JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
11 January 2002 *

In Case T-210/00,

Établissements Biret et Cie SA, established in Paris (France), represented by S. Rodrigues, lawyer, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by J. Carbery and F.P. Ruggeri Laderchi, acting as Agents,

defendant,

* Language of the case: French.

supported by

Commission of the European Communities, represented by T. Christoforou and A. Bordes, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION under Article 178 of the EC Treaty (now Article 235 EC) and the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) for compensation for the damage allegedly suffered by the applicant as a result of its subsidiary, Biret International SA, being placed in judicial liquidation following the prohibition on the importation into the Community of beef and veal treated with certain hormones,

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

composed of: B. Vesterdorf, President, N.J. Forwood and H. Legal, Judges, Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 7 November 2001,

gives the following

Judgment

Legislation

1 Article 2 of Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action (OJ 1981 L 222, p. 32) provides that Member States are to prohibit the administering to a farm animal of substances having a thyrostatic action or substances having an oestrogenic, androgenic or gestagenic action, and the placing on the market of animals or meat coming from farm animals to which the abovementioned substances have been administered. By way of derogation from that prohibition, Article 5 of the directive provides that pending adoption by the Council of a decision on the administering to farm animals of oestradiol 17/ß, progesterone, testosterone, trenbolone and zeranol for fattening purposes the national regulations in force and the arrangements made by Member States concerning those substances are to continue to apply while complying with the general provisions of the Treaty. The reason for the derogation, according to the fourth recital in the preamble to the directive, was that whether the effects of the use of those five substances was harmful still had to be examined in detail.

2 On 31 December 1985 the Council adopted Directive 85/649/EEC prohibiting the use in livestock farming of certain substances having a hormonal action (OJ 1985 L 382, p. 228). As that directive was annulled by the Court of Justice in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855 because it infringed essential procedural requirements, it was replaced by Council Directive

88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action (OJ 1988 L 70, p. 16). Apart from the use of oestradiol 17/ß, progesterone and testosterone for therapeutic treatment, which is still permitted, that directive removes the possibility of derogation provided for in Article 5 of Directive 81/602 with regard to the five substances referred to in paragraph 1 above. Article 6 of Directive 88/146 provides that Member States are to prohibit importation from third countries of animals and of meat from animals to which have been administered in any way whatsoever substances with a thyrostatic, oestrogenic, androgenic or gestagenic action.

3 Directive 88/146 was to be transposed by 1 January 1988, but its entry into force was postponed until 1 January 1989. The result was that from that date importation into the Community from non-member countries of meat and meat products treated with certain hormones was prohibited under Council Directive 72/462/EEC of 12 December 1972 on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries (OJ, English Special Edition 1972 (31 December), p. 7).

4 On 15 April 1994, at the Marrakesh meeting in Morocco, the President of the Council and the Member of the Commission responsible for external relations signed the Final Act concluding the multilateral trade agreements of the Uruguay Round, the Agreement establishing the World Trade Organisation ('the WTO') and all the agreements and memoranda in Annexes 1 to 4 to the Agreement establishing the WTO ('the WTO agreements') on behalf of the European Union, subject to ratification.

5 Following the signature of those documents, the Council adopted Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the

European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

6 The WTO agreements, which include at Annex 1A the Agreement on the Application of Sanitary and Phytosanitary Measures (OJ 1994 L 336, p. 40, 'the SPS Agreement') entered into force on 1 January 1995.

7 Article 3(3) of the SPS Agreement provides that 'Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5'.

8 Article 5(1) of the SPS Agreement provides that 'Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organisations'.

9 On 29 April 1996 the Council adopted Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of ß-agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC (OJ 1996 L 125, p. 3). That directive confirms the

prohibition contained in both Directive 81/602 and Directive 88/146 and adds melengestrol acetate to the five prohibited substances referred to in paragraphs 1 and 2 above.

10 In May and November 1996 respectively the United States and Canada, considering that the Community legislation was restricting their exports to the Community of beef and veal treated with certain hormones, in breach of the obligations the Community had entered into within the framework of the WTO, each brought dispute settlement proceedings before the competent WTO bodies.

11 On 18 August 1997 each of the two Panels set up in respect of those proceedings lodged a report (No WT/DS26/R/USA and No WT/DS48/R/CAN) finding that the Community was in breach of various provisions of the SPS Agreement.

12 In response to an appeal lodged by the Community the Appellate Body delivered a report on 16 January 1998 (No WT/DS26/AB/R WT/DS48/AB/R) amending certain aspects of the reports of the two Panels, but finding none the less that the Community was in breach of Article 3(3) and Article 5(1) of the SPS Agreement, essentially on the ground that there had not been a sufficiently specific scientific analysis of the cancer risks associated with the use of certain hormones as growth hormones. The Appellate Body recommended that 'the Dispute Settlement Body request the European Communities to bring the SPS measures found ... to be inconsistent with the SPS Agreement into conformity with the obligations of the European Communities under that Agreement'.

13 On 13 February 1998 the WTO Dispute Settlement Body ('the DSB') adopted the report of the Appellate Body and the reports of the Panels, as amended by the Appellate Body.

14 As the Community had stated that it intended to comply with its WTO obligations but that it needed a reasonable time to do so, under Article 21(3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (OJ 1994 L 336, p. 234), which forms Annex 2 to the Agreement establishing the WTO, it was granted a period of 15 months for that purpose, which expired on 13 May 1999.

15 On the basis of the results of further analysis of the risks associated with the use of the substances in question the Commission adopted on 24 May 2000, and submitted to the Parliament and the Council on 3 July 2000, the proposal for Directive 2000/C 337 E/25 of the European Parliament and the Council amending Directive 96/22 (OJ 1996 C 337 E, p. 163) and seeking in particular to maintain the prohibition on the use of oestradiol 17/ß as a permanent measure, and on the use of the five other substances prohibited under Directive 96/22 as a temporary measure pending further scientific reports.

Background to the action, procedure and forms of order sought

16 The applicant holds nearly 66% of the capital of Biret International SA ('Biret International'), a company which was incorporated on 26 July 1990 and recorded in the register of companies of the Tribunal de commerce (Commercial Court) de Paris (France) on 9 August 1990; the objects of that company as set out in its articles of association are to trade in various agri-foodstuffs, in particular meat.

17 By judgment of 7 December 1995, the Tribunal de commerce de Paris opened judicial liquidation proceedings in respect of the applicant and provisionally set the date for cessation of payments at 28 February 1995.

18 By application lodged at the Registry of the Court of First Instance on 28 June 2000 Biret International brought an action, registered as Case T-174/00, in which it seeks a ruling that the European Community was liable in respect of its being placed in judicial liquidation, and that the Council be ordered to pay FRF 87 006 000, corresponding in part to the total amount of its liabilities and in part to an alleged loss of earnings for the years 1996 to 2000.

19 By application lodged at the Registry of the Court of First Instance on 10 August 2000, the applicant brought this action, in which it claims that the Court should:

— establish that the European Community was liable in respect of Biret International being placed in judicial liquidation;

— order the defendant to pay it compensation in the sum of FRF 70 630 085;

— order the defendant to pay the costs.

20 Without formally raising an objection as to admissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance, the Council submits in its defence that the Court should:

— declare the action inadmissible, and in the alternative manifestly unfounded, if appropriate by reasoned order;

— order the applicant to pay the costs.

21 The Commission, having been given leave to intervene by order of the President of the First Chamber of the Court of First Instance of 15 January 2001, submits that the defendant's claims should be granted.

22 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure.

23 The parties presented oral argument and their replies to the questions from the Court at the hearing on 7 November 2001.

Admissibility

Arguments of the parties

24 The applicant is seeking compensation for the damage it claims to have suffered as a result of Biret International being placed in judicial liquidation, which it attributes to the prohibition on imports into the Community of beef and veal, in particular those of American origin, decided on and implemented by the Council under Directives 81/602 and 88/146, and confirmed by the adoption of Directive 96/22 ('the embargo').

25 The Council and the Commission question the admissibility of the action.

26 The Council and the Commission submit first of all that the application does not meet 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.

27 The Council considers, secondly, that the applicant failed to seek the remedies available to it in the national courts, which in the Council's view were such that they offered full and effective judicial protection (Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, paragraph 11). The Council states that, unlike a regulation or a decision, a directive cannot be the direct cause of any damage since it is addressed to the Member States and it cannot in any event be a source of obligations for individuals (Case C-91/92 *Faccini Dori* [1994] ECR I-3325). The Council contends that the applicant should have contested the measures adopted by the French authorities to transpose the contested directives, pleading the unlawfulness of those directives and, if appropriate, seeking a ruling from the Court of Justice under Article 177 of the EC Treaty (now Article 234 EC). It would thus have been able to obtain, if appropriate, a declaration that the directives in question, together with the national measures transposing them, were invalid and thus prevent the alleged damage from occurring.

28 The Council, supported by the Commission, contends, thirdly, that the action is time-barred because it was brought after the expiry of the limitation period provided for in Article 43 of the EC Statute of the Court of Justice, that is, five years since the alleged damage had occurred. According to the Council and the Commission, the damage in question arose for those concerned on the transposition of the contested directives into national law and, in the applicant's case, no later than 28 February 1995, the date for Biret International's cessation of payments set by the Tribunal de commerce de Paris in the judgment cited above. After that date Biret International, being insolvent, was unable to import meat and the damage could no longer increase.

29 The Council and the Commission also call in question the applicant's *locus standi*, arguing that Biret International itself is seeking to obtain compensation for the damage it alleges it has suffered. Thus, even if the applicant's claims were well founded, *quod non*, Biret International would receive compensation, which would remove any injurious consequence from the Council's conduct with regard to its creditors and shareholders, including the applicant. To accept the latter's *locus standi* in such circumstances is, according to the Council and the Commission, contrary to the general principle '*ne bis in idem*', common to the laws of the Member States under Article 215 of the EC Treaty (now Article 288 EC).

30 In reply to those arguments, the applicant contends first of all that, according to case-law, an action for damages is admissible once the cause of the damage is certain, even if that damage cannot yet be assessed (Case 147/83 *Binderer* v *Commission* [1985] ECR 257 and Case 281/84 *Zuckerfabrik Bedburg and Others* v *Council and Commission* [1987] ECR 49). That is so in this case.

31 Secondly, the applicant contends that the remedies available to it in national law to challenge the lawfulness of the measures adopted by the national authorities under the embargo cannot give rise to compensation for the alleged damage (*Unifrex* v *Commission and Council*, cited above, paragraph 12, and Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 27).

32 Thirdly, the applicant contends that the five-year limitation period provided for in Article 43 of the EC Statute of the Court of Justice began to run in the present case on the day on which Biret International ceased business following the judgment of the Tribunal de commerce de Paris of 7 December 1995, since that judgment 'created a new legal situation effective against all'. As for the date for cessation of payments, set at 28 February 1995 in that judgment, the applicant replies to the Council that its sole purpose is to identify the doubtful period, prior

to the liquidation, during which acts performed may be declared void under certain conditions. In this case Biret International continued to trade from March to December 1995.

33 Lastly, in order to establish its *locus standi* the applicant claims, in its reply, that the damage it sustained is not the same as that sustained by Biret International. Its own damage concerns all the consequences of the liquidation of its subsidiary, not merely the discharge of its liabilities. In addition to the material and non-material damage resulting from the undermining of its image as a result of its subsidiary being placed in compulsory liquidation, the applicant has a direct interest in the Community being recognised as liable for making it impossible for the applicant to take over Biret International's business. The claim for compensation in respect of the latter damage is implicitly contained in the forms of order set out in the application and is therefore admissible under the rules of procedure (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95).

Findings of the Court

34 Under Article 19 of the EC Statute of the Court of Justice, applicable to the proceedings before the Court of First Instance under Article 46 of that Statute, and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, an application must state the subject-matter of the proceedings and contain a summary of the pleas in law on which it is based. According to settled case-law, the information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to give a ruling, if necessary, without other supporting information. In order to ensure legal certainty and sound administration of justice, for an action to be admissible the facts and law on which it is based must be apparent from the text of the application itself, at

least summarily, provided that the statement is coherent and comprehensible. In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers there to be a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 106 and 107, and Case T-195/95 *Guérin Automobiles* v *Commission* [1997] ECR II-679, paragraphs 20 and 21).

35 In this case the applicant meets those requirements since it enabled both the defendant institution and the Court of First Instance to identify the conduct alleged against the Council, the damage which was allegedly suffered and the causal link which it is claimed exists between that conduct and the damage (see, in particular, paragraphs 19 and 24 above and paragraph 53 below). The argument that the application contains a formal defect must therefore be rejected.

36 As regards the Council's argument that national remedies were not exhausted, it must be observed that the improper conduct alleged in this case originates not from a national body but from a Community institution. Any damage ensuing from the implementation of the Community legislation by the French authorities, which had no discretion with regard to the embargo as such, would therefore be attributable to the Community (see for example Case 126/76 *Dietz* v *Commission* [1977] ECR 2431, paragraph 5, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 9, Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 71, and Case T-30/99 *Bocchi Food Trade International* v *Commission* [2001] ECR II-943, paragraph 31).

37 Since the Community judicature has exclusive jurisdiction under Article 215 of the Treaty to hear actions seeking compensation for damage attributable to the Community (Joined Cases 106/87 to 120/87 *Asteris and Others* v *Greece and*

EEC [1988] ECR 5515, paragraph 14, and Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 14), remedies available under national law cannot automatically guarantee effective protection of the applicant's rights (*Exporteurs in Levende Varkens*, cited above, paragraph 72, and *Bocchi Food Trade International* v *Commission*, cited above, paragraph 32).

38 In that regard, even if in the context of proceedings for a preliminary ruling the Court of Justice considered that the rules applicable were such as to cause damage, the national court would not have power to adopt the measures needed in order to compensate for all the damage alleged by the applicant in this case, with the result that a direct action before the Court of First Instance on the basis of Article 215 of the Treaty would still be necessary (see, to that effect, *Dietz*, cited above, paragraph 5).

39 The argument that national remedies had not been exhausted must therefore be rejected.

40 As regards next the argument that the action was time-barred, it should be noted that under Article 43 of the EC Statute of the Court of Justice, which applies to the procedure before the Court of First Instance under Article 46 of that Statute, proceedings against the Community in matters arising from non-contractual liability will be barred after a period of five years from the occurrence of the event giving rise thereto.

41 According to settled case-law, the limitation period for proceedings against the Community in matters arising from non-contractual liability cannot begin before all the requirements governing the obligation to make good the damage are satisfied and, in particular, in cases where liability stems from a legislative

measure, as here, before the injurious effects of the measure have been produced (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 10, and Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 107).

42 In this case, since the applicant contends that its damage is constituted by the losses suffered by its subsidiary as a result of the adoption and retention of the embargo, it must be said that the injurious effects of that embargo became evident from the time Biret International commenced its commercial activities and hence immediately after the latter's incorporation as a company on 26 July 1990, since as a result of the embargo Biret International was from the outset prevented by law from engaging in one of the activities for which, according to the applicant, it was incorporated, namely the importation of American beef and veal treated with certain hormones.

43 Consequently, if it considered that that embargo was unlawful and damaging to it, the applicant was in a position to raise the issue of the Community's non-contractual liability from the onset of Biret International's activities in 1990. It was at that time, therefore, that the conditions for bringing an action for damages against the Community were met and that consequently the five-year limitation period began to run.

44 In the so-called 'milk quota' cases the Court of First Instance held, however, that where the damage was not caused immediately but recurred on a daily basis over a particular period as a result of an unlawful measure remaining in force, with respect to the date of the event which interrupted the limitation period, the time bar under Article 43 of the EC Statute of the Court of Justice applies to the period preceding that date by more than five years and does not affect rights which arose during subsequent periods (see for example *Hartmann* v *Council and Commission*, cited above, paragraph 132; see also to that effect the Opinion of Advocate General Capotorti in *Birra Wührer and Others* v *Council and Commission*, cited above, ECR 108, paragraph 6).

45 According to that case-law, which the applicant itself stated in its reply should apply in this case, the action relating to liability must be considered to be time-barred in so far as it seeks compensation for damage allegedly suffered prior to the five-year period before the action was brought, that is to say, before 10 August 1995.

46 Since the limitation period is one of the conditions determining the admissibility of the action (see to that effect the order in Case T-106/98 *Fratelli Murri* v *Commission* [1999] ECR II-2553) the action should on that ground be dismissed as inadmissible.

47 For the rest, the fact that in the judgment of 7 December 1995 the Tribunal de commerce de Paris provisionally set the date for Biret International's cessation of payments at 28 February 1995 does not necessarily imply that that company was no longer able to engage in commercial activities from 10 August 1995 to 7 December 1995. Moreover, the applicant contends that it sustained damage itself as a result of its subsidiary being placed in liquidation. The action cannot therefore be dismissed outright as inadmissible in its entirety on the grounds that it is time-barred.

48 As regards the applicant's *locus standi*, it is true, as the Council has rightly said, that the application does not contain any claim for compensation for non-material damage, or for damage allegedly suffered by the applicant, after Biret International ceased its activities as a result of the fact that it was impossible for it to take on its subsidiary's business of importing beef and veal. Nor do those claims constitute a simple costed amplification of the forms of order set out in the application, an amplification which would be admissible according to *Plaumann* v *Commission*, cited above. On the contrary, these are entirely new claims, since the applicant did not assert in its application that it intended to engage in the importation of meat.

49 The Court has consistently held that, under Article 44(1) in conjunction with Article 48(2) of the Rules of Procedure, the subject-matter of the claim must be defined in the application, and a claim put forward for the first time in the reply modifies the original subject-matter of the application and must therefore be regarded as a new claim; accordingly, it must be rejected as inadmissible (see, for example, Case 191/84 *Barcella and Others* v *Commission* [1986] ECR 1541, paragraphs 5 and 6, Case T-41/89 *Schwedler* v *Parliament* [1990] ECR II-79, paragraph 34, and Case T-22/92 *Weissenfels* v *Parliament* [1993] ECR II-1095, paragraph 27).

50 The new claims seeking compensation for so-called non-material damage, which is not, however, costed, and for damage allegedly suffered by the applicant itself after Biret International ceased business, must therefore be rejected as inadmissible.

51 For the rest, the possibility that the claims made in the application relate to damage which is wholly or partly separate from that claimed by Biret International in Case T-174/00 cannot be ruled out at this stage of the Court's consideration. The action cannot therefore be dismissed outright as being inadmissible in its entirety on grounds of lack of *locus standi*.

Substance

52 As regards the merits of the action in respect of the period after 10 August 1995, it is clear from Article 215 of the Treaty and settled case-law that in order for the Community to incur non-contractual liability a number of conditions must be met: the conduct alleged against the institutions must be unlawful, the existence of damage must be shown, and there must be a causal link between the alleged

conduct and the damage. With regard to the first of these conditions, case-law requires it to be shown that there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42).

53 As regards the condition that the conduct alleged against the Council must be unlawful, the applicant submits in its application that by adopting and retaining in force Directives 81/602, 88/146 and 96/22 the Council was in breach of two legal rules designed to confer rights on individuals: first, the principle of the protection of legitimate expectations, and second, the SPS Agreement.

Breach of the principle of the protection of legitimate expectations

The applicant's arguments

54 The applicant contends that its legitimate expectations have been frustrated. It could legitimately expect, first, that the prohibition on the hormones in question would only be temporary, pending an appropriate scientific assessment as to whether or not they posed a risk for human health and, second, that the scope of the derogations provided for in Article 7 of Directive 88/146 would gradually be extended to include the categories of animals originating in the United States which it had planned to import into the Community.

55 In response to the argument that it was not possible for directives adopted in 1981 and 1988 respectively to frustrate the legitimate expectations of the founders of a company incorporated in 1990, the applicant submits in its reply that the embargo was not actually applied by the French authorities until 1991, leading to a dramatic fall in imports of American beef and veal towards the end of that year, following a steep rise between 1989 and 1990. Thus, when Biret International was incorporated in 1990 the applicant was justified in believing in all good faith that the business of importing American beef and veal, which it had freely engaged in up until then and which was handed over to its subsidiary, would continue to develop in accordance with the Community rules.

56 Furthermore, the negotiations undertaken within the framework of the General Agreement on Tariffs and Trade (GATT) for the establishment of the WTO from 1991 to 1994 might, in the applicant's view, have implied that an interpretation of the Community rules was to be expected in line with the new international rules that were in the process of being adopted.

Findings of the Court

57 It should be noted that in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 10, the Court of Justice held that Directive 88/146 did not frustrate the legitimate expectations of the traders affected by the prohibition of the use of the hormones in question. The Court observed, in particular, that in view of the differing appraisals which had emerged, traders were not entitled to expect that a prohibition on administering the substances in question to animals could be based on scientific data alone.

58 Those considerations apply *a fortiori* to the founders of a trader which, like Biret International, did not set up its business until after the adoption and entry into force of Directive 88/146. In the present case the applicant had even less justification for counting on the lifting or relaxing of the embargo since two years before Biret International was incorporated as a company Directive 88/146 had extended the effects of Directive 81/602 (see paragraph 2 above), and on 13 November 1990 the Court of Justice had confirmed the lawfulness of the embargo in the judgment in *Fedesa*, cited above.

59 Furthermore, the derogation provided for in Article 7 of Directive 88/146 in respect of trade in animals intended for reproduction and reproductive animals at the end of their career which, in the course of their existence, have been treated under the provisions of Article 4 of Directive 81/602/EEC and in respect of meat from these various animals would appear to be too limited in both its substantive and its temporal scope to have allowed the applicant to hope for any further extension.

60 As regards the new claim made in the reply that the embargo was not actually applied until 1991, it must be said that it conflicts with the claim made in paragraph 18 of the application that the embargo 'became effective and operational ... from 1 January 1989'. That claim, which is categorically denied by the Council and the Commission, is not supported by any evidence capable of establishing its veracity. On the contrary, it is clear that the embargo progressively applied by the Member States from 1981 was implemented, at the latest, in France by a law of 16 July 1984, in Germany by a law of 11 March 1988, in Spain by a royal decree of 22 November 1987, in the United Kingdom by a regulation of 1988, in Belgium by a royal order of 10 January 1990, and in Luxembourg by a regulation of 13 April 1989. In those circumstances, this claim by the applicant must be rejected.

61 At any event, the possibility that Directive 88/146 might not have been applied by Member States between 1989 and 1991 cannot be likened to conduct by the

Council capable of having given rise to legitimate expectations on the part of traders. Moreover, failure to apply it would have been in manifest breach of the obligations on Member States under the Treaty and, more particularly, the obligations imposed on them by that directive. It is settled case-law (see to that effect Case 67/84 *Sideradria* v *Commission* [1985] ECR 3983, paragraph 21, and Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 30) that no-one may have a legitimate expectation that an unlawful situation will be maintained or, therefore, base such an expectation on the possible failure on the part of Member States to transpose and effectively implement a Council directive.

62 Lastly, as regards the effect of the talks in progress within the framework of GATT between 1991 and 1994, it should be remembered that in the absence of specific assurances given by the administration no-one may claim a breach of the principle of the protection of legitimate expectations (T-521/93 *Atlanta and Others* v *EC* [1996] ECR II-1707, paragraph 57, and Case T-105/96 *Pharos* v *Commission* [1998] ECR II-285, paragraph 64). The applicant does not even claim that it received any assurances from the Community authorities regarding the outcome of the talks. In any event, it is settled case-law that traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained (see for example Case 245/81 *Edeka Zentrale* [1982] ECR 2745, paragraph 27, and *Exporteurs in Levende Varkens and Others* v *Commission*, cited above, paragraph 148). *A fortiori*, therefore, such traders are not justified in placing legitimate expectations in a future, hypothetical amendment of legislation, particularly in an area such as the common agricultural policy where, as a result of its potential effects on public health, any legislative amendment depends on unpredictable developments in scientific knowledge and complex assessments to be made by the legislature.

63 The plea alleging breach of the principle of the protection of legitimate expectations must therefore be rejected as unfounded.

Infringement of the SPS Agreement

The applicant's arguments

64 The applicant contends that since 1 January 1995 the directives in question have conflicted with the WTO agreements, particularly the SPS Agreement, as the DSB has, moreover, recognised. In the context of an action for damages the Community judicature must, according to the applicant, be in a position to draw the appropriate conclusions from such an infringement of the Community's international obligations.

65 It adds that this case differs in two respects from Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395. First, the Community rules at issue in this case were the subject of express criticism on the part of the DSB. Second, the Community's breach of its obligations was not temporary and negotiable: rather, it was permanent, as the Community had expressed its intention to maintain the embargo despite the current state of scientific research (see paragraph 15 above), so that the argument that the dispute settlement mechanism is flexible (*Portugal* v *Council*, cited above, paragraph 40) is immaterial in this case.

66 More fundamentally, the applicant contends that the judgment in *Portugal* v *Council* flouts the clear wording of Article 228(7) of the EC Treaty (now, after amendment, Article 300(7) EC), and that it conflicts with well-established case-law to the effect that international agreements form an integral part of the Community legal order from the time they enter into force (Case

181/73 *Haegeman* [1974] ECR 449, paragraph 5, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7; see also Opinion of Advocate General Saggio in *Portugal* v *Council*, ECR I-8397, cited above). That judgment, being based on a dualist concept of the relationship between the Community legal order and WTO law, is also irreconcilable with the judgment in Case C-53/96 *Hermès International* [1998] ECR I-3603, which takes a monist approach to the question of interpreting WTO law.

67 The applicant also claims that acknowledgment that individuals are entitled to rely on the WTO agreements and the decisions of the DSB would make it possible to remedy the unfair consequences they suffer as a result of retaliatory measures adopted by the Community's partners in the event of the Community being in breach of its commitments. Thus, in this case, since the purpose of the embargo is to protect the health of all European citizens it is legitimate that everyone should bear the cost of it.

68 The applicant contends, moreover, that recognition of the Community's liability in the event of infringement of WTO law would by no means affect the balance of concessions and reciprocal advantages negotiated with non-member countries within that forum, as it would be limited to providing compensation merely for Community traders who suffer damage.

69 Nor would such recognition have the effect of damaging the Community's opportunities for negotiating in the context of the dispute settlement mechanism, since retaliatory measures are authorised by the DSB only after such negotiations have failed, once it has been established that the Community intends to continue its failure to comply with WTO law.

Findings of the Court

70 Although under Article 228(7) of the Treaty agreements concluded between the Community and non-member States are binding on the institutions of the Community and on Member States and, as the Court of Justice held in particular in *Haegeman* and *Demirel*, cited above, the provisions of such agreements form an integral part of the Community legal order, the Court of Justice has repeatedly emphasised that the effects of such agreements in the Community legal order must be determined in the light of the nature and purpose of the agreement in question. Thus, in Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17, the Court held that the effects within the Community of the provisions of an international agreement may not be determined without taking account of the international origin of the provisions in question and that in conformity with the principles of international law the contracting parties are free to agree what effect the provisions of the agreement are to have in their internal legal order (see also Opinion of Advocate General Gulmann in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, at I-4980, paragraph 127). In particular, in *Demirel*, the Court held at paragraph 14 that a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its terms and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, as regards its implementation or effects, to the adoption of any subsequent measure. The question whether such a stipulation is unconditional and sufficiently precise to have direct effect must be considered in the context of the agreement of which it forms part (*Kupferberg*, cited above, paragraph 23).

71 It is clear from case-law which is now firmly established that in view of their nature and structure the WTO Agreement and its annexes, in the same way as GATT 1947, do not in principle form part of the rules by which the Court of Justice and the Court of First Instance review the legality of acts adopted by Community institutions under the first paragraph of Article 173 of the EC Treaty

(now, after amendment, the first paragraph of Article 230 EC), that individuals cannot rely on them before the courts and that any infringement of them will not give rise to non-contractual liability on the part of the Community (judgments of the Court of Justice in *Portugal* v *Council*, cited above, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, and Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079; order in Case C-307/99 *Fruchthandelsgesellschaft* [2001] ECR I-3159; judgments of the Court of First Instance in Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, *Bocchi Food Trade International* v *Commission*, cited above, Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981, Case T-2/99 *T. Port* v *Council* [2001] ECR II-2093, and Case T-3/99 *Bananatrading* v *Council* [2001] ECR II-2123).

72 The purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals. As the Court of Justice stated in *Portugal* v *Council*, cited above, the agreements are still founded on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements and thus differ from the agreements concluded between the Community and non-member countries whereby the obligations are not necessarily reciprocal. To have the task of ensuring that Community law is in conformity with those rules fall directly to the Community judicature would be to deprive the legislative or executive bodies of the Community of the discretion enjoyed by similar bodies of the Community's trading partners.

73 According to that judgment (*Portugal* v *Council*, paragraph 49) it is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Community judicature to review the legality of the Community measure in question in the light of the WTO rules (see, as regards GATT 1947, Case 70/87 *Fediol* v

Commission [1989] ECR 1781, paragraphs 19 to 22, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31).

74 It is clear that the circumstances of this case clearly do not correspond to either of the two hypotheses set out in the preceding paragraph. Since Directives 81/602 and 88/146 were adopted on 1 January 1995, several years before the entry into force of the SPS Agreement, it is not logically possible for them either to give rise to a specific obligation entered into under that agreement or to refer expressly to some of its provisions.

75 In the circumstances, therefore, the applicant cannot rely on an infringement of the SPS Agreement.

76 The decision of the DSB of 13 February 1998 referred to above cannot alter that.

77 There is an inescapable and direct link between the decision and the plea alleging infringement of the SPS Agreement, and the decision could therefore only be taken into consideration if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question (see, with regard to a decision of the DSB finding that certain provisions of Community law were incompatible with GATT 1994, Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraphs 19 and 20).

78 The plea alleging infringement of the SPS Agreement must therefore be rejected as unfounded.

79 As the applicant has thus failed to establish that the conduct alleged against the defendant institution is unlawful, the action must at any event be dismissed as unfounded and it is unnecessary to consider the applicant's *locus standi* (see paragraph 29 above) or the other conditions for non-contractual liability on the part of the Community (see, for example, *Atlanta* v *European Community*, cited above, paragraph 65).

80 In its reply, however, the applicant requests the Court of First Instance, in the alternative, to 'develop its case-law' in the direction of a system of no-fault liability for the Community in respect of its normative acts. In support of that request, it relies in particular on the 'defence of the rule of law', the autonomous nature of an action for damages, the general principles common to the laws of the Member States and considerations of natural justice linked to application of the 'precautionary principle'.

81 That submission, which changes the very basis on which the Community could be held liable, must be regarded as constituting a new plea in law which cannot be introduced in the course of proceedings, as Article 48 of the Rules of Procedure of the Court of First Instance provides (*Atlanta* v *European Community*, cited above, paragraphs 27 to 29).

82 It is clear from all the foregoing that in so far as the action is not inadmissible it is in any event unfounded.

Costs

83 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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. The Commission, however, must bear its own costs under Article 87(4) of the Rules of Procedure, which provides that institutions which intervene in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the action as being partly inadmissible and for the rest unfounded;

2. Orders the applicant to pay, in addition to its own costs, those incurred by the Council. The Commission shall pay its own costs.

Vesterdorf Forwood Legal

Delivered in open court in Luxembourg on 11 January 2002.

H. Jung
Registrar

B. Vesterdorf
President