas from African, Caribbean and Pacific countries (hereinafter referred to as 'ACP countries') were accorded preferential treatment in the form of total exemption from customs duty in respect of a specified quantity of bananas and the application of a preferential tariff in respect of additional quantities.

2 The common arrangements laid down in Title IV of Regulation No 404/93 were amended on several occasions. From 1 July 2001, the basic rules governing the importation of bananas into the Community were laid down in Articles 16 to 20 of Regulation No 404/93, as amended by Council Regulation (EC) No 216/2001 of 29 January 2001 (OJ 2001 L 31, p. 2) and Council Regulation (EC) No 2587/2001 of 19 December 2001 (OJ 2001 L 345, p. 13). The provisions of Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Council Regulation (EEC) No 404/93 as regards the arrangements for importing bananas into the Community were also applicable. (OJ 2001 L 126, p. 6).

3 The first and second recitals in the preamble to Regulation No 216/2001 indicate that in order to settle the disputes arising from the import regime established by Title IV of Regulation (EEC) No 404/93, 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'. The fourth recital in the preamble to the same regulation states that '[u]ntil the entry into force of that regime, the Community should be supplied under several tariff quotas open to imports from all origins ...'.

4 Article 16 of Regulation No 404/93, as amended by Regulation No 216/2001 provides as follows:

'1. This Article and Articles 17 to 20 shall apply to imports of fresh products falling within CN code ex 0803 00 19 up to the entry into force of the rate of the common customs tariff for those products, no later than 1 January 2006, established under the procedure provided for in Article XXVIII of the General Agreement on Tariffs and Trade.

2. Until the entry into force of the rate referred to in paragraph 1, imports of the fresh products referred to in the said paragraph shall be under the tariff quotas opened by Article 18.'

5 Article 18(1) of Regulation No 404/93 provides for the opening of three tariff quotas, designated A, B and C, amounting to a total volume of 3 403 000 tonnes. As a result of amendments introduced by Regulation No 2587/2001, the volume of quota C was fixed, in accordance with the provisions of the first subparagraph, at (c), of Article 18(1) of Regulation No 404/93, at 750 000 tonnes and, as provided for in the third subparagraph of Article 18(1) of Regulation No 404/93, it was reserved for importations of bananas originating in ACP countries (hereinafter referred to as 'ACP bananas').

6 In parallel to those arrangements, the Commission adopted, from 2004, transitional measures following upon the accession of 10 new Member States in order to ensure supplies to the markets of those States. In regard to 2005, those measures were laid down in Commission Regulation (EC) No 1892/2004 of 29 October 2004 on transitional measures for 2005 for imports of bananas into the Community by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ 2004 L 328, p. 50), which made available a quantity of 460 000 tons in additional to the quotas opened by Article 18 of Regulation No 404/93 for the importation of bananas from all sources.

7 Article 1 of Council Regulation (EC) No 1964/2005 of 29 November 2005 on the tariff rates for bananas (OJ 2005 L 316, p. 1), which introduced a tariff-only regime, provides as follows:

'1. As from 1 January 2006 the tariff rate for bananas (CN code 0803 00 19) shall be EUR 176/tonne.

2. Each year from 1 January, starting from 1 January 2006, an autonomous tariff quota of 775 000 tonnes net weight subject to a zero-duty rate shall be opened for imports of bananas (CN code 0803 00 19) originating in ACP countries.'

8 In accordance with Article 16(1) of Regulation No 404/93, the entry into force of that new duty rendered inoperative the tariff quotas for importations laid down in Title IV of that regulation.

9 Article 2 of Regulation No 1964/2005 provided that the measures necessary for the implementation of that regulation, and transitional measures necessary to facilitate the switch-over from the existing arrangements to those laid down in that regulation, were to be adopted in accordance with the comitology procedure (management committee).

10 Commission Regulation (EC) No 2015/2005 of 9 December 2005 on imports during January and February 2006 of bananas originating in ACP countries under the tariff quota opened by Council Regulation (EC) No 1964/2005 on the tariff rates for bananas (OJ 2005 L 324, p. 5, hereinafter referred to as the 'contested regulation'), was adopted in order to lay down detailed rules for the management of the tariff quota applicable to imports from ACP countries during January and February 2006. The second recital in the preamble provides as follows:

'The establishment of the appropriate instruments for managing the tariff quota for ACP banana imports provided for by Regulation ... No 1964/2005 cannot be completed in time before 1 January 2006. The Commission should therefore adopt interim measures for the issue of import licences for January and February 2006 to ensure Community supplies, ensure the continuity of trade with the ACP countries and avoid disruptions of trade flow. These measures are without prejudice to the detailed rules to be adopted later in 2006.'

11 Article 2 of the contested regulation provides as follows:

'For January and February 2006,

— a quantity of 135 000 tonnes shall be available for the issue of import licences to operators referred to in Title II. This tariff quota's serial number shall be 09.4160,

— a quantity of 25 000 tonnes shall be available for the issue of import licences to operators referred to in Title III. This tariff quota's serial number shall be 09.4162.'

12 Title II of the contested regulation deals with '[o]perators registered under tariff quota C, referred to in Article 18(1) of Regulation ... No 404/93, for 2005'. Article 3 thereof provides as follows:

'For January and February 2006, each traditional operator C and each non-traditional operator C, as referred to in Article 3(3) and Article 7(1) of Commission Regulation ... No 896/2001 ... respectively, may lodge one or more import licence applications for up to a maximum, as the case may be, of

— in the case of traditional operators C, the reference quantity established and notified in respect of 2005 under tariff quota C, pursuant to Article 5(4) of Regulation ... No 896/2001,

— in the case of non-traditional operators C, the quantity established and notified in respect of 2005 under tariff quota C, pursuant to Article 9(3) of Regulation ... No 896/2001.

...'

13 Title III of the contested regulation deals with '[o]ther operators'. Article 4(1) of that regulation provides as follows:

'Operators established in the Community, registered for the quotas A/B referred to in Article 18(1) of Regulation ... No 404/93 or the additional quantity set by Regulation ... No 1892/2004, who, in 2005, have released bananas originating in ACP countries into free circulation may lodge a single import licence application in relation to the quantity set in the second indent of Article 2.'

14 Title IV of the contested regulation lays down detailed rules for the submission of applications (Article 5) and the issuing of import licences (Article 6). Title V of the contested regulation, Articles 7 to 9, contains final provisions.

15 Commission Regulation (EC) No 219/2006 of 8 February 2006 opening and providing for the administration of the tariff quota for bananas falling under CN code 0803 00 19 originating in ACP countries for the period 1 March to 31 December 2006 (OJ 2006 L 38, p. 22), subsequently laid down detailed rules for the administration of the tariff quota applicable to imports from ACP countries from 1 March 2006. Article 2(b) of that regulation fixes a quantity of 468 150 tonnes, that is to say, 76% of the available quantities, which is to be administered in accordance

with Chapter III of the regulation. The latter, in Article 7(2), refers back to the method known as 'first come, first served', laid down in Articles 308a, 308b and 308c of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

16 Relations between the ACP countries and the Community are currently governed by the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ 2000, L 317, p. 3, hereinafter referred to as the 'Cotonou Agreement').

17 The general trade regime between the Community and the ACP countries is laid down in Annex V of the Cotonou Agreement. That regime is applicable during the preparatory period of negotiations for new economic partnership agreements, which is to end by 31 December 2007. Article 1 of that annex provides, inter alia, that:

'1. Products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect.

(a) For products originating in the ACP States:

— listed in Annex I to the Treaty where they come under a common organisation of the market within the meaning of Article 34 of the Treaty, or

— subject, on import into the Community, to specific rules introduced as a result of the implementation of the common agricultural policy,

the Community shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products.

...

(d) The arrangements referred to in subparagraph (a) shall enter into force at the same time as this Agreement and shall remain applicable for the duration of the preparatory period defined in Article 37(1) of the Agreement.

However, if during this period, the Community:

...

— modifies the common organisation of the market in a particular product or the specific rules introduced as a result of the implementation of the common agricultural policy, it shall reserve the right to modify the arrangements laid down for products originating in the ACP States, following consultations within the Council of Ministers. In such cases the Community shall undertake to ensure that products originating in the ACP

States continue to enjoy an advantage comparable to that previously enjoyed in relation to products originating in third countries benefiting from the most-favoured-nation clause.'

18 Article 1 of Protocol 5, annexed to Annex V of the Cotonou Agreement, entitled 'The Second Banana Protocol', provides as follows:

'The Parties recognise the overwhelming economic importance to the ACP banana suppliers of their exports to the Community market. The Community agrees to examine and where necessary take measures aimed at ensuring the continued viability of their banana export industries and the continuing outlet for their bananas on the Community market.'

The applicant

19 The applicant was founded on 5 October 1998. Its main purpose, in Cameroon and other countries, is the production, processing and marketing of bananas for export.

20 The applicant is one of those producers which are neither operators nor part of a European or multi-national group. For that reason, it is not an operator within the meaning of the contested regulation and is unlikely to acquire that status since the regulation in question maintains the system of allocating export licences on the basis of historic references established by the rules previously in effect.

Procedure and forms of order sought

21 By application lodged at the Registry of the Court of First Instance on 22 December 2005, the applicant brought the present action.

22 By a separate document lodged at the Registry of the Court of First Instance on the same date, the applicant requested that the case be dealt with under the expedited procedure provided for by Article 76a of the Rules of Procedure of the Court.

23 By decision of the Court of 26 January 2006, the application that the case be dealt with under the expedited procedure was rejected.

24 By a separate document lodged at the Registry of the Court of First Instance on 10 February 2006, the Commission raised an objection of inadmissibility, under Article 114 of the Rules of Procedure, against the present action.

25 The applicant submitted its observations on the objection of inadmissibility on 28 March 2006, the date on which the written procedure on admissibility ended.

26 In its application, the applicant claims that the Court should:

— annul the contested regulation;

— order the Commission to pay the costs.

27 In its objection of inadmissibility, the Commission claims that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

28 In its observations on the plea of inadmissibility, the applicant claims that the Court should:

— reject the plea of inadmissibility raised by the Commission;

— order the Commission to pay the costs.

Law

29 Under Article 114(1) of the Rules of Procedure, if a party so requests, the Court may make a decision on admissibility without going into the substance of the case. Pursuant to Article 114(3) of the Rules of Procedure, unless the Court otherwise decides, the remainder of the proceedings are to be oral. The Court of First Instance (Fifth Chamber) considers that in the present case it is adequately informed by the contents of the file and that there is no need to open the oral procedure.

30 The Commission pleads that the action is inadmissible on the ground that the applicant does not have *locus standi* to bring an action against the contested regulation and that the regulation in question is of general application and is not of direct and individual concern to the applicant.

Arguments of the parties

31 The Commission contends that, in accordance with the fourth paragraph of Article 230 EC, an action for annulment brought in respect of a regulation by a natural or legal person must satisfy the condition that the regulation is, in reality, an individual decision which is of direct and individual concern to that person. It adds that the purpose of that provision is to prevent a situation in which the mere choice of the form of a regulation would exclude an application by an individual against a decision which concerns him directly and individually.

32 In this case, the contested regulation not merely does not concern the applicant directly or individually, its purpose was not to deal with the legal position of producers like the applicant, located outside the territory of the Community, with the result that it does not have *locus standi* to apply for the annulment of regulation in question.

33 First of all, with regard to *locus standi*, the Commission points out that the purpose of the regulation was to lay down interim rules for the issue of import licences under the tariff quota applicable to ACP bananas during January and February 2006, as provided for in Regulation No 1964/2005. The adoption of those measures was made necessary because the time available after the adoption of Regulation No 1964/2005 was not sufficient to permit it to adopt and publish new detailed rules for the management of the tariff quota applicable to ACP bananas and to permit the Member States, on the basis of those rules, to register the operators entitled to share

in that quota. The decision to issue import licences for January and February 2006 only to operators who had supplied the Community market with ACP bananas under the tariff quotas applicable until 31 December 2005 was taken in order to guarantee supplies to the Community, to ensure continuity in trade with the ACP countries and to avoid disturbances in the pattern of trade.

34 The Commission adds that, for that purpose, the regulation defined two sub-quotas, intended for different types of operators. The first, of 135 000 tonnes, was open to operators established in the Community who were registered for 2005 under tariff quota C, provided for in Article 18(1)(c) of Regulation No 404/93 and the second, of 25 000 tonnes was open to other operators, namely those established in the Community and registered under quotas A and B provided for in Article 18(1) of Regulation No 404/93, or of the additional quantity laid down in Regulation No 1892/2004, which had placed ACP bananas in free circulation during 2005. For that reason, such a system could not be applicable to producers like the applicant, which is established in a non-member country and carries on no economic activity in the territory of the Member States. It follows that the applicant's legal position will not change if the contested regulation is annulled, inasmuch as it does not apply to the applicant, which proves that it does not have *locus standi* to seek the annulment of that regulation.

35 Secondly, even if the applicant had *locus standi*, the fact remains, in the Commission's view, that the contested regulation is of neither direct nor individual concern to the applicant, inasmuch as it is a measure of general application. The Commission states that the regulation in question defined the categories of operator and the detailed rules for access to the various sub-quotas on the basis of objectively determined criteria, namely, obtaining a share in the tariff quotas fixed by Article 18 of Regulation No 404/93 or the additional quantity provided for in Regulation No 1892/2004, on the one hand, and, on the other, the origin of the bananas imported into the Community. It is therefore a regulation which has legal effects in respect of categories of persons considered in a general and abstract manner, in

accordance with the criterion for distinguishing between a regulation and a decision laid down in the case-law (judgments of the Court of Justice in Case 307/81 *Alusuisse Italia* v *Council and Commission* [1982] ECR 3463, paragraph 9, and in Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraph 28; order of the Court of First Instance in Case T-107/94 *Kik* v *Council and Commission* [1995] ECR II-1717, paragraph 35, and judgment of the Court of First Instance in 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, paragraphs 108 to 110).

36 Not being an operator within the meaning of the contested regulation, the applicant is concerned by that measure only by reason of its objective status as an economic operator, in the same way as all other economic operators in a similar situation, since, as the applicant itself pointed out in its application, it is not established in the Community and has no historic reference in the context of the Community importation regime applicable until 31 December 2005. The Commission adds that the Court has already had occasion to confirm that the regulations laying down detailed rules for administering tariff quotas on imports are general and abstract in scope (orders of 25 September 2002 in Case T-178/01 *Di Lenardo* v *Commission*, not published in the ECR, and in Case T-179/01 *Dilexport* v *Commission*, not published in the ECR). Moreover, no other factor proper to the applicant's position sets it apart from other economic operators.

37 In reply to the applicant's argument that the contested regulation deprives it in a tangible way of its right to import, the Commission points out that the applicant cannot be deprived of a right to import inasmuch as — like all other economic operators — it has no vested right to do so, all the more so as it is not even an operator within the meaning of the import regime previously in force. The applicant's position is thus no different from that of any other person who fails to fulfil the conditions laid down in Titles II and III of the contested regulation.

38 The Commission also contends that even if the contested measures were such as to endanger the continuance of the applicant's activities, it would not thereby be in a different position from other operators. According to settled case-law, the fact that a measure may produce different specific effects in regard to different persons to whom it applies does not deprive it of its regulatory character in so far as such application takes effect by virtue of an objective legal or factual situation defined by the measure in question (order of the Court of Justice in Case C-107/93 *AEFMA* v *Commission* [1993] ECR I-3999, paragraphs 14 to 22, and order of the Court of First Instance in Case T-11/99 *Van Parys and Others* v *Commission* [1999] ECR II-2653, paragraphs 50 and 51). The same is true of the possibility of determining more or less exactly the number or even the identity of the persons to whom the measure at issue applies (judgment of the Court of Justice in Case 206/87 *Lefebvre* v *Commission* [1989] ECR 275, and order of the Court of First Instance in Case T-108/03 *von Pezold* v *Commission* [2005] ECR II-655, paragraph 46).

39 The applicant contests, first of all, the Commission's argument that it does not have *locus standi* to bring an action against the contested regulation. It contends that it is settled case-law that the applicant's place of establishment or the place in which he carries on his economic activities have no effect on the admissibility of an action for annulment, only the legal effects of the measure in question on the applicant's legal position being relevant (judgment in Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305).

40 It adds that, according to settled case-law, the admissibility of an action for annulment brought by an individual is subject only to the condition that that person can show that he has a vested, current, interest which enjoys judicial protection. In this case, it cannot be denied that in so far as the effect of application of the contested regulation is to deprive producers domiciled in ACP countries who are not operators within the meaning of the regulation of any right whatsoever to export to the Community market, such producers have a legitimate and judicially protected interest in contesting the lawfulness of that regulation.

41 Secondly, the applicant contends that although it is true that the regulation in question applies to all the economic operators concerned, it also of direct and individual concern to some of them. It points out that, according to settled case-law, once a regulation is not, in essence, an individual decision, the legal effects which it is intended to, or does in fact produce must be determined (judgments of the Court of Justice in *Alusuisse Italia* v *Council and Commission*, cited above at paragraph 35, paragraph 8, and in Case C-451/98 *Antillean Rice Mills* v *Council* [2001] ECR I-8949).

42 It has been held that the fact that a measure is normative in nature does not prevent the applicant bringing an action for its annulment. It would be sufficient for it to show that the measure is of direct and individual concern to it (judgments of the Court of Justice in Case 118/77 *ISO* v *Council* [1979] ECR 1277; Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005; Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission and Council* [1990] ECR I-719; Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501; Case C-309/89 *Codorníu* v *Council* [1994] ECR I-1853; and *Antillean Rice Mills* v *Council*, cited above at paragraph 41).

43 Thirdly, the applicant claims that the contested regulation is of direct and individual concern to it, as the case-law requires, by reason of certain attributes peculiar to it, or by reason of a factual situation which differentiates it from all other persons and distinguishes it individually in the same way as the addressee of a decision (judgments of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677; order of the Court of First Instance in Case T-370/02 *Alpenhain-Camembert-Werk and Others* v *Commission* [2004] ECR II-2097). It states that not merely is the factual situation in which it finds itself is clearly distinct from that of other operators or producers of ACP bananas but that its legal position suggests that it should be assimilated to an 'addressee' within the meaning of the case-law. By virtue of the fact that it is one of the independent producers established in the ACP countries, whether operators or non-integrated producers, it is unable to market its production in the territory of the Union.

44 According to the applicant, it is clear from Article 1 of Annex V to the Cotonou Agreement and from Article 1 of Protocol 5 annexed to Annex V to that agreement, entitled 'Second Banana Protocol', that Community law distinguishes the legal position of a producer established in an ACP country which exports its products to the Community market from that of other producers and of all other economic operators in the banana market. Those provisions establish beyond the shadow of a doubt that undertakings producing ACP bananas are in a special legal position in regard to the rules of the Common Agricultural Policy, namely the position envisaged in *Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 39.

45 The applicant points out that it could be individually distinguished by the fact that the institution which adopted the measure took account (or was required to take account) of the applicant's legal position or the situation of fact in which it found itself, which would be the same as those of the undertakings concerned at the time that the measure was adopted. That method of determining the existence of an individual link has already been accepted by the Court of Justice in *Piraiki-Patraiki and Others* v *Commission* (Case 11/82 [1985] ECR 207) in so far as the provisions of the Act of Accession required it, and in *Sofrimport* v *Commission* (Case C-152/88 [1990] ECR I-2477) in which it was decided that the rules at issue required the Commission to take account of the situation of the applicants when it adopted the contested measure.

46 Moreover, its situation is wholly comparable to that of the exporters of rice from the Netherlands Antilles which gave rise to the judgment in *Antillean Rice Mills* v *Council*, cited above at paragraph 41, in which it was held that they had been deprived of the possibility of exporting to the Community as a result of a Community measure. According to the applicant, the Court first decided that the applicants were affected by the Community measure only as exporters of rice to the Community, which was a commercial activity which could be carried out by any undertaking at any time. However, the Court also held that the applicants were concerned only by reason of their objective status as economic operators active in the sector at issue in the same way as any other operator and that the limited number of operators involved was not a sufficient basis on which to conclude that there was an individual link. However, the Court also held that the fact that the

Council or the Commission are required, by specific provisions, to take account of the consequences for the situation of certain individuals of the act they are intending to adopt may be 'such as to distinguish them individually' (judgments of the Court of Justice in *Piraiki-Patraiki and Others* v *Commission*, cited above at paragraph 45, paragraphs 28 and 31, and in Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 25).

47 The applicant argues that a comparable line of reasoning may be adopted in regard to the institutions' obligation, when adopting a regulation under the Common Agricultural Policy (in this case the common organisation of the market in bananas), not merely to take into account the situation of producers established in ACP countries but to ensure that they are able to dispose of their products in a way which is at least as advantageous as that which they enjoyed in their previous situation, in accordance with the provisions of Article 1 of Annex V to the Cotonou Agreement. The requirement to take account of individual situations is strengthened in this case by the fact that the institutions are required by treaty obligations forming an integral part of the Community legal order to maintain traditional trade flows during the period under consideration.

48 Moreover, the Commission cannot contest the admissibility of the application on the basis that, as the Court of Justice held in *Antillean Rice Mills* v *Council*, cited above at paragraph 41, the applicants were affected by the Community measure only as exporters of rice to the Community, which was a commercial activity which could be carried out by any undertaking at any time. In this case, the contested regulation is to be applied only for two months, with the result that the possibility of other undertakings becoming banana producers in such a short period is purely theoretical.

49 Fourthly, the applicant contends that the Commission advances no argument in support of its objection of inadmissibility which refutes the claim that the contested regulation is of direct concern to it. It points out that by virtue of the absence of any Community or national measure implementing the import regime established by the contested regulation, that regulation is of direct concern to it. In any event, the Commission could not possibly have been unaware at the time that it adopted the contested regulation that the marketing mechanism created by the licensing system would immediately make it impossible for producers such as the applicant to maintain the traditional trade flows towards the Community.

50 Finally, the applicant refers to the judgment of 3 May 2002, *Jégo-Quéré* v *Commission* (Case T-177/01 [2002] ECR II-2365), in which the Court held that, in the absence of national measures implementing a Community act, the effect of an action for annulment being inadmissible would be to deprive litigants of an effective judicial remedy, which is guaranteed by national constitutional provisions, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the principles of a Community based on the rule of law and the Charter of Fundamental Rights. It also points out that, in its judgment in *Unión de Pequeños Agricultores* v *Council*, cited above at paragraph 43, the Court of Justice held that the European Community is a Community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law, of which fundamental rights are a part. Among those rights is the right to effective legal protection.

51 In the applicant's view, since the validity of the regulation in question cannot be raised before any national court, it is only if its application is found to be admissible that it will be possible to avoid a denial of justice incompatible with the principles of a Community based on the rule of law, namely, that the contested regulation would be rendered immune from judicial review. Moreover, if it does not accept that such an application is admissible, the Community judicature would be unable to consider possible illegalities which might taint the act at issue, which would thereby not be subject to any form of judicial review contrary to the rules which flow from the fact that the Community is a Community based on law (judgment of the Court in Case

294/83 *Les Verts* v *Parlement* [1986] ECR 1339). In support of that position, the applicant points out that the draft Treaty of 18 July 2003 establishing a constitution for Europe (Article II-47 and Article III-270(4)) provides that individuals may institute proceedings against an act which is of direct concern to them and which does not entail implementing measures.

Findings of the Court

Locus standi

52 According to settled case-law, for an action for annulment brought by a natural or legal person to be admissible, that person must have a vested and present interest in the annulment of the contested act (judgments of the Court of Justice in Case 88/76 *Société pour l'exportation des sucres* v *Commission* [1977] ECR 709, paragraph 19, and in *Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 39, paragraph 59; orders of the Court of First Instance in Case T-78/98 *Unione provinciale degli agricoltori di Firenze and Others* v *Commission* [1999] ECR II-1377, paragraph 30, and in Case T-28/02 *First Data and Others* v *Commission* [2005] ECR II-4119, paragraph 34).

53 Moreover, a natural or legal person may bring an action for annulment only if the annulment of the measure is of itself capable of having legal consequences (Case 53/85 *Akzo Chemie* v *Commission* [1986] ECR 1965, paragraph 21, and *Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 39, paragraph 59).

54 According to the Commission, the applicant does not have a legal interest in bringing proceedings in this case inasmuch as the contested regulation is not applicable to producers like the applicant, which is established in a non-member country and carries on no economic activity in the territory of the Member States. It follows that the applicant's legal position will not change if the contested regulation is annulled.

55 That argument cannot be accepted.

56 The applicant contests the regulation at issue precisely because it does not take account of the situation of independent producers like itself and thereby deprives it of the opportunity to export its products to the Community market. It points out, in particular, that because Articles 3 and 4 of the regulation in question establish a system of import licences based on historic references, it infringes the treaty provisions dealing with the banana market and the principles laid down in the Community provisions governing the Common Agricultural Policy and in the rules concerning the common organisation of the market in bananas. In addition, the contested regulation infringes the principle of non-discrimination, inasmuch as it unduly favours certain, traditionally significant, importers, and the principle of legitimate expectations.

57 It should be noted that under Article 233 EC the institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures do not relate to the elimination of the act itself from the Community legal order, because the very annulment by the Court has that effect. They are concerned in particular with eradicating the consequences of the act in question which are affected by the illegalities which the judgment annulling the measure have found to be committed. Such an annulment requires the institution which adopted the act to adopt the measures necessary to give effect to the judgment. The institution concerned may thus be required to take adequate steps to restore the applicant to its original situation or to avoid the adoption of an identical measure (*Antillean Rice Mills and Others* v *Commission*, cited above at paragraph 39, paragraph 60).

58 In order to comply with a judgment annulling a measure and to implement it fully, the institution is required, according to settled case-law, to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and,

on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure (judgment of the Court of Justice in Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27, and Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 29; judgment of the Court of the Court of First Instance in Case T-106/92 *Frederiksen* v *Parliament* [1995] ECR-SC I-A-29 and II-99, paragraph 31).

59 As can be seen from the abovementioned case-law, the institution concerned is required to ensure that any act intended to replace the annulled act is not affected by the same irregularities as those identified in the judgment annulling the original act. Under those circumstances, the annulment of an act on the ground that it does not take account of a specific category of economic operators, which requires the institution which adopted the act to adopt the measures necessary to give effect to the judgment, can affect the applicant's legal position.

60 It follows that the applicant has an interest in securing the annulment of the contested decision.

The question whether the applicant is directly and individually concerned

61 According to settled case-law, the fourth paragraph of Article 230 EC empowers individuals to contest, inter alia, any decision which, although in the form of a regulation, is of direct and individual concern to them. The objective of that provision is in particular to prevent the Community institutions from being in a position, merely by choosing the form of a regulation, to exclude an application by an individual against a decision which concerns him directly and individually; it therefore stipulates that the choice of form cannot change the nature of a measure

(judgment of the Court of Justice in Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta* v *Commission* [1980] ECR 1949, paragraph 7; orders of the Court of First Instance in Case T-12/96 *Area Cova and Others* v *Council and Commission* [1999] ECR II-2301, paragraph 24, and in Case T-287/04 *Lorte and Others* v *Council* [2005] ECR II-3125, paragraph 36).

62 It also follows from the case-law that the criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the act in question and it is therefore necessary to appraise the nature of the contested measure and in particular the legal effects which it is intended to produce or actually produces (judgment of the Court of Justice in Case 26/86 *Deutz und Geldermann* v *Council* [1987] ECR 941, paragraph 7; order of the Court of Justice in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 28; order in *Area Cova and Others* v *Council and Commission*, cited above at paragraph 61, paragraph 25; and judgment of the Court of First Instance in Case T-139/01 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2005] ECR II-409, paragraph 87).

63 In this case, it should be pointed out that the purpose of the contested regulation, drafted in general and abstract terms, is to define the detailed rules for implementing Regulation No 1964/2005 for January and February 2006 in regard to the importation of bananas originating in ACP countries.

64 The applicant's claim that, because it is not an operator within the meaning of the contested regulation, it cannot import its products into the Community market is merely a consequence of the application of Articles 3 and 4 of the regulation in question to its situation. However, those provisions of the contested regulation appear to be measures of general application. They define two sub-quotas, intended for different types of operators. The first, of 135 000 tonnes, was open to operators established in the Community who were registered for 2005 under tariff quota C, provided for in Article 18(1)(c) of Regulation No 404/93 and the second, of 25 000

tonnes was open to other operators, namely those established in the Community and registered under quotas A and B provided for in Article 18(1) of Regulation No 404/93, or of the additional quantity laid down in Regulation No 1892/2004, which had placed ACP bananas in free circulation during 2005.

65 The contested regulation is therefore a legislative act of general application inasmuch as it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in general and in the abstract. Such measures concern the applicant only by reason of its being an economic operator not established in the Community and not having an historic reference in regard to the Community rules for the importation of bananas applicable until 31 December 2005. The measures at issue therefore concerned it in the same way as any other economic actor in an identical situation, namely producers established in an ACP country, engaging in no economic activity on Community territory and having no historic reference in regard to the Community rules for the importation of bananas applicable until 31 December 2005 (see, to that effect, the orders in *Di Lenardo* v *Commission*, cited above at paragraph 36, paragraph 47 and in *Dilexport* v *Commission*, cited above at paragraph 36, paragraph 47, and the judgment in *Comafrica and Dole Fresh Fruit Europe* v *Commission*, cited above at paragraph 62, paragraph 88).

66 However, the provisions of a legislative act applying to all economic operators concerned can, in certain circumstances, be of individual concern to certain of them (judgments in *Extramet Industrie* v *Council*, cited above at paragraph 42, paragraph 13; *Codorníu* v *Council*, cited above at paragraph 42, paragraph 19; and *Unión de Pequeños Agricultores* v *Council*, cited above at paragraph 43, paragraph 36). In those circumstances, a Community measure could be of a legislative nature and, at the same time, vis-à-vis some of the traders concerned, in the nature of a decision (judgments in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 50; *Comafrica and Dole Fresh Fruit Europe* v *Commission*, cited above at paragraph 35, paragraph 101; and *Comafrica and Dole Fresh Fruit Europe* v *Commission*, cited above at paragraph 62, paragraph 107).

67 According to settled case-law, natural or legal persons other than the addressee of a measure may claim that a contested measure is of individual concern to them within the meaning of the fourth paragraph of Article 230 EC only if the measure at issue affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons in the same way as the addressee (judgments of the Court of Justice in *Plaumann* v *Commission* cited above at paragraph 43, p. 223; *Codorníu* v *Council*, cited above at paragraph 42, paragraph 20; *Unión de Pequeños Agricultores* v *Council*, cited above at paragraph 43, paragraph 36; Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 45; and *Comafrica and Dole Fresh Fruit Europe* v *Commission*, cited above at paragraph 62, paragraph 107). If that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation (judgment in *Unión de Pequeños Agricultores* v *Council*, cited above at paragraph 43, paragraph 37).

68 In the light of that case-law, it must be determined whether, in this case, the applicant is individually concerned by the contested decision.

69 With regard, first, to the applicant's argument that the contested regulation denies it access to the Community market, it should be pointed out that the contested regulation concerns the applicant only in its objective status as an undertaking which produces and markets ACP bananas, in the same way as any other independent operator established in an ACP country and carrying on the same business. However, as can be seen from the case-law, that status is not sufficient in itself to establish that the applicant is individually concerned by the contested regulation (see, to that effect, the judgments in *Piraiki-Patraiki and Others* v *Commission*, cited above at paragraph 45, paragraph 14, and *Antillean Rice Mills* v *Council*, cited above at paragraph 41, paragraph 51; and the order of the Court of First Instance in Case T-154/02 *Villiger Söhne* v *Council* [2003] ECR II-1921, paragraph 47).

70 That finding is not weakened by the applicant's claim that the contested regulation prevents it from importing any bananas and thereby imperils its existence. Even if that claim was well founded, the fact that a measure of general application may have specific effects which differ according to the various persons to whom it applies is

not such as to differentiate them in relation to all the other operators concerned where, as in this case, that measure is applied on the basis of an objectively determined situation (order of the Court of Justice in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 37; orders of the Court of First Instance in *Di Lenardo* v *Commission*, cited above at paragraph 36, paragraph 52; *Dilexport* v *Commission*, cited above at paragraph 36, paragraph 52; and in T-397/02 *Arla Foods and Others* v *Commission* [2005] ECR II-5365, paragraph 70).

71 Secondly, with regard to the applicant's argument that the contested regulation deprives only a limited number of traders of the opportunity to market ACP bananas in Community territory, it should be borne in mind that it is settled case-law that that the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as it is established that, as in the present case, that application takes effect by virtue of an objective legal or factual situation defined by the measure in question (order of the Court of Justice in Case C-276/93 *Chiquita Banana and Others* v *Council* [1993] ECR I-3345, paragraph 8; judgment in *Antillean Rice Mills* v *Council*, cited above at paragraph 41, paragraph 52; and the order in *von Pezold* v *Commission*, cited above at paragraph 38, paragraph 46).

72 That conclusion is not weakened by the fact that the contested regulation applies only for two months and that, consequently, the possibility that other undertakings might become banana producers in such a short time is purely theoretical. It is sufficient to note that the contested regulation is not intended to limit production of the products at issue nor does it have such a result and that the applicant is affected by it only in its capacity as an exporter to the Community and that it follows that the regulation in question concerns it in the same way as any other trader actually or potentially finding himself in the same position (see, to that effect, the judgment in *Piraiki-Patraiki and Others* v *Commission*, cited above at paragraph 45, paragraphs 12 to 14).

73 Thirdly, the applicant claims that it is individually concerned on the ground that the Commission ought to have taken account of its particular situation.

74 It should be borne in mind that it is settled case-law that the fact that the Commission is required, by specific provisions, to take account of the consequences for the situation of certain individuals of the act they are intending to adopt may be such as to distinguish them individually (judgments of the Court of Justice in *Piraiki-Patraiki and Others* v *Commission*, cited above at paragraph 45, paragraphs 21 and 28 to 31; *Sofrimport* v *Commission*, cited above at paragraph 45, paragraphs 11 to 13; *Antillean Rice Mill and Others* v *Commission*, cited above at paragraph 46, paragraph 25; and *Antillean Rice Mills* v *Council*, cited above at paragraph 41, paragraph 57; judgment of the Court of First Instance in *Antillean Rice Mills* v *Commission*, cited above at paragraph 39, paragraphs 67 to 78, and in Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, paragraph 41).

75 It is certainly true, as the applicant pointed out in its observations on the objection of inadmissibility, that Article 1 of Protocol 5, annexed to Annex V of the Cotonou Agreement, entitled 'The Second Banana Protocol', provides that the parties recognise the overwhelming economic importance to the ACP banana suppliers of their exports to the Community market and, in particular, that the Community agrees to examine and where necessary take measures aimed at ensuring the continued viability of their banana export industries and the continuing outlet for their bananas on the Community market.

76 However, it is clear from the case-law that even if such an obligation is shown to exist, such a finding will not be sufficient to conclude that the applicant is individually concerned. At paragraph 28 of the judgment in *Piraiki-Patraiki and Others* v *Commission*, cited above at paragraph 45, the Court, after finding that the Commission was required to inquire into the negative effects which its decision might have on the economy of the Member State concerned and on the undertakings concerned, did not conclude from that finding alone that all the undertakings concerned were individually concerned within the meaning of the

fourth paragraph of Article 230 CE. On the contrary, it considered that only those undertakings which had already entered into contracts which were due to be performed during the period of application of the contested decision but which had been prevented from being performed, in part or at all, were individually concerned within the meaning of the fourth paragraph of Article 230 CE (judgments in *Piraiki-Patraiki and Others* v *Commission*, cited above at paragraph 45, paragraphs 28, 31 and 32; *Antillean Rice Mills* v *Council*, cited above at paragraph 41, paragraph 60; and Case C-142/00 P *Commission* v *Nederlandse Antillen* [2003] ECR I-3483, paragraph 74).

77 It follows from the foregoing that the finding that the Commission was required, in so far as the circumstances of the case so permitted, to take account of the negative effects which its decision might have on, in particular, on the undertakings concerned does not discharge the applicant from the burden of proving that it is affected by the regulation by reason of a factual situation which differentiates it from all other persons (see, by analogy, the judgments in *Antillean Rice Mills* v *Council*, cited above at paragraph 41, paragraph 62, and *Commission* v *Nederlandse Antillen*, cited above at paragraph 76, paragraph 76).

78 However, the applicant did not adduce any evidence on the basis of which it may be concluded that it is affected by reason of a specific situation.

79 It follows from the foregoing that the applicant is not in a situation which differentiates it in relation to all other economic operators and it is not therefore individually concerned by the contested regulation.

80 Finally, the applicant claims that the inadmissibility of the present action would constitute an infringement of the fundamental right to effective judicial protection. For the Community system of judicial protection to be effective, the applicant must be regarded as individually concerned on the ground that national law affords it no possibility of bringing an action against the contested regulation before a national court.

81 The Court of Justice has held that the right to effective judicial protection is one of the general principles of law stemming from the constitutional traditions common to the Member States and that that right has also been enshrined in Articles 6 and 13 of the ECHR and that the EC Treaty, in Articles 230 EC and 241 EC, on the one hand, and Article 234 EC, on the other, established a complete system of legal remedies and procedures designed to enable the Community Courts to review the legality of acts of the institutions. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling in that regard (judgment in *Unión de Pequeños Agricultores* v *Council*, cited above at paragraph 43, paragraphs 39 and 40; *Commission* v *Jégo-Quéré*, cited above at paragraph 67, paragraphs 29 and 30; and the order of the Court of First Instance of 29 June 2006 in Case T-311/03, *Nürburgring* v *Parliament and Council*, not published in the ECR, paragraph 69).

82 Contrary to the applicant's claim, the fact that there might be no effective judicial remedy in this case, even if that were proved to be the case, does not justify a change, carried out by the courts, in the system of remedies and procedures provided for in Articles 230 EC, 234 EC and 241 EC, referred to in paragraph 81. It is apparent from the case-law that the admissibility of an action for annulment before the Community courts does not depend on whether there is a remedy before a national court enabling the validity of the act being challenged to be examined (see, to that effect, the judgements in *Unión de Pequeños Agricultores* v *Council*, cited above at paragraph 43, paragraph 43, and 46 and *Commission* v *Jégo-Quéré*, cited above at paragraph 67, paragraphs 33 and 34; and the order in *Nürburgring* v *Parliament and Council*, cited above at paragraph 81, paragraph 70). In no event could such a circumstance enable an action for annulment brought by a natural or legal person to be declared admissible where it did not satisfy the conditions laid down in the fourth paragraph of Article 230 EC (order of the Court of Justice in Case C-301/99 P *Area Cova and Others* v *Council and Commission* [2001] ECR I-1005, paragraph 47).

83 Moreover, as the Court of Justice has pointed out, individuals are not denied access to justice because they are unable to apply for the annulment of measures which they contest, since an action for non-contractual liability under Article 235 EC and the second paragraph of Article 288 EC is available if the conduct is of such a nature as to entail liability for the Community (see, to that effect the judgment of the Court of Justice in Case C-131/03 P *Reynolds Tobacco and Others* v *Commission* [2006] ECR I-7795, paragraph 82).

84 It is clear from the foregoing that the applicant cannot be considered to be individually concerned by the contested regulation. Since it does not fulfil one of the conditions of admissibility laid down in the fourth paragraph of Article 230 CE, it is not necessary to consider whether the applicant is directly concerned by the regulation in question.

85 It follows that the application must be dismissed as inadmissible.

Costs

86 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay the latter's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action as inadmissible;

2. Orders La Société des plantations de Mbanga SA (SPM) to bear its own costs and to pay those incurred by the Commission.

Luxembourg, 12 January 2007.

E. Coulon — Registrar

M. Vilaras — President