JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
24 October 2000 *

In Case T-178/98,

Fresh Marine Company AS, established in Trondheim (Norway), represented by J.-F. Bellis and B. Servais, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 11 rue Goethe,

applicant,

v

Commission of the European Communities, represented by V. Kreuschitz, Legal Adviser, assisted by N. Khan, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Centre Wagner, Kirchberg,

defendant,

APPLICATION for compensation to make good the damage allegedly suffered as a consequence of the adoption of Commission Regulation (EC) No 2529/97 of 16 December 1997 imposing provisional anti-dumping and countervailing duties

* Language of the case: English.

on certain imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 346, p. 63),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: K. Lenaerts, President, J. Azizi, R.M. Moura Ramos, M. Jaeger and P. Mengozzi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2000

gives the following

Judgment

Legal framework and facts

1 The applicant is a company established in 1992 and incorporated under Norwegian law, which specialises in the sale of farmed Atlantic salmon.

2 Following complaints lodged in July 1996 by the Scottish Salmon Growers' Association Ltd and the Shetland Salmon Farmers' Association on behalf of their members, the Commission announced on 31 August 1996, by two separate notices published in the *Official Journal of the European Communities*, the initiation of an anti-dumping and an anti-subsidy proceeding concerning imports of farmed Atlantic salmon originating in Norway (OJ 1996 C 253, pp. 18 and 20).

3 The Commission sought and verified all the information deemed necessary for the purpose of its definitive findings. Following that investigation it found that it was necessary to impose definitive anti-dumping and countervailing measures in order to eliminate the harmful effects of the dumped imports and the subsidies complained of.

4 On 17 June 1997, the applicant, having been informed of the Commission's findings, offered an undertaking pursuant to Article 8 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1) and Article 10 of Council Regulation (EC) No 3284/94 of 22 December 1994 on protection against subsidised imports from countries not members of the European Community (OJ 1994 L 349, p. 22). Among other things, it undertook that the average price, per quarter, for its exports of farmed Atlantic salmon gutted head-on would not be lower than ECU 3.25/kg and that the price of each individual transaction would not be less than 85% of the abovementioned average minimum price, save in exceptional cases and not exceeding 2% of the total quantity of sales to the Community during the relevant quarter. Furthermore, it undertook to notify the Commission each quarter, in accordance with the requisite technical specifications, of any sales of farmed Atlantic salmon to its unrelated customers in the Community.

5 By Decision 97/634/EC of 26 September 1997 accepting undertakings offered in connection with the anti-dumping and anti-subsidy proceedings concerning

imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 81), the Commission accepted the undertakings offered by a number of Norwegian exporters of farmed Atlantic salmon, including that of the applicant. The anti-dumping and anti-subsidy proceedings were terminated with regard to those exporters. The applicant's undertaking entered into force on 1 July 1997.

6 On the same day, the Council adopted Regulation (EC) No 1890/97 of 26 September 1997 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 1) and Council Regulation (EC) No 1891/97 of 26 September 1997 imposing a definitive countervailing duty on imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 19). Pursuant to Article 1(2) of each of those two regulations, imports into the Community of farmed Atlantic salmon originating in Norway produced by the applicant were exempt from those duties on account of the acceptance of its undertaking by the Commission.

7 On 22 October 1997, the applicant sent the Commission a report on all its exports of farmed Atlantic salmon to the Community during the third quarter of 1997 ('the October 1997 report').

8 On 16 December 1997, the Commission adopted, on the basis of Council Regulation No 384/96 and Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1), Regulation (EC) No 2529/97 of 16 December 1997 imposing provisional anti-dumping and countervailing duties on certain imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 346, p. 63). That regulation imposed a provisional anti-dumping duty of ECU 0.32 per kilo and a provisional countervailing duty of 3.8% for a period of four months from 18 December 1997 on imports, into the Community, of farmed Atlantic salmon originating in Norway produced by the applicant (Articles 1 and

2) and removed the applicant's name from the Annex to Decision 97/634 listing those companies whose undertakings had been accepted (Article 5). The regulation entered into force on 18 December 1997. Its period of application was fixed at four months (Article 6). The parties concerned were invited to make their views known in writing and apply for a hearing by the Commission within one month of the date of entry into force of the regulation, that is to say by 17 January 1998 at the latest (Article 4).

9 By letter of 19 December 1997, the Commission informed the applicant of the essential facts and considerations on the basis of which the provisional duties had been imposed on it. It stated that examination of the data disclosed in the October 1997 report had shown that the applicant had exported farmed Atlantic salmon, gutted head-on, at an average price of ECU 3.22/kg, that is at a price lower than the minimum average price set in its undertaking of 17 June 1997, which led it to believe that it had not observed that undertaking. To that letter was attached a copy of the data on the basis of which the Commission had come to that conclusion.

10 By fax of 22 December 1997, the applicant complained that the Commission had manipulated the October 1997 report by deleting a number of lines which were intended to cancel lines containing errors. Pointing out that it had ceased all exports to the Community since the entry into force of Regulation No 2529/97, and as a result was suffering considerable harm, it asked for the immediate lifting of the sanctions taken against it.

11 In its letter of 5 January 1998, the Commission explained to the applicant the reasons why it had decided to delete a number of lines from the October 1997 report containing quantities and values preceded by a minus sign, which, in the absence of explanations in the report, could not be offset against the corresponding invoices. It added that, if the applicant sent it in good time a proper report showing that all sales transactions, net of credit notes, during the third quarter of 1997 were, on average, above the minimum price, the

Commission would be prepared to reconsider its position. It again emphasised the provisional nature of the duties imposed by Regulation 2529/97 and pointed out to the applicant that it could have chosen to continue to export to the Community by providing the relevant customs authorities of the Member States concerned with an appropriate guarantee in regard to its 'DDP' ('delivered duty paid') sales.

12 On 6 January 1998, the applicant sent to the Commission an amended version of the October 1997 report.

13 By letter of 7 January 1998, at the request of the Commission, it gave additional explanations relating to certain lines of the initial version of the October 1997 report, which contained a number of negative values.

14 On 8 January 1998, the Commission sent the applicant an amended version of that report, modified in accordance with the explanations provided the day before by the applicant. The applicant was requested to let the Commission know in writing whether it agreed with the content of the new version.

15 By fax of 9 January 1998, the applicant informed the Commission that it agreed with the content of that new amended version of the October 1997 report. Stating that it had no additional observations to make on the subject and reiterating that it was suffering considerable losses, it insisted that the situation should be resolved and the provisional duties abolished before the expiry of the period

prescribed by Regulation No 2529/97 within which interested parties could make their points of view known.

16 That same day, counsel for the applicant made the same request to the Commission, on the ground that it now seemed clear that its client had not broken its undertaking and had no additional comments to make.

17 By fax of 12 January 1998, counsel for the applicant repeated his request.

18 On 26 and 27 January 1998, Commission staff carried out an investigation at the applicant's premises.

19 By letter of 30 January 1998, the Commission informed the applicant that it now took the view that the applicant had, during the third quarter of 1997, complied with the minimum export price fixed in its undertaking in respect of salmon, gutted head-on, and that, accordingly, that there was no longer any reason to believe that the undertaking had been broken.

20 By letter of 2 February 1998 the Commission informed the applicant that it intended to propose to the Council that it should not impose definitive duties and that, accordingly, the provisional duties imposed by Regulation No 2529/97 ought not to be confirmed. It added that, under Article 10(2) of Regulation

No 384/96, the amounts lodged as provisional duties were to be released in so far as there was no decision by the Council to collect all or part of them definitively.

21 On 23 March 1998, the Commission adopted Regulation (EC) No 651/98 amending Regulations Nos 1890/97, 1891/97 and 2529/97 and Decision 97/634 (OJ 1998 L 88, p. 31). Under Regulation No 651/98, the provisional anti-dumping and countervailing duties imposed by Regulation No 2529/97 were repealed so far as concerned imports of the applicant's products (Article 1(1)). Its undertaking was moreover reinstated with effect from 25 March 1998 (Articles 2 and 4).

Procedure

22 By document lodged at the Court Registry on 27 October 1998, the applicant brought the present action.

23 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure after adopting measures of organisation of procedure requesting the parties to reply to written questions.

24 The parties presented oral argument and answered questions put by the Court at the hearing on 10 May 2000.

Forms of order sought

25 The applicant claims that the Court should:

— order the Commission to make good the damage it suffered following the adoption of the provisional measures prescribed by Regulation No 2529/97 totalling NOK 2 115 000;

— order the Commission to pay the costs.

26 The defendant contends that the Court should:

— dismiss the application as inadmissible or, alternatively, as unfounded;

— order the applicant to pay the costs.

Admissibility

27 The Commission, while not raising a formal plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance, challenges the admissibility of the application. It puts forward three pleas in law in support

of its contention. The first plea alleges breach of Article 44(1)(c) of the Rules of Procedure. In the second plea it submits that the applicant is not entitled to claim damages for loss allegedly caused by a legislative act. By its third plea in law, it alleges failure of the applicant to seek annulment of Regulation No 2529/97 in due time.

The first plea in law: breach of Article 44(1)(c) of the Rules of Procedure

Arguments of parties

28 The Commission submits that the claim for damages is not sufficiently pleaded, so that the application fails to comply with the formal requirements prescribed by Article 44(1)(c). It puts forward three arguments in support of that plea in law. First, the application does not make it possible to identify the conditions necessary for establishing the non-contractual liability of the Commission. Second, as regards causation, the applicant merely makes the unsupported assertion that, between 18 December 1997 and 25 March 1998, it was not able to sell any salmon to the Community market. Thirdly, so far as concerns the quantum of the damages claimed, the applicant adduces no evidence to prove that it attempted to mitigate its damage by seeking to obtain a bank guarantee to cover its provisional duties. The costs of re-establishing itself on the Community market are purely hypothetical.

29 The applicant submits that its application complies with all the formal requirements prescribed by the Rules of Procedure. It rejects, in particular, the Commission's argument that the auditor's certificate appended as annex 6 to the application is not evidence of a causal link between the imposition of provisional measures and the loss or damage to the applicant's business.

Findings of the Court

30 According to Article 19 of the EC Statute of the Court of Justice, which is applicable to proceedings before the Court of First Instance by virtue of the first paragraph of 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, *inter alia*, the subject-matter of the dispute and must contain a brief statement of the grounds on which the application is based. In order to fulfil those requirements, an application seeking compensation for damage allegedly caused by a Community institution must state the evidence from which the conduct alleged by the applicant against the institution may be identified, the reasons for which the applicant considers there to be a causal link between the conduct and the damage which it claims to have suffered and the nature and extent of that damage (Case T-113/96 *Edouard Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 30; Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 27; and Case T-145/98 *ADT* v *Commission* [2000] ECR II-387, paragraph 74).

31 In the present case, it is sufficiently clear from the application that the conduct for which the Commission is criticised relates to its failure to discharge its duties of diligence and of good administration, as well as to an infringement by it of the applicant's right to a fair hearing, during the procedure to verify whether the applicant had complied with its undertaking, in particular during the analysis of the October 1997 report. Following that analysis, the Commission concluded that the applicant had breached the undertaking and, by Regulation No 2529/97, provisionally revoked it and imposed provisional duties on imports of the applicant's products into the Community. As a result of the application of such provisional measures, the applicant claims to have found it impossible to export to the Community between 18 December 1997 and 25 March 1998. That impossibility resulted in the applicant's incurring loss of profit estimated at NOK 1 115 000 and costs in re-establishing itself on the Community market, estimated at NOK 1 000 000.

32 It follows that the requirements laid down in Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance have been fulfilled in the present case.

33 The Commission's arguments concerning the existence and extent of the damage alleged by the applicant and the causal link between such damage and the imposition of the provisional measures go to the substance of the application and should therefore be examined in that context (see, to that effect, Case T-184/95 *Dorsch Consult Ingenieurgesellschaft* v *Council and Commission* [1998] ECR II-667, paragraph 23).

34 The first plea in law must accordingly be rejected.

The second plea in law: legislative nature of the act which allegedly caused the damage claimed by the applicant

Arguments of the parties

35 The Commission submits that the lack of diligence it allegedly showed when monitoring the applicant's compliance with its undertaking could not, *per se*, have been such as to cause the applicant loss. The loss of which the applicant complains arose only as from 18 December 1997, when Regulation No 2529/97, a legislative act, entered into force (Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 51). Pointing out that all legislation involves preparatory administrative acts, the Commission states that the applicant cannot circumvent the test of liability for legislative acts by claiming that the liability of the Community arises from those preparatory administrative acts. Such an argument has already been rejected by the Court in *Nölle* v *Council*

and Commission, cited above, paragraph 52. The Commission claims that the legislative nature of the act which allegedly gave rise to the loss claimed by the applicant should result in the action being held inadmissible.

36 In its rejoinder, the Commission points out that the applicant does not identify, in its reply, the administrative acts which it claims caused its loss. It rejects the distinction drawn in the reply between the present case and *Nölle* v *Council and Commission* (cited in paragraph 35 above), and states, first, that the legislative nature of an anti-dumping or anti-subsidy measure is not dependent on the adoption of that measure by the Council and, secondly, that the fact that the applicant is an exporter rather than an importer, and that it could thus be individually concerned within the meaning of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) by Regulation No 2529/97 because the regulation in fact resembled, in regard to it, a decision, cannot change the legislative nature of that regulation (see, to that effect, the judgment of the Court of Justice in Case C-122/86 *Metalleftikon Viomichanikon kai Naftiliakon and Others* v *Commission and Council* [1989] ECR 3959, summary publication).

37 The applicant states first of all that the source of its loss is not Regulation No 2529/97 but a series of administrative acts by the Commission which led to the imposition of provisional measures. It maintains that the circumstances of the case which gave rise to the judgment in *Nölle* v *Council and Commission* (cited in paragraph 35 above), relied on by the Commission, were different from those in the present case in two important respects: first, the measures which allegedly gave rise to the damage which it claimed to have suffered had been adopted by the Council; and secondly, the applicant was an importer. Furthermore, the judgments in which the Court of Justice held that the measures of the Council and the Commission relating to anti-dumping proceedings constituted legislative acts were all delivered in actions for damages brought by importers. However, the situation of an exporter with regard to an anti-dumping measure is appreciably different from that of an importer (see, to that effect, Case 113/77 *NTN Toyo*

Bearing v *Council* [1979] ECR 1185, and the Opinion of Advocate General Warner in that case, pp. 1212, 1213, 1243, 1245 and 1246; also the judgment of the Court of Justice in Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005).

Findings of the Court

38 The nature — be it legislative or administrative — of a measure for which a Community institution is criticised has no bearing on the admissibility of an action for damages. In the context of such an action, that factor is relevant exclusively to assessment of the substance of the case, where what is at issue is the definition of the test of what degree of fault is required when examining the non-contractual liability of the Community (see, in particular Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 25; *Nölle* v *Council and Commission*, cited in paragraph 35 above, paragraphs 51 and 52, and Case T-199/96 *Laboratoires Pharmaceutiques Bergaderm and Goupil* v *Commission* [1998] ECR II-2805, paragraphs 48 to 51, confirmed by the Court of Justice in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291).

39 It is not therefore necessary to enquire at this stage into the nature of the Commission's measure allegedly giving rise to the damage claimed by the applicant and the Court concludes that the nature of that act, whatever it may be, cannot in any event be a bar to the admissibility of the present action for damages.

40 The second plea in law must therefore be rejected.

The third plea in law: failure to seek the annulment of Regulation No 2529/97

Arguments of the parties

41 The Commission submits that the applicant has not sought the annulment of Regulation No 2529/97 even though it had locus standi to challenge it on the basis of Article 173 of the Treaty (see *Allied Corporation* v *Commission*, cited in paragraph 37 above, paragraph 12, and Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781). The principle of legal certainty requires that, once the limitation period for bringing an action for annulment has expired, the effects of the act in question must be regarded as definitive. The Commission thus argues that in so far as, in the present case, the only possible basis for the claim for damages brought by the applicant is the unlawfulness of Regulation No 2529/97 (see, to that effect, Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraph 15), which has not been contested in due time, the present application is inadmissible. To admit this application would allow Article 215 of the EC Treaty (now Article 288 EC) to be used to circumvent the limitation period laid down by Article 173 of the Treaty.

42 Furthermore, the admissibility of an action for damages must be examined in the light of the whole system of legal protection for the individual established by the Treaty (Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 27). Accordingly, since, in the present case, the applicant had the opportunity to bring an action under Article 173 of the Treaty, its action under Article 215 of the Treaty must be dismissed as it seeks, in actual fact, a declaration of unlawfulness of an act whose annulment it has not sought within the prescribed period.

43 In its rejoinder, the Commission rejects the interpretation which the applicant gives, in its reply, to the order made by the Court of First Instance in Case T-208/95 *Miwon* v *Commission* [1996] ECR II-635 (see paragraph 44 below). It points out that, in that case, the Court of First Instance did not rule inadmissible

an action for annulment brought against the contested provisional anti-dumping regulation, but rather, it ruled that there was no longer any need to adjudicate on such an action because a definitive anti-dumping duty had subsequently been imposed.

44 The applicant, relying on the order in *Miwon* (cited in paragraph 43 above, paragraphs 26 and 28) claims that it was not in a position to challenge Regulation No 2529/97 in view of the provisional nature of that instrument. Furthermore, the applicant criticises the interpretation given by the Commission to the judgment in *Krohn* v *Commission* (cited in paragraph 42 above) pointing out that, in order for the admissibility of an action for damages to be dependent on the exhaustion of the remedies available under national law, it is necessary, according to the case-law, that those remedies effectively ensure protection for individuals aggrieved by measures of the Community institutions (Case 20/88 *Roquette Frères* v *Commission* [1989] ECR 1553, paragraph 15), which is not the case where, as in the present case, the illegality relied upon in the claim for damages was committed not by a national body but by a Community institution (*Krohn* v *Commission*, cited in paragraph 42; Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens et Nederlandse Bond van Waaghouders van Levend Vee* v *Commission* [1995] ECR II-2941). Moreover, that line of authority in no way makes the admissibility of an action for damages dependent on the bringing of an action for annulment. In conclusion, it submits that its action is admissible in accordance with the principle of the independence of actions based on Article 215 of the EC Treaty, as laid down in *Krohn* v *Commission*, cited in paragraph 42 above.

Findings of the Court

45 It is well settled case-law that the action for damages provided for in the second paragraph of Article 215 of the Treaty was introduced as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions as to its use dictated by its specific nature (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 3; *Krohn* v *Commission*, cited in paragraph 42 above, paragraph 26; and Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 14). It differs from an application for annulment in that its end is not the abolition of a particular measure but

compensation for damage caused by an institution (*Zuckerfabrik Schöppenstedt* v *Council*, cited above, paragraph 3; *Krohn* v *Commission*, cited in paragraph 42 above, paragraph 32; and *Sonito and Others* v *Commission*, cited above, paragraph 14). The principle of the independent character of the action for damages is thus explained by the fact that the purpose of such an action differs from that of an action for annulment.

46 In the present case, the purpose of an action for annulment directed against Regulation No 2529/97 would be to cancel the provisional revocation of the applicant's undertaking and to bring about the repeal of the provisional anti-dumping and countervailing measures imposed on imports of its products into the Community and the release of the amounts already lodged, if any, by way of provisional duties. However, in the present action for damages, the applicant does not pursue any of those objectives. It seeks compensation for loss or damage to its business, equal to the loss of profit resulting from the suspension of its exports to the Community as well as the cost of re-establishing itself on the Community market, which it claims to have suffered as a result of a wrongful act by the Commission which led to the imposition, by Regulation No 2529/97, of provisional measures against imports of its products.

47 Even on the assumption that the applicant had sought the annulment of that regulation in good time and that it had been successful, that would not in any event have enabled it to obtain compensation for the loss or damage to its business which it claims to have suffered. To obtain such compensation it would have been necessary to make, at the same time, an application for compensation.

48 Furthermore, even if the Commission's argument that Regulation No 2529/97 must be regarded as the act giving rise to the damage alleged by the applicant were correct, the applicant's action for damages cannot in any event be declared inadmissible on the ground that it failed to challenge the validity of that regulation in due time.

49 Although it is true that the case-law accepts, within very precise limits, the possibility of recognising, in an action for annulment, an interest in seeking the annulment of a regulation imposing provisional duties in anticipation of a subsequent claim for compensation (see, to that effect, Joined Cases C-304/86 and C-185/87 *Enital* v *Commission* [1990] ECR I-2939, summary publication, and *Neotype Techmashexport* v *Commission and Council*, cited above in paragraph 41, paragraph 15), it cannot be inferred from those cases that the bringing of an action for damages must be preceded by an action for annulment of the act allegedly giving rise to the alleged damage. A party may bring an action for damages without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage (order of the Court of Justice in Joined Cases C-199/94 P and C-200/94 P *Pevasca and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 27, and the case-law cited).

50 It is indeed the case that an action for damages must be declared inadmissible where it is actually aimed at securing withdrawal of a measure which has become definitive and would, if upheld, nullify the legal effects of that measure (see Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 59; Case T-93/95 *Laga* v *Commission* [1998] ECR II-195, paragraph 48; and Case T-94/95 *Landuyt* v *Commission* [1998] ECR II-213, paragraph 48). That is, for example, the case where it seeks the payment of an amount precisely equal to the duty paid by the applicant pursuant to the measure which has become definitive (see *Krohn* v *Commission*, cited in paragraph 42 above, paragraph 33).

51 However, in the present case, the action for damages brought by the applicant cannot, in view of the findings made in paragraph 46 above, be regarded as seeking to bring about the withdrawal of Regulation No 2529/97, which has become definitive, and to nullify its legal effects, those effects having in any event been repealed *vis-à-vis* the applicant by Regulation No 651/98 (see paragraph 21 above). Nor, in view of those same findings, can the action be considered to be seeking payment of an amount equal to the provisional duty levied under Regulation No 2529/97. In any event, since the applicant has not exported to the Community during the period when the measures imposed by that regulation were in force, it has not had to pay any provisional duties, which explains why

Article 1(2) of Regulation No 651/98, which relates to the release of amounts lodged under Regulation No 2529/97, is of no relevance to it. The present action for damages seeks to obtain compensation for loss or damage to business, distinct from the intrinsic legal effects of Regulation No 2529/97, which an application for annulment of the aforementioned regulation brought in due time by the applicant could not have redressed (see paragraph 47 above). Accordingly, the present case cannot be regarded as seeking to circumvent the inadmissibility of an action for the annulment of Regulation No 2529/97.

52 In conclusion, in accordance with the principle of the independent character of an action based on the second paragraph of Article 215 of the Treaty, as clarified in the case-law, the particular purpose of the present action for damages precludes it from being declared inadmissible upon the ground that the applicant failed to challenge the lawfulness of Regulation No 2529/97 in due time.

53 The third plea in law must accordingly be rejected. The action must therefore be declared admissible.

Substance

54 According to established case-law, in order for the Community to incur non-contractual liability the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage (see Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; and *Dubois et Fils* v *Council and Commission*, cited above in paragraph 30, paragraph 54). It is necessary therefore to ascertain whether the applicant has established the existence of those various conditions.

Unlawfulness of the conduct alleged against the Commission

The standard of breach required

— Arguments of the parties

55 The applicant submits that the Commission's decision to revoke the undertaking and to impose provisional measures on it must be regarded not as a legislative act but as a bundle of administrative acts targeted only at itself. In order for the Community to incur liability, the applicant does not therefore have to show that the wrongful conduct of the Commission reached the level of gravity required by the case-law on the Community institutions' liability for legislative acts.

56 The Commission contends that the damage alleged by the applicant can have been caused only by a legislative act, namely Regulation No 2529/97. Accordingly, the conduct alleged against it can render the Community liable to the applicant only if it is established that its wrongfulness attained the higher level of gravity required by the case-law (*Metalleftikon Viomichanikon kai Naftiliakon and Others* v *Commission and Council*, cited in paragraph 36 above, and *Nölle* v *Council and Commission*, cited in paragraph 35 above, paragraphs 51 and 52).

— Findings of the Court

57 Although the measures of the Council and Commission in connection with a proceeding relating to the possible adoption of anti-dumping measures must in

principle be regarded as constituting legislative action involving choices of economic policy, so that the Community can incur liability by virtue of such measures only if there has been a sufficiently serious breach of a superior rule of law for the protection of individuals (*Nölle* v *Council and Commission*, cited in paragraph 35 above, paragraph 51), the special features of the present case must be pointed out. In the present case, the damage at issue arose from the allegedly unlawful conduct of the Commission when it examined the October 1997 report with the intention of checking whether the applicant had complied during the third quarter of 1997 with the undertaking, the acceptance of which had brought to an end the anti-dumping and anti-subsidy investigation in regard to it. That allegedly unlawful conduct led the Commission to believe that the applicant had broken its undertaking. It took place in the course of an administrative operation which specifically and exclusively concerned the applicant. That operation did not involve any choices of economic policy and conferred on the Commission only very little or no discretion.

58 It is true that the alleged unlawfulness of the Commission's conduct caused the alleged damage only when, and because, it was confirmed by the adoption of provisional measures against imports of the applicant's products within the framework of Regulation No 2529/97. However, the Commission, in that regulation, did no more with regard to the applicant than draw the appropriate provisional conclusions from its analysis of the abovementioned report, in particular from the level of the average price of exports charged by the applicant during the period covered by that report (see the ninth recital in the preamble to Regulation No 2529/97).

59 Furthermore, the background to the cases giving rise to the judgments relied on by the Commission in its written submissions (see paragraph 56 above), in which the Community judicature characterised the measures of the Council and the Commission in an anti-dumping proceeding as legislative acts involving choices of economic policy, was radically different from that of the present dispute. In those cases, unlike the present case, the applicants sought compensation for

damage, the operative event for which was a choice of economic policy made by the Community authorities in the context of their legislative power.

60 Thus, in *Metalleftikon Viomichanikon kai Naftiliakon and Others* v *Commission and Council*, cited in paragraph 36 above, the applicants sought compensation for the damage which they claimed to have suffered as a result of the Council's decision to close an anti-dumping proceeding without adopting the regulation proposed by the Commission for the imposition of a definitive anti-dumping duty on the relevant imports. In *Nölle* v *Council and Commission*, cited in paragraph 35 above, a Community importer sought compensation for damage allegedly suffered as a result of the adoption by the Council of a regulation introducing a definitive anti-dumping duty and definitively collecting the provisional anti-dumping duty, a regulation which had been declared invalid by the Court of Justice on grounds relating to the conditions under which the Community authorities had chosen the reference country when determining the normal value of the products at issue.

61 In conclusion, mere infringement of Community law will be sufficient, in the present case, to lead to the non-contractual liability of the Community (see *Bergaderm and Goupil* v *Commission*, cited in paragraph 38 above, paragraph 44). In particular, a finding of an error which, in analogous circumstances, an administrative authority exercising ordinary care and diligence would not have committed will support the conclusion that the conduct of the Community institution was unlawful in such a way as to render the Community liable under Article 215 of the Treaty.

62 It is therefore necessary to examine whether the Commission, when monitoring compliance by the applicant with its undertaking on the basis of the October 1997 report, committed an error which an administrative authority exercising ordinary care and diligence would not have committed in the same circumstances.

The allegedly wrongful nature of the Commission's conduct

— Arguments of the parties

63 The applicant claims, first, that the Commission failed to discharge its duty of diligence and good administration.

64 The applicant states that in the course of the third quarter of 1997 it had committed clerical errors when inserting data concerning its exports of farmed Atlantic salmon to the Community during that period. It states, however, that the October 1997 report clearly showed that those errors had been corrected by the repetition of erroneous entries with a negative sign before the amount in question and by the insertion of the correct data where necessary. It claims, in any event, to have taken all possible steps in order to ensure that the report was unambiguous.

65 The applicant considers that the Commission should therefore have noticed that its October 1997 report contained entries which had been corrected. However, when examining that report, the Commission deleted all entries with a negative value, which led it to take into account the erroneous entries which the negative entries sought to reverse. Since a number of those errors related to the currency in which the transactions concerned had been carried out, the sales price involved, converted into ecu, was extremely low and caused a significant drop in the average export price for farmed Atlantic salmon gutted head-on. The Commission thus concluded, mistakenly, that that average price was lower than the minimum price set in the applicant's undertaking and that the applicant had breached that undertaking, which prompted it to impose provisional duties on imports of its products.

66 According to the applicant, the Commission could simply have requested any clarifications necessary in order to understand properly any information in the October 1997 report which it found unclear. Such explanations would have enabled the Commission to find that the applicant had not breached its undertaking. The Commission thus acted wrongfully by failing to seek clarification of the October 1997 report before imposing provisional duties.

67 Secondly, the applicant, relying on case-law according to which the undertaking concerned must have been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts and circumstances alleged and its observations on any documents used (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, and Case C-69/89 *Nakajima All Precision* v *Council* [1991] ECR I-2069), states that it should have been informed by the Commission of the essential facts and considerations on the basis of which it was intended to impose provisional duties on imports of its products (see, to that effect, Case C-16/90 *Nölle* [1991] ECR I-5163). The applicant submits that, if it had been informed of those matters, it would have been able to comment on the Commission's findings, which, in the light of those observations, would have been led to the conclusion that there was no need to revoke its undertaking and impose provisional duties. According to the applicant, this would have made it possible to avoid the damage caused to it.

68 The Commission first of all denies having failed in its duties of care and good administration. It points out that, by Decision 97/634, it had accepted the undertakings of 190 Norwegian exporters who had thereby been exempted from the definitive duties imposed by Regulations Nos 1890/97 and 1891/97. It states that, in those circumstances, the requirements laid down in the undertakings were to be rigorously observed, so that the Commission could treat all companies equally when monitoring compliance with the undertakings.

69 After setting out the terms of the undertakings given by the applicant, it states that, according to Article 8(10) of Regulation No 384/96 and Article 13(10) of

Regulation No 2026/97, a provisional duty may be imposed where there is reason to believe that an undertaking has been breached. The mere appearance that the undertaking has been breached is thus sufficient to authorise the Commission to adopt provisional measures without it being required to find that the undertaking in question has in fact been breached. In view of the nature of the system of anti-dumping measures, it is incumbent on the company offering the undertaking to persuade the Commission that there is no reason to conclude that it has failed to comply with its terms. To decide otherwise would be tantamount to disregarding the wording of the provisions in issue, as well as the rule that such verification must take place only before definitive duties are imposed (see Article 8(9) of Regulation No 384/96).

70 The Commission contends that in the present case the terms of the undertaking did not provide for the possibility of inserting negative values in its quarterly sales reports, that no provision was made for dealing with invoices constituting credit notes, and that one of its clauses required the applicant to consult with the Commission regarding any difficulties which might arise from the interpretation or application of the undertaking in question. However, in the present case, the applicant simply sent the Commission a diskette containing its October 1997 report, without offering any explanation as to the meaning of the negative entries in it or how they were to be correlated with the other entries. The Commission disputes the various arguments put forward by the applicant in its written submissions in order to substantiate its claim that it was obvious that certain entries in the report were clerical errors and that the report made it easy to understand the meaning of such entries and how they related to the negative values it contained.

71 Accordingly, the Commission denies having committed an act of maladministration. It contends that, on the contrary, the October 1997 report did not comply with the requirements and that the applicant failed to take all measures possible to ensure that the report was unambiguous. Moreover, the applicant's inexperience in the matter is not a factor that can be invoked in its favour.

72 Secondly, the Commission disputes that it infringed the applicant's right to a fair hearing. It points out that it had to analyse nearly 90 monitoring reports of the type represented by the October 1997 report. Next, it states that, as soon as it had reason to believe that the applicant was in breach of its undertaking, it was bound to act as swiftly as possible, in so far as the proximity of the Christmas period, which is a particularly sensitive period for the salmon trade, made it essential to ensure the effectiveness of the protection which anti-dumping and anti-subsidy measures are intended to provide for the Community industry against dumped and/or subsidised imports. Furthermore, Article 7 of Regulation No 384/96 and Article 12 of Regulation No 2026/97, which govern the imposition of provisional anti-dumping and countervailing duties, do not require it to inform interested parties beforehand.

— Findings of the Court

73 The October 1997 report, which was sent by the applicant to the Commission on computer diskette provided for that purpose by the Commission, contains 200 lines, all of them relating to sales on the Community market of farmed Atlantic salmon, gutted head-on, ('Presentation B' products in the terms of the undertaking provided by the applicant). It is set out in a table divided into 27 columns. Of the 200 lines, 12 are negative entries.

74 The last page of that report contains the following final entries:

'...

Sum of Qtyw (kg)	477 725.50
Sum of CIF value * Qtyw	1 577 762.37
Sum of Qtyw sold at below 85% of minimum price in kg	0.00

...'

75 At first sight, on reading those final entries in the October 1997 report, it was possible to adopt the view that the applicant had observed its undertaking during the period covered by that report. Indeed, it showed that it had not concluded any individual transaction on the basis of a price below the threshold of 85% of the average minimum price of ECU 3.25 per kg fixed in the undertaking for its exports of farmed Atlantic salmon gutted head-on, and that their average price during the period in question had been greater than the abovementioned minimum average price, as it had been ECU 3.3026 per kg (ECU 1 577 762.37/477 725.50 kg).

76 Even if it is accepted that the terms of the applicant's undertaking did not provide for the possibility of including negative values in the quarterly sales reports, the Commission could not, when faced with a report which, at first glance, suggested that the applicant had complied with its undertaking, take it upon itself, as it did in the present case (see paragraph 11 above), unilaterally to change the content of that report by deleting lines containing negative values and replacing the final entries set out in paragraph 74 above with its own calculations, carried out on the basis of the report thus amended, of the average export price charged by the applicant during the period in question, without explaining to it the reasons prompting it to ignore those final entries and without checking with it whether the changes so made affected the reliability of the information provided in order to monitor compliance with the undertaking. Having decided not to accept the first impression given by the October 1997 report, which was favourable to the applicant, the Commission was bound to exercise due care in interpreting correctly the data provided in that report, on which it intended to base its finding as to whether or not the applicant's conduct amounted to compliance with the undertaking during the period in question.

77 It cannot, in that connection, rely on the provisions of Article 8(10) of Regulation No 384/96 or Article 13(10) of Regulation No 2026/97.

78 Those provisions aim to enable the Commission, where there are grounds for believing on the basis of the best information available to it that an undertaking which it has initially accepted in the context of an anti-dumping or anti-subsidy proceeding has been breached, to take in good time any necessary provisional measures in order to protect the interests of the Community industry, without prejudice to a subsequent examination of the merits in order to check whether the undertaking in question has in fact been breached.

79 However, in the present case, the Court holds that the October 1997 report, in particular its final entries, suggested that the applicant had complied with its undertaking (see paragraphs 74 and 75).

80 It was after it had amended that report on its own initiative, without taking the precaution of asking the applicant what possible impact its unilateral action might have on the reliability of the information which the applicant had provided, that the Commission concluded that there had been an apparent breach of the undertaking by the applicant. The data contained in the October 1997 report, amended in that way, evidently cannot therefore be considered the best information, within the meaning of the provisions referred to in paragraph 77 above, available to the Commission at the time on which to base its conclusion as to whether the applicant had complied with its undertaking.

81 The fact that in the run-up to the end-of-year celebrations, a particularly important period for salmon sales, the Commission was obliged to analyse more than 90 reports similar to the October 1997 report cannot, of itself, justify unilateral changes to that report by the Commission, when the report appeared to show, at first sight, that the undertaking had been complied with. Moreover, as soon as the Commission chose to amend that report, which, *prima facie*, suggested that the applicant had complied with its undertaking, the urgency of the situation could not excuse a relaxation of the duty of diligence incumbent upon the Commission when analysing the evidence on which it intended to ground its finding on that point.

82 It must therefore be held that, when analysing the October 1997 report, the Commission committed an error which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence.

83 So far as concerns the alleged breach of the applicant's right to a fair hearing, it should be pointed out that the applicant does not claim in that respect to have suffered any damage as a result of the unlawful act committed by the Commission when analysing the October 1997 report which is distinct from that arising from the imposition of the provisional measures. Accordingly, there is no need to rule on whether the Commission, by failing to inform the applicant of its conclusions before adopting Regulation No 2529/97, infringed its right to a fair hearing.

84 However, it must be pointed out that the applicant's conduct is not blameless either. As the Commission observes, the lines of the October 1997 report which contained negative values, namely lines 8, 14, 29, 36, 37, 52, 100, 138, 178, 179, 195 and 196, were unexplained.

85 Contrary to what the applicant contends, neither the lines containing errors — errors which, according to the explanations in its written submissions, related either to the currency in which the transaction concerned had been carried out, the gross value of the invoice, or were connected with a repeat entry for the same transaction — nor the relationship between the lines containing errors and those containing the negative values intended to cancel them out, were obvious on perusal of the October 1997 report, which, as stated in paragraph 73 above, contained a considerable amount of data. In places there were several lines between the line containing the error and the line intended to cancel it.

86 Secondly, as is clear from the explanations subsequently provided by the applicant, the negative values in the October 1997 report were not all of the same significance.

87 Thus, the explanations provided by the applicant in its written submissions make it clear that most of those values, namely those in lines 14, 29, 36, 37, 100, 138, 178, 179, 195 and 196, were intended to completely cancel values that had been wrongly entered. The same explanations also make it clear that certain lines containing errors were cancelled in that way without the transaction in question being re-entered. Conversely, other transactions containing errors were re-entered after the error affecting the original entry had been cancelled out by the insertion of a negative entry.

88 On the other hand, it appears from the explanations provided by the applicant to the Commission in its letter of 7 January 1998 (see paragraph 13 above) that, as the Commission's officials had understood in the light of that letter (see the correspondence with the applicant of 8 January 1998, referred to in paragraph 14 above), the negative values in lines 8 and 52 were not intended to cancel the whole of the values mentioned in the line or lines corresponding to the original entry for the transaction concerned, but to correct some of those values — contained in lines 5 and 6 and in line 49, respectively — in order to take account of the fact that part of the quantities involved in that transaction either had not been received by the customer or had not been accepted by him and had therefore not been paid for in each case.

89 In view of the complexity of its October 1997 report, the lack of obvious links between the erroneous lines and those containing negative values and the ambiguity of those values, the applicant, without being prompted, should have sent to the Commission, with the report, the explanations necessary in order to understand that report. By sending the October 1997 report without any comment to that effect, the applicant was guilty of negligence which, as the letter which the Commission sent it on 5 January 1998 shows (see paragraph 11 above), confused the Commission's officials. Clarification in that regard would have allowed them to understand from the outset that there was good reason for those negative values being inserted and to realise that, taken together, the data relating to the various sales made by the applicant on the Community market during the quarter in question confirmed the conclusion shown by the final

entries in the October 1997 report, namely that the applicant had complied with its undertaking during the period in question.

90 The applicant's lack of relevant experience did not excuse it from automatically appending to the October 1997 report the explanations required for a correct understanding of certain parts of it.

91 In view of the analysis set out in paragraphs 73 to 90 above, the Court holds that the applicant and the Commission were equally at fault during the investigation as to whether the applicant had complied with its undertaking during the third quarter of 1997 and at the end of which the Commission found that there had been an apparent breach of the undertaking making it necessary to take provisional measures against imports of the applicant's products in the framework of Regulation No 2529/97. For its part, the applicant, by failing of its own accord to append to its October 1997 report the explanations required for the correct understanding of the negative values appearing in it, showed such negligence as would never have been committed by a trader exercising ordinary care and diligence. Even taking into consideration such irregular conduct on the part of the applicant and the confusion which such conduct may have caused when the report was read, the Court holds that the Commission's reaction, in unilaterally amending that report even though it suggested, prima facie, that the applicant had complied with its undertaking during the period in question, was disproportionate and therefore unlawful, and could not be excused in any circumstances.

92 If the damage alleged by the applicant is proved, even in part, and if it is apparent that a causal link exists between that damage and the events leading to the imposition of provisional measures on imports of its products, the question which must now be considered, it will be appropriate, when determining the Commission's obligation to make reparation, to take account of the fact that each party bears half of the responsibility for those events.

The alleged damage and the causal link between it and the wrongful conduct of the Commission

Arguments of the parties

93 The applicant submits that the imposition of provisional measures caused it twofold damage, related, first, to the loss of profit following the entry into force of those measures and, secondly, to the costs it was forced to bear in re-establishing itself on the Community market.

94 As regards the first head, the applicant contends that because of the imposition of provisional measures it was not able to sell any of its products in the Community between 18 December 1997, when Regulation No 2529/97 entered into force, and 25 March 1998, when its undertaking was reinstated by Regulation No 651/98. In support of that claim, it appends, as Annex 6 to its application, the certificate issued by an external auditor. Moreover, for economic reasons linked, in particular, to the volume of farmed Atlantic salmon sales, its low profit margins and its capital, it was impossible for it to provide the bank guarantee necessary to cover the provisional duties imposed by the Commission. Relying on data on its exports in the two preceding years over the same period as that when Regulation No 2529/97 was in force, its average profit margin during those two years, and the average profit margin achieved, during the period when that regulation was in force, by the Norwegian exporters whose undertakings were maintained, it assesses its loss of earnings at NOK 1 115 000.

95 As to the second head, the applicant maintains that it faced, and continues to face, substantial costs in re-establishing itself on the Community market. It estimates that damage at NOK 1 000 000.

96 In its reply, it submits that it never obtained from the Commission, during the period when the provisional duties were in force, an assurance that, as they were expected not to be confirmed, it could continue safely to export its product to the Community. It was not until the publication of Regulation No 651/98 on 24 March 1998 that the applicant was certain that the provisional measures were repealed and its undertaking was reinstated.

97 Next, it rejects the Commission's contention that the only costs which it would have had to incur if it had continued to export during the period when the provisional duties were in force would have been those relating to the provision of a bank guarantee. It submits that, as it had no way of knowing, when those duties came into force, that they would subsequently be repealed, the only approach available to it in order to cover the additional costs brought about by the imposition of the duties in question was to increase its sales prices by an amount corresponding to the level of the duties, otherwise it would have made a loss which it would have been impossible to offset subsequently. It points out, in that regard, that most of its sales to the Community are DDP sales. Moreover, the argument put forward by the Commission that it could have continued to export at unchanged prices during the period when the provisional duties were in force is contrary to the Commission's policy with regard to the imposition of anti-dumping duties, in that such duties should lead to an increase in the price level on the Community market, failing which the Commission is able to initiate an 'anti-absorption' investigation on the basis of Article 12(1) of Regulation No 384/96 and, if necessary, increase the level of the duties imposed.

98 Finally, it criticises the method used by the Commission to calculate its loss of earnings, pointing out that it does not take account of the seasonal variations that are typical of the salmon market.

99 The Commission contends that the applicant has not shown that it was unable to sell any salmon to the Community as a result of the imposition of provisional duties on its imports. It cannot seek to avoid its burden of proof by claiming that

the imposition of such duties automatically excluded any possibility of exporting its salmon to the Community.

100 The Commission claims that, in any event, the applicant was required to mitigate the loss allegedly suffered. Referring to the applicant's sales between July 1997 and September 1998, it states that, if, while Regulation No 2529/97 was in force, the applicant had continued to sell the same quantity each month and to hold the same share of the Community market as during the last months preceding the entry into force of the duties set by that regulation, duties which would have amounted to ECU 296 110. Bearing in mind that these were provisional duties, it would have sufficed for the applicant to provide a security against the eventuality of the duties being definitively collected. However, the applicant has provided no evidence to show that it had sought to have such a guarantee issued or that it had not been able to obtain one, for economic reasons. The Commission states that the most rational course of action open to the applicant would have been to obtain the guarantee in question, at a minimal cost, and to continue to sell to the Community at unchanged prices. That is particularly so in view of the fact that by letter of 5 January 1998 the applicant received from the Commission an assurance that its undertaking would be reinstated and that the provisional duties would not be collected if the Commission was able to verify that the undertaking had not been breached during the third quarter of 1997. By letter of 2 February 1998 the Commission had, moreover, confirmed to the applicant that it had reached the conclusion that the provisional duties would not become definitive.

101 It adds that such a course of action would have saved the applicant the cost of re-establishing itself in the Community market. In any event, the applicant has not provided any evidence in support of its claim that it had made substantial efforts in seeking to win back its market share.

102 In its rejoinder, the Commission argues, first of all, that the applicant should have realised at the time that, if its explanations concerning the October 1997 report

were correct, the duties would not be collected. The Commission observes that it was the Commission itself, by adopting Regulations No 2529/97 and Regulation No 651/98, that imposed measures in respect of the applicant's imports and subsequently reinstated the latter's position. It submits that the Council was not lawfully entitled, in the present case, to decide to collect the provisional duties in the absence of any injury to the Community industry. Furthermore, provisional duties have never been collected in the past in circumstances such as those of the present case, where the provisional measure has not been followed by the imposition of a definitive duty.

103 Next, the Commission contends that, if during the period when the provisional duties were in force the applicant had chosen to export to the Community by increasing its prices by the amount of the duties, it would have made a substantial profit, since those duties were not definitively collected. For the same reason, even if the applicant had chosen, for obvious commercial reasons, to continue to sell to the Community during that period at unchanged prices, it would not, in the Commission's view, have suffered any loss other than the cost of the bank guarantee. The Commission rejects the applicant's allegation, based on Article 12(1) of Regulation No 384/96, that to continue its exports at unchanged prices after the entry into force of Regulation No 2529/97 would have been contrary to the Commission's policy.

104 Finally, the Commission rejects the applicant's complaints with regard to its method of calculating loss of profit during the period when the provisional duties were in force. It contends, moreover, that there are errors in the methodology applied by the applicant, which is based on the turnover in the two previous years over the period corresponding to that when the provisional duties were in force, when there were no anti-dumping measures in force at that time with regard to Norwegian salmon.

Findings of the Court

105 It is necessary to examine first whether the applicant has proved that it suffered actual loss or damage to its business, as it claims.

106 So far as concerns, first, loss of profit between 18 December 1997 and 25 March 1998, it must be observed that the figures given by the Commission for exports of farmed Atlantic salmon by the applicant to the Community between July 1997 and September 1998 show that the applicant wholly suspended its exports during the period from approximately mid-December 1997 to the end of March 1998. That suspension of the applicant's business activities on the Community market is confirmed by the auditing firm's certificate appended as annex 6 to the application, which states:

'[W]e hereby confirm that according to the books of the [applicant], no sales of Atlantic salmon have been made to the Community in the period 18 December 1997 and 25 March 1998.'

107 There is nothing in the case-file to show that, during that period, the applicant was in a position to make up, even in part, for the total absence of exports to the Community market by a corresponding increase in its sales on other world markets. The Commission has, moreover, never made such an argument, either in its written submissions or at the hearing.

108 On the contrary, the mission report drawn up by the Commission after the inspection at the applicant's premises on 26 and 27 January 1998 (see paragraph

18 above) shows that following the imposition of the provisional duties the applicant's business activity was extremely reduced and that its directors stated that they would probably have to close if the duties were confirmed. That report goes on to state that the applicant effectively exported only to Japan following the entry into force of the provisional measures. However, that last indication, read in the light of the preceding statements, must be understood as referring to the applicant's exploitation of an opening on the Japanese market and cannot be taken as an indication that the focus of the applicant's business activities had shifted towards that market in order to make up for the total absence of sales by it on the Community market.

109 In light of those circumstances, it is necessary to assess the amount of the loss of profit suffered by the applicant as a result of the suspension of its exports to the Community between 18 December 1997 and 25 March 1998. That loss of profit must be considered to equate to the profit which it would have made if it had continued to export to the Community during that period.

110 In order to do so, it is necessary first to determine at what rate the applicant's exports to the Community fell following the entry into force on 1 July 1997 of its undertaking, which would in any event still have applied if it had continued to export to the Community during the period in question. For a reliable calculation, the trends in the applicant's sales within the Community between 1996 and 1997 during the period from 1 July to 17 December have to be examined.

111 In that respect, it appears from the figures sent on 14 April 2000 by the applicant to the Court in reply to a written question that, during the period from 1 July to 17 December, it exported to the Community 1 271 304 kg of farmed Atlantic salmon in 1997 instead of the 2 030 883 kg of 1996, which represents a

reduction of 759 579 kg, or a fall in the order of 37% of its sales on the Community market.

112 On that basis, it may thus be held that, if the applicant had continued exporting to the Community within the framework of its undertaking between 18 December 1997 and 25 March 1998, its sales of farmed Atlantic salmon would have been 63% (100% — 37%) of those realised on the Community market in the previous year during the corresponding period. The figures set out in the abovementioned reply provided by the applicant make it clear that it exported to the Community approximately 450 000 kg of farmed Atlantic salmon from 18 December 1996 to 31 January 1997, 210 000 kg in February 1997 and 230 000 kg from 1 to 25 March 1997.

113 It can therefore be estimated that the applicant's sales of farmed Atlantic salmon on the Community market would have amounted to approximately 284 000 kg (63% of 450 000 kg) during the period between 18 December 1997 and 31 January 1998, 132 000 kg (63% of 210 000 kg) in February 1998 and 145 000 kg (63% of 230 000 kg) during the period from 1 to 25 March 1998.

114 From the information provided in the abovementioned reply by the applicant, it is apparent that between 1 July and 17 December 1997, when it exported its products to the Community within the framework of its undertaking, the applicant made an average profit of NOK 1 307 539/1 271 304 kg, that is to say NOK 1.028/kg. It may thus be inferred that, if it had continued to export on the basis of that undertaking between 18 December 1997 and 25 March 1998, it would have made a profit equivalent to NOK 292 000 (284 000 kg × NOK 1.028/kg), NOK 135 000 (132 000 kg × NOK 1.028/kg) and NOK 150 000 (145 000 kg × NOK 1.028/kg) between 18 December 1997 and 31 January 1998, in February 1998 and between 1 and 25 March 1998 respectively.

115 The loss of profit suffered by the applicant will therefore be fixed at NOK 292 000 in respect of the period between 18 December 1997 and 31 January 1998, NOK 135 000 in respect of February 1998 and NOK 150 000 in respect of the period from 1 to 25 March 1998.

116 So far as concerns, secondly, the costs incurred in re-establishing its position on the Community market, it must be stated, as the Commission points out, that, contrary to the requirement laid down in the case-law (see Case C-237/98 P *Dorsch Consult* v *Council* [2000] ECR I-4549, paragraph 23, and the case-law cited), the applicant does not adduce any evidence to prove that it has actually incurred such costs and that it will continue to do so. Moreover, it must be pointed out that, according to the figures provided by the Commission in annex 5 to the defence, which were not disputed by the applicant in its reply, the applicant has largely recovered its share of the market in the Community since June 1998. Its exports of farmed Atlantic salmon to the Community during that month, in proportion to the total exports of salmon originating in Norway to the Community, in fact represented 1.60% of the market whereas, according to the same Commission figures, the applicant's share of the market had been, on average, 1.38% during the five months prior to the entry into force of Regulation No 2529/97. Accordingly, the Court holds that that head of damage alleged by the applicant has not been proved.

117 It is necessary now to determine whether there is a causal link between the loss or damage to the applicant's business, as established by the analysis set out in paragraphs 105 to 116 above, and the wrongful conduct of the Commission, confirmed by Regulation No 2529/97, which is clear from the examination carried out in paragraphs 73 to 82 and 91 above.

118 There is a causal link for the purposes of the second paragraph of Article 215 of the Treaty where there is a direct causal nexus between the fault committed by the

institution concerned and the injury pleaded, the burden of proof of which rests on the applicant (Case T-149/96 *Coldiretti and Others* v *Council and Commission* [1998] ECR II-3841, paragraph 101, and the cited case-law). The Community cannot be held liable for any damage other than that which is a sufficiently direct consequence of the misconduct of the institution concerned (see, in particular, Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 21; Case T-168/94 *Blackspur and Others* v *Council and Commission* [1995] ECR II-2627, paragraph 52, and *TEAM* v *Commission*, cited above in paragraph 30, paragraph 68).

119 In the present case, it is clear from the certificate issued by the firm of auditors analysed in paragraph 106 above that the period during which the applicant suspended its exports to the Community coincides with that during which the provisional measures imposed by Regulation No 2529/97 applied to imports of its products. That must be interpreted as evidence of the existence of a causal link between the irregularities, in particular those committed by the Commission, giving rise to the imposition of provisional measures, on the one hand, and the loss of profit, on the other.

120 It is, indeed, undeniable that, were it not for such irregularities and the provisional measures which followed them, the applicant would have continued its exports to the Community in compliance with its undertaking. It would thus have suffered no loss of profit on the Community market. The misconduct of the Commission, when analysing the October 1997 report, and which was confirmed by Regulation No 2529/97, is therefore causally linked, within the meaning of the case-law referred to in paragraph 118 above, with the loss or damage to the applicant's business.

121 The evidence mentioned in paragraph 119 above cannot however be considered in itself to prove that the whole of the applicant's loss of profits, as determined in

paragraph 115 above, was caused exclusively by the irregularities, in particular those of the Commission, which gave rise to the adoption of the provisional measures. In that regard, it is necessary to ascertain whether, as the case-law requires, the applicant showed reasonable diligence in limiting the extent of the damage which it claims to have suffered, a matter which the Commission disputes (see, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 85; and Case C-284/98 P *Parliament* v *Bieber* [2000] ECR I-1527, paragraph 57).

122 The Commission's argument is that, in view of the fact that the duties imposed by Regulation No 2529/97 were provisional, the applicant could, by providing a modest amount for the setting-up of a bank guarantee, have continued to export to the Community at unchanged prices.

123 In that regard, the parties do not dispute that, at the time, the applicant exported its products to the Community mainly under the DDP system. Under that system, it would have been obliged to pay the provisional anti-dumping and countervailing duties imposed by Regulation 2529/97 to the relevant customs authorities, if it had exported to the Community market during the period when the provisional measures were in force. For that reason, it would have been for the applicant, and not for its customers within the Community, to provide a bank guarantee for that type of sale to cover such provisional duties, and on which Article 7(3) of Regulation No 384/96 and Article 12(2) of Regulation No 2026/97 predicate the free circulation of the products in question within the Community.

124 However, even supposing that the applicant, which has not disputed the Commission's statements regarding the cost of such a bank guarantee, had obtained one, the Court holds that it would have run an unusual commercial risk, beyond the level of risk inherent in any commercial enterprise, by exporting to the Community during the period when Regulation No 2529/97 was applicable to imports of its products. If, once that bank guarantee had been issued, it had, as the Commission suggests, decided to export to the Community at unchanged

prices without passing on to its Community customers the amount of the provisional duties through the prices it charged, it would have run the risk of having to bear on its own the burden of those duties should they ever have been collected definitively. Since it was not able to tell at that time whether that would eventually be the case, it therefore had no option but to increase its export prices by the amount of those provisional duties. Having regard in particular to competition from Community companies selling salmon and from the numerous Norwegian exporters which had been able to continue to sell on the Community market within the terms of their undertakings during the period in question, the applicant could reasonably have taken the view that there was no chance of finding an outlet for its products on that market during that period.

125 In view of those circumstances, the absence of any attempt by the applicant to export its products to the Community during the period in question cannot be regarded as a failure to fulfil the obligation, laid down in the case-law referred to in paragraph 121 above, to show reasonable diligence in mitigating the extent of the damage which it claims to have suffered.

126 The Commission maintains that it gave the applicant an early assurance that its undertaking would be reinstated and that the provisional duties imposed by Regulation No 2529/97 on imports of its products would not be confirmed.

127 None the less, the Court observes that in its letter of 5 January 1998 (see paragraph 11 above) the Commission stated that it was prepared to reconsider its position *vis-à-vis* the applicant in the light of any new data which the latter sent it in good time. It did not however offer it any certainty as to the reinstatement of

its undertaking or the non-confirmation of the provisional duties imposed by Regulation No 2529/97.

128 It is true that in its letter of 30 January 1998, mentioned in paragraph 19 above, the Commission informed the applicant that it no longer had any reason to believe that it had breached its undertaking, that the provisional duties imposed on imports of its products were expected to be repealed and that the undertaking would be reinstated as soon as that repeal took effect or by 19 April 1998, whichever was the earlier. However, in its letter of 2 February 1998, the Commission — which, during the hearing, did not dispute that that letter constituted the reply to the applicant's inquiry regarding the conditions under which it could resume exporting to the Community pending the reinstatement of its undertaking — after recalling the content of Article 7(3) of Regulation No 384/96 (see paragraph 123 above), stated:

'As it is intended to propose to the Council to make a negative determination, i.e. *not to* impose definitive duties, the provisional duties imposed by Regulation (EC) No 2529/97 are expected not to be confirmed, pursuant to Article 10(3) of Regulation (EC) No 384/96. Article 10(2) of Regulation (EC) No 384/96 provides that amounts of provisional duties shall be released in so far as there is no decision by the Council to definitively collect all or part of the provisional duties.'

129 Whatever the reason for them, the last words of that passage, which suggest that the Commission's intention not to propose the imposition of definitive duties on the applicant's products did not mean that the Council would not decide to collect definitively all or part of the amounts paid by way of provisional duties, left the applicant's directors with the prospect of the unusual commercial risk

described in paragraph 124 above, if it resumed exports to the Community while the provisional measures imposed by Regulation No 2529/97 remained in force.

130 Although it was not possible, at the material time, to find any actual cases of provisional duties being collected definitively where they had not been replaced by definitive duties, the applicant cannot be reproached for continuing, upon reading such a statement, to refrain from exporting to the Community until 25 March 1998, when it knew for certain, with the entry into force of Regulation No 651/98, that its undertaking had been reinstated and the provisional duties imposed by Regulation No 2529/97 on imports of its products had been repealed.

131 On the other hand, the Court holds, on reading the letters of 30 January and 2 February 1998 analysed in paragraph 128 above, that the Commission did not take the necessary and appropriate measures which the party causing the damage must take where damage, such as that at issue here, is ongoing (see, to that effect, *Parliament* v *Bieber*, cited in paragraph 121 above, paragraph 57) in order to limit the extent of the damage to which its misconduct, when it was verifying compliance by the applicant with its undertaking, had contributed.

132 It is clear from the case-file that, following the explanations provided by the applicant at the beginning of January 1998 (see paragraphs 12 and 13 above) and the investigation carried out at its premises at the end of that month (see paragraph 18 above), the Commission had become convinced, at least as from 30 January 1998, as attested by its letter of that date, that the applicant had complied with its undertaking in the course of the third quarter of 1997. However, the Commission, which, in its own words (see paragraph 102 above) and as is shown moreover by the fact that it adopted Regulation No 651/98, was alone entitled in the present case to lift the provisional measures imposed on imports of the applicant's products by Regulation No 2529/97, for no obvious reason delayed until 25 March 1998 before giving the applicant, by means of

Regulation No 651/98, the formal legal reassurance which it could have given at the end of January 1998. Although it could have realised during the above-mentioned investigation at the applicant's premises that the applicant was suffering considerable commercial loss as a result of the application of those provisional measures (see paragraph 108), by its letter of 2 February 1998 it unjustifiably perpetuated the doubts as to the final outcome regarding the provisional duties imposed by Regulation No 2529/97. It thus dissuaded the applicant from resuming commercial activities on the Community market.

133 The fact that the Commission was faced at the same time with several similar cases, which prompted it to check the information necessary for the purposes of definitively determining whether undertakings had been breached, and the fact that the period of validity of Regulation No 2529/97 had been set at four months, did not exonerate it from the duty to regularise the applicant's own situation as soon as it was finally convinced that the applicant had complied with its undertaking during the period in question.

134 For having thus failed to take the necessary measures as soon as the irregularities giving rise to the imposition of provisional measures on imports of the applicant's products were definitively rectified, the Commission must be held solely responsible for the applicant's loss of profit, at least as from the end of January 1998.

135 It must therefore be held that, although, as is apparent from the grounds set out in paragraphs 73 to 92 above, the applicant contributed to the same extent as the Commission in causing loss or damage to its business, continuation of that loss after the end of January 1998 is, on the other hand, exclusively due to a failure by the Commission to exercise due care; even though the explanations which it had obtained from the applicant had definitely made it possible to correct their respective prior errors and removed any reason to continue to believe that the undertaking had been breached, the Commission delayed, for no apparent

reason, in regularising the applicant's situation by withdrawing the provisional measures originally imposed against it.

136 It follows that the Commission must be held to be liable for one half of the loss of profit suffered by the applicant between 18 December 1997 and 31 January 1998 and for all the loss caused to the applicant from 1 February to 25 March 1998 (see paragraph 115 above).

137 In conclusion, the Commission will be ordered to pay to the applicant, first, one half of NOK 292 000 in respect of the applicant's loss of profit between 18 December 1997 and 31 January 1998 and, second, NOK 285 000 (NOK 135 000 + NOK 150 000) as compensation for the damage caused to the applicant from 1 February to 25 March 1998, that is a total amount of NOK 431 000. The remainder of the application will be dismissed.

Costs

138 Under Article 87(3) of the Rules of Procedure, the Court may order costs to be shared if each party succeeds on some and fails on other heads. Since the Commission has been unsuccessful in all essential respects, it must be ordered to pay three quarters of the applicant's costs, in addition to its own costs. The applicant is ordered to bear one quarter of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. Orders the Commission to pay to the applicant NOK 431 000;

2. Dismisses the remainder of the application;

3. Orders the Commission to bear its own costs and to pay three quarters of the applicant's costs;

4. Orders the applicant to bear one quarter of its own costs.

Lenaerts Azizi Moura Ramos

Jaeger Mengozzi

Delivered in open court in Luxembourg on 24 October 2000.

H. Jung J. Azizi

Registrar President