JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
28 April 1998 *

In Case T-184/95,

Dorsch Consult Ingenieurgesellschaft mbH, a company incorporated under German law, established in Munich (Germany), represented by Professor Karl M. Meessen, with an address for service in Luxembourg at the chambers of Patrick Kinsch, 100 Boulevard de la Pétrusse,

applicant,

v

Council of the European Union, represented initially by Yves Cretien, Legal Adviser, then by Stephan Marquardt and Antonio Tanca, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Office of Alessandro Morbilli, Director-General of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

Commission of the European Communities, represented by Peter Gilsdorf and Allan Rosas, Principal Legal Advisers, and Jörn Sack, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

* Language of the case: German.

APPLICATION for compensation for the damage allegedly suffered by the applicant as a result of the adoption of Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1),

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

composed of: C. W. Bellamy, President, A. Kalogeropoulos and V. Tiili, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 19 June 1997,

gives the following

Judgment

Facts

1 The applicant, Dorsch Consult Ingenieurgesellschaft mbH, is a German limited company established in Munich (Germany) whose principal activity is engineering consultancy in various countries.

2 On 30 January 1975 the applicant concluded with the Ministry of Works and Housing of the Republic of Iraq (hereinafter 'the Iraqi Ministry') a contract for services relating to the organisation and supervision of works on the construction of Iraqi Expressway No. 1. The contract, which was for a minimum period of six years, was subsequently renewed several times for the purposes of execution and supervision of the abovementioned works. Article X of the contract provided *inter alia* that, in the event of differences arising as to the interpretation of the contract or non-performance of contractual obligations, the contracting parties were to endeavour to find an acceptable solution by conciliation (Article X(1)). In the event of the differences persisting, the matter was to be referred to the Planning Board, whose decision would be final and binding. However, no decision taken in relation to the contract could prevent the contracting parties from bringing a dispute before the competent Iraqi courts (Article X(2)).

3 According to the documents before the Court, outstanding debts owed to the applicant by the Iraqi authorities at the beginning of 1990 for services rendered under the abovementioned contract were acknowledged in two letters, dated 5 and 6 February 1990, from the Iraqi Ministry to an Iraqi bank, Rafidian Bank, directing it to transfer the sums due to the applicant to the latter's bank account.

4 On 2 August 1990 the United Nations Security Council adopted Resolution No 660 (1990) to the effect that there had been a breach of international peace and security resulting from Iraq's invasion of Kuwait and that Iraqi forces should withdraw immediately and unconditionally from the territory of Kuwait.

5 On 6 August 1990 the United Nations Security Council adopted Resolution No 661 (1990) in which, declaring that it was 'mindful of its responsibilities under the Charter of the United Nations for the maintenance of international peace and security' and noting that the Republic of Iraq (hereinafter 'Iraq') had not complied

with Resolution No 660 (1990), decided to impose an embargo on trade with Iraq and Kuwait.

6 On 8 August 1990 the Council, referring to the 'serious situation resulting from the invasion of Kuwait by Iraq' and to United Nations Security Council Resolution No 661 (1990), adopted, on a proposal from the Commission, Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1, hereinafter 'Regulation No 2340/90').

7 Article 1 of Regulation No 2340/90 prohibits as from 7 August 1990 the introduction into the territory of the Community of all commodities or products originating in, or coming from, Iraq or Kuwait and the export to those countries of all commodities or products originating in, or coming from, the Community. Article 2 of the same regulation prohibits as from 7 August 1990 (a) all activities or commercial transactions, including all operations connected with transactions which have already been concluded or partially carried out, the object or effect of which is to promote the export of any commodity or product originating in, or coming from, Iraq or Kuwait; (b) the sale or supply of any commodity or product, wherever it originates or comes from, to any natural or legal person in Iraq or Kuwait or to any other natural or legal person for the purposes of any commercial activity carried out in or from the territory of Iraq or Kuwait; and (c) any activity the object or effect of which is to promote such sales or supplies.

8 According to the documents before the Court, on 16 September 1990 the 'Higher Revolutionary Council of the Republic of Iraq', referring to 'arbitrary decisions by certain governments', adopted with retroactive effect from 6 August 1990 Law No 57 on protection of Iraqi property, interests and rights in Iraq and elsewhere (hereinafter 'Law No 57'). Article 7 of that Law froze all property and assets and income from them held at the material time by the governments, undertakings, companies and banks of those States which had adopted 'arbitrary decisions' against Iraq.

9 Not having received payment from the Iraqi authorities of the sums acknowledged as due in the abovementioned letters of 5 and 6 February 1990 from the Iraqi Ministry (see paragraph 3 above), the applicant, by letters of 4 August 1995, asked the Council and the Commission to compensate it for the damage suffered as a result of those debts having become irrecoverable through application of Law No 57, since that Law had been adopted in response to the adoption by the Community of Regulation No 2340/90. In those letters, the applicant claimed that the Community legislature was under an obligation to compensate operators affected by the embargo imposed on trade with Iraq and that the failure to do so rendered the Community liable under the second paragraph of Article 215 of the EC Treaty. It added that, as a precaution, it had registered its claims against Iraq with the United Nations Iraq Claims Compensation Commission.

10 By letter dated 20 September 1995 the Council refused to grant the applicant's request for compensation.

11 In those circumstances the applicant, by application lodged at the Registry of the Court of First Instance on 6 October 1995, brought the present action.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry. However, by way of measures of organisation of procedure, the parties were requested to reply to a number of written questions.

13 The parties presented oral argument and replied to questions put to them orally by the Court at the public hearing on 19 June 1997.

Forms of order sought

14 The applicant claims that the Court of First Instance should:

— Order the Community to pay it DM 2 279 859.69, plus interest at the rate of 8% per annum as from 9 August 1990, against assignment to the Community of the balance of the applicant's claim in the same amount against Iraq;

— Order the defendants to pay the costs;

— Declare the judgment enforceable;

— In the alternative, declare the judgment provisionally enforceable against presentation of a bank guarantee.

15 The Council contends that the Court of First Instance should:

— Declare the application inadmissible;

— Otherwise, dismiss it as unfounded;

— Order the applicant to pay the costs.

16 The Commission contends that the Court of First Instance should:

— Dismiss the application as unfounded;

— Order the applicant to pay the costs.

Admissibility

Pleas in law and arguments of the parties

17 The Council, without formally raising an objection of inadmissibility under Article 114(1) of the Rules of Procedure, maintains that the application is inadmissible because the Community cannot incur liability for the damage allegedly suffered by the applicant (Case 99/74 *Grands Moulins des Antilles* v *Commission* [1975] ECR 1531).

18 First, the Council maintains that the alleged damage was caused not by Regulation No 2340/90 but by Law No 57. Contrary to the applicant's assertion, the adoption of that Law was not a 'direct reaction' to the adoption of Regulation No 2340/90 but, as is clear from its preamble, a reaction to the 'arbitrary decisions' taken by 'certain governments'. According to the Council, it was United Nations Security Council Resolutions Nos 660 (1990) and 661 (1990) which in fact prompted the adoption of Law No 57. In those circumstances, the fact that the embargo ordered by the United Nations Security Council against Iraq was justified by Iraq's illegal conduct (the invasion of Kuwait) means that no objective connection can be established between the adoption of Regulation No 2340/90 and the adoption by Iraq, as a counter-measure, of Law No 57 and, therefore, there can be no causal link between the Community regulation and the damage alleged by the applicant.

19 Second, the Council questions whether the applicant's claims against the Iraqi authorities constitute 'assets' frozen by virtue of Article 7 of Law No 57 (see paragraph 8 above). In particular, the applicant has not shown that it was pursuant to Law No 57 that Rafidian Bank refused to execute the transfer orders given by the Iraqi Ministry. The Council states that the transfer orders in question were given by letter from the Iraqi Ministry dated 5 and 6 February 1990 — well before the adoption of Law No 57 in September 1990.

20 Third, the Council maintains that, even if the Iraqi authorities' refusal to honour their debts to the applicant was based on Law No 57, only that Law, in the absence of any national or Community measure prohibiting the transfer of funds to Germany from Iraq, gave rise to the damage alleged by the applicant. The applicant's situation is thus different from that of other German operators who suffered losses as a result of German national measures prohibiting, in implementation of Regulation No 2340/90, any commercial dealings with Iraq.

21 The Commission, for its part, considers that, in principle, there is no basis in the case-law of the Court of Justice on non-contractual liability for an action under Article 178 and the second paragraph of Article 215 of the Treaty to establish non-contractual liability on the part of the Community for a lawful act. However, it considers that there must a legal basis in the Treaty on which an individual may rely to establish liability on the part of the Community for a lawful act.

22 The applicant maintains that its application is admissible and that the considerations of fact and law put forward by the Council, in particular those relating to the absence of any causal link between the adoption of Regulation No 2340/90 and the impossibility of its recovering its debts from the Iraqi authorities, relate to the substance rather than to the admissibility of the application.

Findings of the Court

23 The Court observes that the applicant clearly describes in its application the nature and extent of the alleged damage and the reasons for which it considers that there is a causal link between that damage and the adoption of Regulation No 2340/90. The application thus contains sufficient information to satisfy the admissibility requirements laid down in that regard by Article 44(1)(c) of the Rules of Procedure and by the case-law: the Council's arguments concerning the existence and

nature of the alleged damage and the causal link go to the substance of the application and should therefore be examined in relation thereto. It follows that the application must be declared admissible (Case T-554/93 *Saint and Murray* v *Council and Commission* [1997] ECR II-563, paragraph 59, and Case T-38/96 *Guérin Automobiles* v *Commission* [1997] ECR II-1223, paragraph 42).

Substance

24 The applicant maintains that, in so far as the origin of Law No 57 is to be found in the adoption of Regulation No 2340/90, which imposed an embargo on trade with Iraq, the Community is required to compensate it for the damage sustained as a result of the Iraqi authorities' refusal to honour their debts to the applicant. It submits that the Community's liability for the damage thus sustained necessarily arises by virtue of the principle of Community liability for lawful acts, in that it suffered an impairment of its property rights equivalent to expropriation, or, in the alternative, by virtue of the principle of Community liability for unlawful acts, the illegality in question stemming in this case from the Community legislature's failure to provide, when adopting Regulation No 2340/90, for compensation for the damage caused by that regulation to the undertakings concerned.

The Community's liability for lawful acts

Arguments of the parties

The basis of the Community's liability for lawful acts

25 The applicant maintains, first, that in accordance with the first paragraph of Article 1 of the First Additional Protocol to the European Convention for the Protection

of Human Rights and Fundamental Freedoms (hereinafter 'the Human Rights Convention') and the general principles of international law relating to the obligation to compensate for damage to property, Paragraph 14(3) of the Grundgesestz (German Basic Law) provides that expropriation decided upon in the general interest can be effected only against payment of compensation. According to the applicant, the same rule also applies in cases of 'an impairment equivalent to expropriation' where, under German case-law, there is an obligation to pay compensation when lawful State acts, although not constituting formal expropriation measures, nevertheless have the incidental consequence of adversely affecting property rights.

26 Moreover, according to settled case-law of the European Court of Human Rights, debts receivable fall within the concept of property protected against impairment equivalent to expropriation under Article 1 of the First Protocol to the Human Rights Convention (judgment of the European Court of Human Rights of 9 December 1994 in the case of *Greek Refineries Stan and Stratis Andreadis* v *Greece*). The same approach is also taken in the case-law on public international law and in the laws of the Member States.

27 On the basis of those considerations, the applicant maintains that the fact that its existing and uncontested claims became irrecoverable as a result of the application of Law No 57, adopted in retaliation for the imposition of an embargo on trade with Iraq by Regulation No 2340/90, caused it a 'still subsisting injury' which must be redressed by the Community.

28 It maintains that its claim for compensation for lawful impairment of its property rights is justified by the consideration that its contribution to the political costs of the embargo applied by the Community should not be greater than that of the other Community taxpayers who must likewise bear those costs in accordance with the principle of equal treatment (Case 265/78 *Ferwerda* v *Produktschap voor Vee en Vlees* [1980] ECR 617, at 628).

29 In response to the defendants' argument that this case is concerned with a Community measure reflecting economic policy choices, with the result that the damage alleged by it does not exceed the limits of the risks inherent in economic activity in the field concerned and does not threaten its existence as an undertaking, the applicant states that the question whether the embargo imposed on trade with Iraq is a measure of economic policy or of security policy, threatening its existence, is irrelevant since this case is concerned not with future financial losses but with the impairment of pre-existing property rights. As to whether, by providing services in Iraq, it knowingly took the risk of being unable subsequently to recover its debts, it states that the contract which it concluded with the Iraqi authorities in 1975 predates by four years the establishment of the present Iraqi regime and by five years the war between Iraq and Iran.

30 The Council maintains, first, that the conditions for the Community to incur liability as the result of a lawful act must be stricter than those applicable to liability for an unlawful act.

31 It observes that, according to the relevant case-law, strict liability can be incurred only if an individual has to bear, in the public interest, a financial burden which would not normally fall upon him (Case 267/82 *Développement SA and Clemessy* v *Commission* [1986] ECR 1907) or if a particular group of undertakings specialising in certain products has to bear a disproportionate part of the burden deriving from the adoption by the Community of certain economic measures (Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677).

32 However, according to the Council, none of those conditions is satisfied in this case. In response to the applicant's statement that it is unacceptable for it to contribute more than other economic operators to the costs of the policy of embargoing trade with Iraq, merely because its claims remained outstanding when that policy was implemented, the Council replies that it is not for the Community to make reparation for 'mishaps' befalling operators engaging in transactions involving economic risks.

33 The Commission contends that the German legal concept of 'exceptional sacrifice' ('Sonderopfer'), on which the applicant bases its claim for compensation, presupposes that an individual has suffered particular damage and is not transposable, as such, into Community law. Moreover, it is doubtful whether the applicant can be regarded as forming part of a sufficiently well-defined group of undertakings which has made an 'exceptional sacrifice' of the kind referred to.

34 The Commission emphasises that the applicant's references to German case-law concern adverse effects on real estate or commercial property resulting from the adoption of State measures relating to building or reparcelling of land and are not therefore relevant to the present case. Similarly, the case-law of the European Human Rights Court on protection of property rights cited by the applicant (see paragraph 29 above) in fact concerns direct deprivation of ownership by acts of the public authorities and not the indirect consequences of lawful legal measures adopted by the Community, as in this case.

35 Moreover, as is clear from the relevant case-law, the Community's liability in respect of lawful acts can be incurred only if the damage alleged was not foreseeable or could not be avoided by a diligent economic operator. However, the foreseeability of Iraq's insolvency and/or its refusal to pay its debts was manifest in this case, having regard, first, to the surrounding circumstances in general and, second, to the particular situation prevailing in that country. According to the Commission, undertakings like the applicant, which had been unable to obtain guarantees from public bodies or insurance companies to cover risks associated with commercial transactions with countries considered as 'high-risk countries', merely accepted, in full knowledge, the increased risks involved.

36 Finally, the applicant has not mentioned any circumstance liable seriously to affect its functioning and threaten its survival as an undertaking (see the Opinion of Advocate General Lenz in Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau and Others* v *Commission* [1987] ECR 1084, at 1114).

The causal link

37 The applicant maintains that the alleged damage was caused by the adoption of Regulation No 2340/90 which imposed an embargo on trade with Iraq, since the Iraqi authorities' refusal to settle its claims was based on Law No 57, a measure adopted in response to the adoption of that regulation. Contrary to the Council's contention, Iraq's adoption of Law No 57 is not a 'remote' consequence within the meaning of the case-law (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères* v *Council* [1979] ECR 3091) but a typical and foreseeable consequence of an act applying an embargo.

38 In that regard, the applicant maintains that when Regulation No 2340/90 was adopted both the Commission and the Council in fact took account of the costs and other consequences of the possibility of Iraq's suspending payment of its outstanding debts to Community undertakings. In support of that assertion, it cites as witnesses the former President of the Commission, Mr Delors, and the former President of the Council, Mr De Michelis, and asks the Court of First Instance to order the Council and the Commission to produce all the documents leading to the adoption of Regulation No 2340/90 (Case T-194/94 *Carvel and Guardian Newspapers* v *Council* [1995] ECR II-2765).

39 According to the applicant, the defendants' argument that the alleged damage is attributable not to the adoption of Regulation No 2340/90 but solely to the fact that, before the adoption of that regulation and even before the invasion of Kuwait on 2 August 1990, Iraq was not in a position to pay its debts, is belied by the fact that, in April and May 1990, the Iraqi authorities had already paid it a sum of about DM 200 000 for services rendered. Similarly, the Iraqi authorities' delay in settling various invoices in foreign currency can be accounted for only by the bureaucratic difficulties encountered by the Iraqi administration, not by Iraq's alleged insolvency.

40 The applicant rejects the Council's argument that the impossibility of recovering its debts was attributable not to Regulation No 2340/90 but to a more remote cause, namely the invasion of Kuwait by Iraq, in violation of international law. The fact that the Community embargo on trade with Iraq was justified by that State's previous unlawful conduct does not mean that the Community is under no obligation to compensate third parties for an impairment of their property rights equivalent to expropriation. Nor is the existence of the direct link claimed in this case undermined by that fact that the damage suffered is attributable to an unlawful cause, namely Law No 57, which was adopted as a counter-measure to a previous lawful measure, namely the adoption of Regulation No 2340/90 (Case 145/83 *Adams* v *Commission* [1985] ECR 3539).

41 As to the Council's argument that, ultimately, it was the resolutions adopted by the United Nations Security Council that gave rise to the damage, the applicant replies that United Nations Security Council resolutions have no direct effect in the legal systems of the Member States.

42 With regard to the question raised by the defendants as to whether, first, the applicant's claims actually constitute an 'asset' within the meaning of Law No 57 and, second, whether that Law is still in force, the applicant maintains that all that matters is the fact that the Iraqi authorities continue to refuse to honour their debts.

43 Finally, the applicant maintains that, contrary to the Council's contention, the fact that Regulation No 2340/90 was concerned solely with imports and exports of goods and not the provision of services has no bearing on any appraisal as to whether or not there was a causal link since it was because of the adoption of that regulation that the Iraqi authorities refused to settle their debts.

44 The Council contends that even if the applicant's claims against Iraq were to be regarded as having become irrecoverable and if, therefore, it had suffered damage, there was no link, or at least no 'sufficiently direct' link, between that damage and the adoption of Regulation No 2340/90.

45 According to the Council, Iraq's refusal to settle the applicant's claims is due not to the application of Law No 57, adopted as a counter-measure to Regulation No 2340/90, but to the financial difficulties experienced by Iraq as a result of its policy of aggression towards neighbouring States. Moreover, since, at the time when Law No 57 was adopted, the Iraqi authorities had not yet transferred the funds into a bank account in the name of the applicant, no 'property' or 'asset' belonging to the applicant had been frozen within the strict sense of the provisions of that Law.

46 Even if it were assumed that the damage invoked by the applicant was to be regarded as caused by the application of Law No 57, the Council considers that, contrary to the applicant's assertion, it was not Regulation No 2340/90 that prompted the adoption of that Law but United Nations Security Council Resolutions Nos 660 (1990) and 661 (1990), which ordered an embargo to be imposed on trade with Iraq which the Community was legally bound to apply. It follows that the adoption of Law No 57 cannot be regarded as a 'sufficiently direct' consequence of the adoption of Regulation No 2340/90 within the meaning of the relevant case-law.

47 Moreover, the alleged causal link is non-existent since, placed in its historical context, Law No 57 cannot be regarded as a 'reaction' by Iraq to the embargo ordered by the United Nations Security Council and put into effect by the Community by means of Regulation No 2340/90, because the measures against Iraq were adopted following earlier breaches of international law by that country.

48 Finally, the Council maintains that, since the aim of Regulation No 2340/90 was to prevent imports and exports of goods and not to prohibit Community economic operators from receiving payment of debts already owed to them by the Iraqi authorities, there is no sufficiently direct causal link between the adoption of that regulation and the alleged damage.

49 The Commission contends that the damage alleged by the applicant derives solely from Law No 57 and not from the adoption of Regulation No 2340/90: the latter was merely used by Iraq as a pretext for suspending payment of its debts as a result of the difficulties it was experiencing and the adverse financial situation in which it found itself as a result of its engaging in warfare in the region and its armaments policy.

50 Furthermore, it is clear from Articles 5 and 7 of Law No 57 that Iraq has not definitively refused to pay its debts to the applicant, which explains why the applicant suggested assigning its claims to the defendants in return for compensation: for that reason too, therefore, there is no direct link between the damage alleged and Regulation No 2340/90. In any event, even if the existence of an indirect causal link were sufficient to give rise to non-contractual liability on the part of the Community, the fact remains that such a link is irrelevant in circumstances such as those of this case where it relates to lawful conduct (the adoption by the Council of Regulation No 2340/90) which subsequently gave rise to unlawful conduct by a third party (the adoption by Iraq of Law No 57).

51 The Commission adds that, by letter to the President of the United Nations Security Council of 28 February 1991, Iraq formally acknowledged the legality of United Nations Security Council Resolution No 660 (1990) and of the other resolutions which followed in the wake of Law No 57, and that that Law was finally repealed on 3 March 1991, with the result that, as from that date, the applicant was in a position to call on the Iraqi authorities to settle its claims.

52 As to the request that witness evidence be taken from the former Presidents of the Commission and the Council, the Commission states that it would be pointless to do so since the evidence required of the applicant cannot consist of statements by those persons.

The damage

53 The applicant claims that it suffered a 'still subsisting injury' within the meaning of the Community case-law on non-contractual liability because its debts against Iraq became irrecoverable following the adoption of Regulation No 2340/90. The fact that it suggested assigning its claims to the defendants in return for the compensation sought in no way detracts from the existence of the damage but is intended merely to prevent any unjust enrichment on its part. If the defendants seek to challenge both the existence of its claims against Iraq and the impossibility of securing payment of them, the applicant suggests that evidence be taken from its commercial manager, Hartwig von Bredow, and its representative in Baghdad, Wolfgang Johner. If it did not explain why the Iraqi authorities failed to settle its claims, that was because it had not received any explanation itself, particularly since the Community embargo on the provision of services to Iraq (Council Regulation (EEC) No 3155/90 of 29 October 1990 extending and amending Regulation No 2340/90, OJ 1990 L 304, p. 1, hereinafter 'Regulation No 3155/90') prohibited it from giving any instructions to legal representatives in Iraq.

54 The applicant estimates its loss as DM 2 279 859.69, corresponding to the debts which the Iraqi Ministry acknowledged in its letters of 5 and 6 February 1990 and ordered to be paid, although no payment has yet been received.

55 It maintains that, according to the case-law of the European Court of Human Rights, the amount of its compensation should reflect a just balance between the general interest of the Community and the need to safeguard the fundamental rights of the individual. That does not, in its view, mean, however, that the compensation cannot cover the full amount of the debts which have been rendered irrecoverable by the adoption of a State measure, including all interest thereon since they arose (*Greek Refineries Stan and Stratis Andreadis*, cited above). German law allows compensation to be obtained for all financial losses caused by an 'impairment of rights equivalent to expropriation'. The same applies in the case-law of the European Court of Human Rights. The Community should therefore be ordered to pay it, against assignment of its claims against Iraq, compensation corresponding to the amount of those claims, together with accrued interest. However, the applicant does not exclude the possibility that the compensation claimed might be reduced to reflect the circumstances of this case.

56 The Council maintains that the measures adopted by Iraq, in particular Law No 57, merely had the effect of delaying payment of the applicant's claims, so that, from the legal standpoint, the applicant has not suffered 'a still subsisting injury' within the meaning of the relevant case-law, a position further confirmed by the fact that the applicant is prepared to assign its claims to the Community institutions in return for compensation for the damage allegedly suffered.

57 Moreover, it is clear from the letter sent to it by the applicant on 4 August 1994 that the applicant registered its claims with the competent administrative authorities in Germany, so as to be able to assert them before the Claims Commission set up by the United Nations Organisation (hereinafter 'the UNO') with a view to settling the question of financial losses suffered by operators as a result of the imposition of an embargo on trade with Iraq, which shows that the question whether the applicant has in fact suffered damage will ultimately depend on whether the UNO lifts the embargo on trade with Iraq.

58 The Commission maintains that the precise amount of the damage suffered has not yet been established since, from the legal point of view, the applicant's claims have not ceased to exist, and it rejects the applicant's proposal to assign its claims in return for the award of compensation by the Community.

Findings of the Court

59 At the outset, the Court would point out that if the Community is to incur non-contractual liability as the result of a lawful or unlawful act, it is necessary in any event to prove that the alleged damage is real and the existence of a causal link between that act and the alleged damage (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80, Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44, Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30, Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 54). Secondly, with respect to the Community's liability in respect of a lawful act, as in this case, the Court notes that it is clear from the relevant case-law that, in the event of such a principle being recognised as forming part of Community law, a precondition for such liability would in any event be the existence of 'unusual' and 'special' damage (Joined Cases 9/71 and 11/71 *Compagnie d'Approvisionnement and Grands Moulins de Paris* v *Commission* [1972] ECR 391, paragraphs 45 and 46, Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057, paragraph 28, *Développement SA and Clemessy* v *Commission*, cited above, paragraph 33, and *De Boer Buizen* v *Council and Commission*, cited above, paragraphs 16 and 17). It is therefore necessary to consider whether the alleged damage exists, in the sense that it is 'actual and certain', whether that damage is a direct result of the Council's adoption of Regulation No 2340/90, and whether the damage alleged is such as to render the Community liable in respect of a lawful act within the meaning of the abovementioned case-law.

The existence of the alleged damage

60 As to the question whether the applicant has in fact suffered 'actual and certain' damage, within the meaning of the relevant case-law (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council* [1982] ECR 85, paragraph 9, Case 51/81 *De Franceschi* v *Council and Commission* [1982] ECR 117, paragraph 9, Case T-108/94 *Candiotte* v *Council* [1996] ECR II-87, paragraph 54, Case T-99/95 *Stott* v *Commission* [1996] ECR II-2227, paragraph 72, and *Oleifici Italiani* v *Commission*, cited above, paragraph 74), that is to say whether its claims against Iraq have become definitively irrecoverable, the Court would point out, first of all, that, according to established case-law, it is incumbent upon the applicant to produce to the Community judicature the evidence to establish the fact of the loss which he claims to have suffered (Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 97).

61 It must be stated that in this case, whilst it is common ground that the applicant's claims have not yet been paid, the fact remains that the evidence produced by the applicant is not such as to show, to the requisite legal standard, that it has been confronted with a definitive refusal by the Iraqi authorities to settle their debts, prompted by the adoption of Regulation No 2340/90. The applicant has produced no evidence to show that it has actually contacted, or at least attempted to contact, either the appropriate Iraqi State authorities or Rafidian Bank in order to clarify why the orders for payment of its claims given to Rafidian Bank by letters of 5 and 6 February 1990 from the Iraqi Ministry have not yet been executed.

62 In that connection, the Court, by way of measure of organisation of procedure, asked the applicant to produce any correspondence between it and the Iraqi authorities concerning the payment of its claims. In its written answers to the questions put to it by the Court, the applicant admitted that it had not exchanged any correspondence with the Iraqi authorities, emphasising that it was not in its interest to 'cast any doubt, by further correspondence, on the binding nature of the orders given on 5 and 6 February by the Ministry of Housing and Reconstruc-

tion to Rafidian Bank' and that it 'would, moreover, have been unacceptable, and therefore counter-productive, to seek to expedite, by setting out its views in writing, the internal execution of orders from the Ministry'. However, the fact that the applicant did not consider it useful or appropriate to seek to 'expedite the internal execution of orders from the Iraqi Ministry' is not sufficient in itself to support its assertion that the Iraqi authorities have definitively refused to pay its claims. Consequently, the possibility cannot be ruled out that the non-payment of its claims may be due to a mere delay of an administrative nature, a temporary refusal to pay or temporary or permanent insolvency on the part of Iraq.

63 That conclusion is not put in doubt by the letter of 10 October 1990 sent by the Iraqi Minister to the applicant and produced by the latter at the hearing on 19 June 1997, from which it appears, according to the applicant, that the Iraqi Minister gave it to be understood 'in diplomatic language' that its claims would not be paid for so long as the Community embargo on trade with Iraq remained in force. That letter, sent to the applicant 'when the unification of the Federal Republic of Germany and the German Democratic Republic was declared', makes no reference to the contractual relations between the applicant and the Iraqi authorities under the 1975 contract nor, *a fortiori*, to the fate of the applicant's claims, but confines itself to statements of a general nature concerning the contribution which German undertakings might be able to make to 'the development of productive bilateral cooperation' between Germany and Iraq, and the damage caused to such relations by the embargo and the 'threats hanging over Iraq'.

64 Moreover, whilst the applicant refers, in its written answer to the abovementioned question from the Court, to certain confidential reports which the assistant manager of its branch in Iraq had drawn up, showing that the Iraqi authorities are still refusing to pay its claims because of the maintenance of the Community embargo, it must be pointed out that it did not produce copies of those reports to the Court.

65 In any event, even if it is assumed, as claimed by the applicant in its application, that Iraq's refusal to pay its debts derives from the adoption of Law No 57, which

froze all assets of undertakings established in States whose governments had adopted 'arbitrary decisions' against it, such as Regulation No 2340/90, that Law, as the defendants have made clear in their pleadings, was finally repealed on 3 March 1991. It follows that, at least from that date, there should in principle have been no legal obstacles preventing the Iraqi authorities from paying the applicant's claims. The Court, by way of measures of organisation of procedure, asked the applicant to state whether it had taken the necessary steps following the repeal of Law No 57 to secure payment of its claims and the reasons for which they remained unpaid notwithstanding that repeal. In its written answer, the applicant stated, as moreover it had done for the first time in its reply, that Law No 57 cannot be regarded as the cause of Iraq's refusal to pay but must be seen as evidence of that refusal in that, as debtor, Iraq needed no legal basis for failing to discharge its contractual obligations. However, even if it were assumed that it was not, ultimately, because of the adoption of Law No 57 that Iraq refused to settle the applicant's claims — which in any event runs counter to the line of argument developed in its application — the fact remains that its assertion is unsupported since, as just pointed out, the applicant has still not established that the refusal to pay was final and it has not set out the reasons for the persistence of that refusal despite the repeal of Law No 57.

66 Moreover, as is clear from the documents before the Court, the applicant did not even attempt to avail itself of the contractual remedies included for that purpose in the contract which it had signed with the Iraqi Ministry on 30 January 1975 in order to obtain from the Iraqi authorities a definitive statement of their position concerning the non-payment of its claims. According to Article X of that contract (see paragraph 2 above), in the event of differences arising as to the interpretation of the contract or non-performance of contractual obligations, the contracting parties were to endeavour to find an acceptable solution by conciliation, failing which they were to refer the matter to the Planning Board, and even then they would not forfeit their right to bring the same dispute before the competent Iraqi courts (Article X(1) and (2) of the contract). As the applicant explained at the hearing on 19 June 1997, the Community embargo on the provision of services in Iraq and Kuwait introduced by Regulation No 3155/90 prevented it from instructing Iraqi lawyers or legal representatives. However, whilst the possibility cannot be excluded that, in view of the domestic situation in Iraq after the end of the Gulf War, recourse by foreign undertakings to Iraqi lawyers to resolve disputes between

them and the Iraqi authorities might be difficult, the fact remains that, contrary to the applicant's assertion, that difficulty did not derive from Regulation No 3155/90 since the latter merely prohibited the provision of services, in or from the Community, to natural persons in Iraq or to undertakings registered in Iraq with the object or effect of promoting the economy of Iraq, but not the provision of services in Iraq to third parties by natural or legal persons established in that country (Article 1 of the regulation).

67 Finally, the fact that the applicant has offered to assign its claims against Iraq to the defendants in return for payment of the amount at issue rules out the conclusion, in the absence of any evidence to the contrary, that those claims are to be regarded as having become definitively irrecoverable.

68 It is clear from the foregoing that the applicant has been unable to demonstrate to the requisite legal standard that it has suffered actual and certain damage within the meaning of the case-law cited above (see paragraph 60).

69 However, even if it were assumed that the damage alleged by the applicant could be regarded as 'actual and certain', the Community's liability for a lawful act could be incurred only if there was a direct causal link between Regulation No 2340/90 and that damage. In view of the particular features of this case, the Court considers it appropriate to examine that possibility and to ascertain whether in this case such a causal link exists.

The causal link

70 The applicant's argument is that, in so far as its claims have become irrecoverable through Iraq's adoption of Law No 57 as a foreseeable and direct counter-measure

to the adoption of Regulation No 2340/90 imposing a trade embargo on Iraq, the damage which it allegedly suffered must ultimately be attributed to the Community. It is therefore necessary to consider first of all whether the applicant's claims against Iraq have become irrecoverable as a result of the adoption of Law No 57 and, if so, whether the adoption of that Law and the Iraqi authorities' subsequent refusal to pay those claims derive directly from the adoption of Regulation No 2340/90 (see *International Procurement Services* v *Commission*, cited above, paragraph 55).

71 In that regard, the Court notes, first, that it is clear from the preamble to Law No 57 that its enactment was justified by the adoption by 'certain governments' of 'arbitrary decisions' against Iraq. However, it must be observed that Law No 57 contains no reference to the European Community or to Regulation No 2340/90. Even if it were assumed that Law No 57 referred by implication to the governments of all the Member States, it is undeniable that it was not those governments but the Community which adopted Regulation No 2340/90 prohibiting trade between the Community and Iraq.

72 Even if it were appropriate to see the adoption by the Council of Regulation No 2340/90 as an 'arbitrary decision' taken by 'certain governments' within the meaning of Law No 57, the Court considers that the applicant, which bears the burden of proof (Case 40/75 *Produits Bertrand* v *Commission* [1976] ECR 1 and Case T-485/93 *Dreyfus* v *Commission* [1996] ECR II-1101, paragraph 69), has not established to the requisite legal standard that the adoption of that Law constituted, as a retaliatory measure, an objectively foreseeable consequence, in the normal course of events, of the adoption of that regulation. Moreover, even if such a direct causal link existed between the damage allegedly suffered and the adoption of Law No 57, it is clear from the documents before the Court that that Law, which entered into force on 6 August 1990, was finally repealed on 3 March 1991. It follows that, since that date at least, Law No 57 cannot be regarded as the cause of the refusal to pay the applicant's claims.

73 In any event, even if it were appropriate to consider that Law No 57 was a foreseeable consequence of the adoption of Regulation No 2340/90 and/or that, despite the repeal of that Law, it was still by way of retaliation for the maintenance of the Community embargo that the Iraqi authorities were refusing to pay the applicant's claims, the Court considers that the alleged damage cannot, in the final analysis, be attributed to Regulation No 2340/90 but must, as the Council has in fact contended, be attributed to United Nations Security Council Resolution No 661 (1990) which imposed the embargo on trade with Iraq.

74 In that regard, the Court observes that, under Article 25 of the United Nations Charter, only the 'Members of the United Nations' are required to accept and carry out the decisions of the Security Council of that organisation. Whilst it is true that the Member States of the UNO were required, in that capacity, to take all necessary measures to give effect to the trade embargo against Iraq imposed by Resolution No 661 (1990), the fact remains that those of them which were also Member States of the Community were able to take action to that effect only under the Treaty, since any measure of common commercial policy, such as the imposition of a trade embargo, falls, by virtue of Article 113 of the Treaty, within the exclusive competence of the Community. It was on the basis of those considerations that Regulation No 2340/90 was adopted, its preamble stating that 'the Community and its Member States have agreed to have recourse to a Community instrument in order to ensure uniform implementation, throughout the Community, of the measures concerning trade with Iraq and Kuwait decided upon by the United Nations Security Council'. The Court therefore considers that, in the circumstances of this case, the alleged damage can be attributed not to the adoption of Regulation No 2340/90 but only to United Nations Security Council Resolution No 661 (1990) which imposed the embargo on trade with Iraq. It follows from the foregoing that the applicant has not demonstrated the existence of a direct causal link between the alleged damage and the adoption of Regulation No 2340/90.

75 In view of the particular circumstances of this case, the Court considers that it is also appropriate to examine whether, in the event that the conditions relating to the existence of damage and of a direct causal link have been fulfilled, the damage could be classified as 'special' and 'unusual' within the meaning of the case-law referred to above (paragraph 59) concerning the Community's liability in respect of a lawful act.

The nature of the damage suffered

76 The Court observes that the Court of Justice, in its judgment in *Compagnie d'Approvisionnement and Grands Moulins de Paris*, cited above, rejected a claim for compensation for 'unusual and special' damage based by the applicants on Community liability in respect of a lawful act owing to the 'unequal discharge of public burdens', on the ground that 'any liability for a valid legislative measure is inconceivable in a situation like that in the present case since the measures adopted by the Commission were only intended to alleviate, in the general economic interest, the consequences which resulted in particular for all French importers from the national decision to devalue the franc' (paragraphs 45 and 46 of the judgment).

77 Similarly, in *Biovilac* v *EEC*, cited above, the Court of Justice held that the condition whereby the Community can incur liability in respect of an unlawful legislative act only where the damage alleged exceeds the limits of the economic risks inherent in operating in the sector concerned 'would have to be applied *a fortiori* if the concept of liability without fault were accepted in Community law' (paragraph 28 of the judgment). In that case, the applicant based its claim for compensation for an unlawful act on the German legal concept of 'exceptional sacrifice' (Sonderopfer) and the French legal concept of 'unequal discharge of public burdens', both of which are also relied on by the applicant in these proceedings.

78 In its judgment in *Développement SA and Clemessy* v *Commission*, cited above, the Court of Justice also rejected a claim for compensation based on strict liability, declaring that that principle, as described by the applicants, implied that 'an individual has to bear, in the public interest, a financial burden which would not normally fall upon him', which was not, however, the case (paragraph 33 of the judgment).

79 Finally, in its judgment in *De Boer Buizen* v *Council and Commission*, cited above, the Court of Justice, having held that the scheme established by the Community institutions to implement an arrangement between the Community and the United States of America for trade in steel pipes and tubes did not give rise to any discrimination against Community producers of those products as compared with distributors and that, therefore, the conditions for Community liability for an unlawful act to be incurred were not met, added, however, that the absence of any such discrimination between Community producers and distributors of the products at issue did not mean that the institutions would not bear 'a degree of responsibility' if it were found that certain undertakings, 'as a category, had to bear a disproportionate part of the burden' attributable to the implementation of that trade arrangement. According to the Court of Justice, in such circumstances 'it would be for the Community institutions to provide a remedy' (paragraphs 16 and 17 of the judgment).

80 It is clear from the abovementioned case-law of the Court of Justice that, in the event of the principle of Community liability for a lawful act being recognised in Community law, such liability can be incurred only if the damage alleged, if deemed to constitute a 'still subsisting injury', affects a particular circle of economic operators in a disproportionate manner by comparison with others (special damage) and exceeds the limits of the economic risks inherent in operating in the sector concerned (unusual damage), without the legislative measure that gave rise to the alleged damage being justified by a general economic interest (*De Boer Buizen* v *Council and Commission*, *Compagnie d'Approvisionnement and Grands Moulins de Paris*, and *Biovilac* v *EEC*, all cited above).

81 As regards the special nature of the alleged damage, in that it affects a particular category of economic operators in a disproportionate manner by comparison with others, the Court notes, first, that the adoption of Law No 57, to which, according to the applicant's reasoning, must be assimilated any other retaliatory measure by the Iraqi authorities having the same effects, was designed to freeze the 'assets' held in Iraq by undertakings established in the Community, together with the 'income' produced by those 'assets'. It follows that it was not only the applicant's claims that were affected but also those of all other Community undertakings

which, when the embargo on trade with Iraq was imposed by Regulation No 2340/90, had not yet been paid. As the applicant stated at the hearing, the claims of Community undertakings against Iraq which, following the imposition of the Community embargo on trade with that country, became irrecoverable and had to be covered by State guarantees amounted to US $18 000 million.

82 In those circumstances, the applicant cannot be regarded as forming part of a category of economic operators whose property interests were affected in a manner which set them apart from all other economic operators whose claims became irrecoverable as a result of imposition of the Community embargo. It cannot therefore claim to have suffered special damage or to have made an exceptional sacrifice. Moreover, the fact that it was not possible to obtain cover for its claims by State guarantees because they derived from the performance of a contract concluded before the implementation in Germany of a system of guarantees against commercial risks in countries like Iraq, as it explained in its written answers to questions from the Court and at the hearing, is not such as to distinguish it from the undertakings which did benefit from such guarantees. The applicant has been unable to establish that it was the only undertaking or that it belonged to a small group of economic operators for which the benefit of insurance cover of that kind was unavailable.

83 Secondly, as far as the unusual nature of the alleged damage is concerned, in that it exceeds the economic risks inherent in doing business in the sector concerned, the Court considers that in this case those limits have not been exceeded. It is common ground that Iraq, by reason of its involvement in a war with Iran long before its invasion of Kuwait on 2 August 1990, was already regarded, as the defendants have contended without being contradicted by the applicant, as a 'high-risk country'. In those circumstances, the economic and commercial risks deriving from the possible involvement of Iraq in renewed warfare with neighbouring countries and the suspension of payment of its debts for reasons associated with its foreign policy constituted foreseeable risks inherent in any provision of services in Iraq. The fact that Iraq succeeded, as the applicant asserts, in paying its debts, albeit after a considerable delay, could not mean that the abovementioned risks had disappeared.

84 That conclusion is corroborated, moreover, by a letter of 28 November 1995 sent by the Federal Ministry of Finance to the Commission, from which it appears that the system of guarantees established in Germany between 1980 and 1990 to cover debts in respect of German exports to Iraq was suspended on several occasions specifically because of the deteriorating political situation in Iraq.

85 It follows that the risks involved in the applicant's providing services in Iraq formed part of the risks inherent in operating in the sector concerned.

86 Finally, and in any event, it must be observed, first, that Regulation No 2340/90, even assuming, as the applicant asserts, that it is at the root of the alleged damage, constitutes, as just indicated (see paragraph 74 above), implementation in the Community of the obligation incumbent on the Member States as members of the UNO to give effect, by means of a Community measure, to United Nations Security Council Resolution No 661 (1990), which imposed a trade embargo against Iraq. Secondly, as is apparent in particular from Resolution No 661 (1990), the trade embargo against Iraq was decided upon in order to ensure the 'maintenance of international peace and security' and on the basis of the 'inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter [of the United Nations].'

87 As the Court of Justice held in Case C-84/95 *Bosphorus* v *Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953, whilst it is true that rules intended, by the imposition of a trade embargo against a non-member country, to maintain international peace and security have, by definition, effects which affect the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions, the fact nevertheless remains that the importance of the aims pursued by such rules is such as to justify negative consequences, even of a substantial nature, for some operators.

88 Consequently, having regard to the objective of general interest so fundamental for the international community of bringing to an end the invasion and occupation of Kuwait by Iraq and maintaining international peace and security in the region, the damage alleged by the applicant, even if it were capable of being classified as substantial, within the meaning of the *Bosphorus* judgment, cited above, cannot render the Community liable in this case (see also *Compagnie d'Approvisionnement and Grands Moulins de Paris*, cited above, paragraph 46, and the Opinion of Advocate General Mayras in that case, at pp. 417, 425 and 426).

89 It follows from all the foregoing that the applicant's claim for compensation, based on the principle of Community liability in respect of a lawful act, is unfounded and must therefore be rejected.

The alternative claim for compensation for damage allegedly suffered as a result of an unlawful act

Arguments of the parties

The illegality of Regulation No 2340/90

90 The applicant seeks, in the alternative, to establish the Community's liability in respect of an unlawful act in the event of the Court of First Instance considering that it is entitled not to compensation corresponding to the current value of its claims but rather to determination by the Community legislature of compensation at a fixed rate for the damage suffered. It maintains in that regard that since, when adopting Regulation No 2340/90, the Community legislature did not provide for machinery to compensate economic operators whose claims against Iraq were to become irrecoverable as a result of the imposition of an embargo on trade with that country, the condition to be met for the Community to incur liability, namely the existence of an unlawful act, is fulfilled in this case, such illegality consisting precisely in breach of the obligation to pay, or provide for, compensation for persons whose property rights have, without fault, been adversely affected, which

constitutes a general principle of law. According to the applicant, the Council and the Commission in this case failed in their obligation to exercise the discretion available to them in order to provide for compensation of 100%, 50% or some other percentage, thereby committing an error of appraisal of the kind found by the Court of First Instance in its judgment in *Carvel and Guardian Newspapers*, cited above.

91 The Council considers that the alleged unlawful omission on the part of the Community legislature in failing, when adopting Regulation No 2340/90, to provide for machinery to compensate economic operators affected by the embargo against Iraq raises, essentially, the same substantive issue as the applicant's claim for compensation in respect of a lawful impairment of its property rights equivalent to expropriation. In both cases the issue is whether the infringement of the right to property relied upon by the applicant constitutes a breach of a superior rule of law causing the Community to incur liability under the second paragraph of Article 215 of the Treaty. In the Council's view, that question should be answered in the negative.

92 According to the Council, since Regulation No 2340/90 is a legislative measure of an economic nature, the Community can incur liability only if there is a sufficiently serious breach of a superior rule of law for the protection of individuals, and there has been no such breach in this case. It states that, according to the case-law, exercise of the right to property may be subjected to restrictions provided that they correspond to Community objectives and do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237). However, even if the applicant's claims against the Iraqi authorities had become definitively irrecoverable, the damage suffered by it would not constitute a disproportionate and serious impairment of the substance of its right to property.

93 Moreover, according to the Council, in the case of damage of an economic nature, the Community can incur non-contractual liability only if, first, the institution concerned has, without invoking a higher public economic interest, failed to take

any account of the specific situation of a clearly defined group of economic operators (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061), and, second, the alleged damage exceeds the limits of the economic risks inherent in operating in the economic sector concerned. In this case, however, the applicant's commercial interests were impaired in the same way as those of any other economic operator with claims against Iraq or a company established there. Moreover, it is common ground that the financial situation of Iraq at the time was such that the non-recovery of debts deriving from transactions with that country formed part of the risks inherent in the business activities concerned. Finally, in the sphere of Community economic policy, individuals are required, within reasonable limits, to accept the harmful consequences which a legislative measure may have on their economic interests, without any right to compensation (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 6, and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305).

94 The Commission submits that the merits of the applicant's arguments based on the alleged unlawfulness of Regulation No 2340/90 depend on the existence of the right to compensation which it asserts in its main claim, so that the non-existence of any such right necessarily means that its alternative claim for damages must be rejected.

The causal link and the damage suffered

95 The applicant, the Council and the Commission put forward the same pleas and arguments concerning the alleged damage and the existence of a causal link between such damage and Regulation No 2340/90 as those put forward in the main claim for compensation in respect of a lawful act (see paragraphs 42 to 57 and 58 to 63 above).

Findings of the Court

96 The Court notes, as a preliminary point, that, as the applicant emphasised in its reply and at the hearing on 19 June 1997, its alternative claim for compensation is made only in the event of the Court recognising in favour of economic operators like the applicant, whose claims have become irrecoverable as a result of the imposition of a trade embargo against Iraq, only a right to compensation at a fixed rate and not a right to compensation corresponding to the current value of their claims (see paragraph 90 above), as sought in its principal claim for compensation in respect of a lawful act.

97 For the purposes of its alternative claim, the applicant maintains, in particular, that the conditions for the Community to incur liability on account of the unlawful nature of Regulation No 2340/90 are met in this case in that the Community legislature failed, when adopting that regulation, to exercise the discretion available to it in order to provide for compensation for the damage which economic operators would suffer as a result of the imposition of an embargo on trade with Iraq.

98 The Court considers that this alternative claim for compensation, formulated by the applicant in the terms set out above, presupposes, as the defendants have moreover pointed out, that it is entitled to compensation, as it asserts in its main claim for compensation in respect of a lawful act.

99 However, the examination of the main claim has clearly disclosed that the applicant cannot be recognised as being entitled to any compensation since it has not established, in particular, that it suffered actual and certain damage. In those

circumstances, whatever the relevance of the distinction drawn by the applicant between a possible right to compensation corresponding to the current value of its claims and a possible right to compensation at a fixed rate, since both claims seek compensation for the same damage, its alternative claim must also be rejected. In those circumstances, in the absence of any right to compensation, the applicant likewise cannot claim that the Community legislature failed to exercise its discretion in order to adopt measures to compensate undertakings in the same situation as the applicant. As to the judgment in *Carvel and Guardian Newspapers*, cited above (paragraph 78) and referred to by the applicant, the Court considers it irrelevant since, in that case, in contrast to this one, a provision of Community secondary legislation in fact called on the Council to exercise its discretion as to whether or not it should accede to requests in areas within its competence regarding access to its documents.

100 Accordingly, the applicant's alternative claim for compensation for damage suffered in respect of an unlawful act must also be rejected.

101 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

102 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 defendants have applied for costs and the applicant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Bellamy Kalogeropoulos Tiili

Delivered in open court in Luxembourg on 28 April 1998.

H. Jung A. Kalogeropoulos

Registrar President