JUDGMENT OF THE COURT (FIRST CHAMBER)
1 APRIL 1982 [1]

Firma Anton Dürbeck
v Commission of the European Communities

(Protective measures against the importation of dessert apples)

Case 11/81

Procedure — Raising of a fresh issue during proceedings — Condition — New matter — Concept

(Rules of Procedure, Art. 42 (2))

For a new fact to be able to justify the raising of a fresh issue during the proceedings the fact must not have existed or must not have been known to the applicant when the action was commenced. Since measures adopted by the Community institutions are presumed to be valid until such time as the Court may declare them incompatible with the Treaties establishing the Communities, a judgment of the Court finding that there is nothing capable of affecting the validity of a measure cannot be regarded as a matter allowing the raising of a fresh issue in other proceedings.

In Case 11/81

FIRMA ANTON DÜRBECK, whose registered office is in Frankfurt am Main, represented by Messrs. Ehle, Feldmann, Schiller and Eyl of the Cologne Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Jörn Sack, a member of its Legal Department, acting as Agent, with an address for service

1 — Language of the Case: German.

in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION pursuant to the second paragraph of Article 215 of the EEC Treaty for compensation for damage which the applicant considers it has suffered and will suffer as a result of protective measures against the importation of dessert apples from Chile, adopted by Commission Regulation (EEC) No 687/79 of 5 April 1979 (Official Journal, L 86, p. 18), as amended by Commission Regulations (EEC) No 797/79 of 23 April 1979 (Official Journal, L 101, p. 7) and No 1152/79 of 12 June 1979 (Official Journal, L 144, p. 13),

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

The facts which gave rise to the present case are the same as those in Case 112/80, a reference for a preliminary ruling in which judgment was given on 5 May 1981.

On 21 January 1981, while the reference for a preliminary ruling was pending, Firma Anton Dürbeck (hereinafter referred to as "Dürbeck") submitted the present application under the second paragraph of Article 215 of the EEC Treaty against the European Economic Community represented by the Commission of the European Communities.

By means of this action Dürbeck seeks to obtain compensation for damage which it claims it has suffered or will suffer as a result of the protective measures adopted by the Commission, namely:

Damages payable to the Chilean producer for non-performance of contractual obligations in relation to taking delivery of some 110 000 boxes of dessert apples;

Damages for cancellation of the charterparty, payable to the owners of the ship which was to transport the goods to Europe;

Loss of profit from not marketing the goods on the Community market;

Material loss in the form of lost goodwill and lost market-share;

Other contingent and future losses.

The action was lodged at the Court Registry on 21 January 1981.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. The Court also decided pursuant to Article 95 (1) and (2) of the Rules of Procedure to refer the case to the First Chamber.

II — Conclusions of the parties

Dürbeck claims in its application that the Court should:

1. Order the defendent to pay the applicant 506 850 US dollars, with interest at 6% from the commencement of the proceedings;

2. Declare that the defendant is obliged to compensate the applicant for all further damage (not yet ascertainable) which it will suffer as a result of the introduction of the disputed protective measures;

3. Order the defendant to pay the costs.

In its reply Dürbeck added to paragraph 1 of its claim (which thus becomes paragraph 1 (a)) a claim in the alternative that the Court should:

1 (b) Find that the defendant is bound to pay the amount of damages referred to in 1 (a) when the applicant accepts such liability or is the subject of a court order to that affect.

The *Commission* contends that the Court should:

1. Dismiss the action as inadmissible and in any event unfounded;

2. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Dürbeck first of all gives the following particulars concerning the amount which it claims as compensation for damage which it has suffered or will suffer by reason of the suspension ordered by the Commission on 5 April 1979 of importations of Chilean dessert apples:

By way of damages payable to the Chilean producer for failure to take delivery of some 110 000 boxes of dessert apples which were the subject of a firm order, the sum of 300 000 US dollars, that is to say the difference between the contract price and the price which the producer subsequently obtained on the Chilean market;

100 000 US dollars for the cancellation of a charterparty for the transport of the apples from Chile to Europe (257 000 US dollars were subsequently claimed by the shipowners but the claim is being contested by the applicant);

96 850 US dollars for loss of profit;

10 000 US dollars by way of damages for loss of goodwill and position in the market, leading in Dürbeck's view to financial losses far in excess of the amount claimed as compensation;

Further contingent damage, the amount of which is not yet quantifiable.

As the basis for its claim for compensation Dürbeck submits that the adoption of the protective measure and the refusal to adopt special transitional provisions in its favour are unlawful for the following reasons:

1. Lack of legal basis for the conclusion of agreements on voluntary restraint;

2. Breach of the provisions of Article 29 of Regulation (EEC) No 1035/72 in conjunction with Articles 1, 2 and 3 of Regulation (EEC) No 2707/72;

3. Breach of the principle of the protection of legitimate expectation;

4. Breach of the provisions of Article 37 of Regulation (EEC) No 1035/72 in conjunction with Articles 39 and 110 of the EEC Treaty;

5. Breach of the special principle of non-discrimination contained in Article 40 (3) and the general principle of non-discrimination laid down in the EEC Treaty.

Those submissions are in substance the same as Dürbeck put forward in its observations in Case 112/80, save the first, which was not raised until the oral procedure.

In its *first submission* Dürbeck alleges that the protective measure was adopted with regard to Chile because Chile refused to agree to voluntary restraint as proposed by the Commission. It considers that such agreements, being instruments of economic policy, may be concluded by the Commission only on the basis of express authorization from the Council pursuant to Articles 113 and 43 of the EEC Treaty and that no such authorization was granted in the present case. Since it was thus contrary to Community law to conclude such agreements it was even more so to penalize Chile's refusal to be a party thereto.

In its *second submission* Dürbeck states first of all that the decisive factor in assessing the existence of conditions justifying the adoption of a protective measure in the present case was the situation of the apple market not for the whole of the 1978/79 marketing year but only during the first half of April 1979.

It then claims as follows:

(a) Supplier countries of the southern hemisphere other than Chile to which the Commission had proposed in 1979 voluntary restrictions on exports of dessert apples to the Community had forecast higher quantities than they could in fact supply in order to be able to claim those quantities in future;

(b) The Commission assessed the situation on the market in dessert apples according to criteria which did not comply with the provisions on the adoption of protective measures inasmuch as it took into account produce not qualifying for intervention and thus not marketable (in Dürbeck's view some 70 % of the 1978 production) and produce qualifying for intervention but not marketable as dessert apples and thus not competing with fresh apples from the southern hemisphere;

(c) The Commission wrongly assessed the quantity of marketable dessert apples still in storage when the protective measure was adopted, that is to say on 5 April 1979, since for technical reasons the stocking of apples in ordinary or cold storage could not be extended (save in the case of controlled atmosphere warehouses) beyond the end of February and beginning of March in each year;

(d) The wholesale price of European dessert apples tended to rise continually as from January 1979;

(e) In 1980, when Community production was over seven million tonnes, Chile alone exported some 80 600 tonnes of dessert apples to the Community, which did not constitute a threat to the Common Market.

Dürbeck also challenges the Commission's allusion to the alleged urgency of the protective measure. The Commission has been acquainted for many years with all the particulars concerning imports of dessert apples from countries of the southern hemisphere. Since October 1978, as in previous years, the situation of the apple market has been discussed by the Advisory Committee and the Management Committee. The Commission thus had at least five months to consider and assess from all aspects the need for protective measures in 1979.

Dürbeck then states that contrary to what the Commission said in the preamble to Regulation No 687/79 the imports to be feared when the protective measure was adopted were not imports of unlimited quantities of fresh apples from non-member countries but solely imports from Chile since the other countries in the southern hemisphere had concluded agreements on voluntary restraint with the Commission. Moreover, the quantity which could have been exported from Chile (13 000 tonnes of which between 5 000 and 8 000 tonnes were in transit to Austria) was known to the Commission, which had received precise information on that subject during a meeting of its representatives with the representatives of the importers on 14 March 1979.

Dürbeck adds that the absence of any danger of disturbing the market by reason of such an importation (13 000 tonnes in relation to 338 000 tonnes of apples imported and 6 776 000 tonnes of Community produce) appears to be confirmed by the fact that the following year (1980), with Community production standing at 6 869 000 tonnes, the Commission considered that at least 370 000 tonnes of apples originating from non-member countries could freely be imported into the Community without its being necessary to adopt protective measures.

Dürbeck moreover maintains its opinion, which it thinks well founded, to the effect that fresh dessert apples imported from the southern hemisphere cannot be substituted for dessert apples originating in the Community save to a very limited

degree, but have a positive marketing effect upon the sales of domestic dessert apples both from the quantitative point of view and as regards the prices obtained. Moreover, the passage in the reasons given for Regulation No 687/79 which states that imports from non-member countries "could . . . in all probability lead to an increase in the quantities to be withdrawn from the market" shows clearly that the Commission adopted the protective measure not on the basis of findings of fact but suppositions which are not supported by the experience of the previous years.

In support of its allegation Dürbeck refers to the price trends in 1980 as apparent from the figures supplied by the Zentrale Markt- und Preisberichtsstelle (Central Office for Market and Price Reports). The prices of dessert apples were subject in 1980 to great fluctuation until the 13th week of the marketing year, which is the week when imports from overseas normally begin each year; thereafter prices increase constantly. There was no such trend in 1979 and the reason was that in the 1978/79 marketing year Community dessert apples did not satisfy standards for size and quality, an essential condition for the stimulation of sales.

In Dürbeck's view, the first effect of the protective measure introduced in April 1979 was that the countries of the southern hemisphere other than Chile were forced to exhaust completely the quotas allocated to them pursuant to the agreements on voluntary restrictions. But as a rule those countries hardly ever supply all the quantities forecast. It is apparent from a comparison with other years, for example with 1980, that all the supplier countries with the exception of Chile supplied less than they said they would.

Finally, Dürbeck mentions fraudulent transactions carried out in 1979 in the Netherlands by persons who reintroduced on to the market some 8 000 tonnes of apples which had already benefited from intervention. That fact shows that in spite of the imports expected from overseas it was reasonable in 1979 to consider that there was still a possibility of marketing even apples which ought to have been processed into animal feed.

It is right therefore to conclude that there was no way in which the Community market in apples suffered or risked suffering serious disturbances by reason of imports in April 1979.

As regards the Community market in apples, which the Commission governs with its regulations and manages in conjunction with the Member States, it is Dürbeck's opinion that the Commission in no way attempted to enquire about the distribution of dessert apples according to size and whether those stored and those benefiting from intervention complied with the standards of quality. The defective nature of the Commission's checks on compliance with the standards of quality on the domestic market was moreover also criticized by the Court of Auditors of the European Community.

If in fact the Commission did not know what quantity of produce complying with the standards of quality was available on the Community market, that reason in itself sufficed, from the strictly legal point of view, to prevent it from finding that there was a threat of a disturbance of the market.

As regards price trends, Dürbeck observes that an analysis is possible only on the basis of comparable quality and varieties. In the present case it is necessary to analyse the prices for the "golden delicious" variety having a

diameter of 70 mm or more, since it is only apples of that kind and size which have been supplied by countries of the southern hemisphere. The information provided by the Commission does not meet the said criterion.

The Commission's infringement of Regulation No 1035/72 involves at the same time a breach of the applicant's right to carry on its trade, which right is protected by the German constitution. That leads to the conclusion that the Commission has infringed a superior rule of law conferring rights on individuals.

Dürbeck's *third submission* is that in arbitrarily and for no good reason disregarding existing contracts in order to show Chile what might be the consequences of not accepting voluntary restrictions the Commission acted in breach of the principle of the protection of legitimate expectation. The adoption of an unjustified protective measure was intervention which could not reasonably be expected. The admission for many years of a total quantity of some 360 000 tonnes with a tendency to increase, the obligation laid down by Article XI of GATT, numerous meetings between the Commission and the exporting countries of the southern hemisphere and with the importers, and the precise knowledge which the Commission had of the market, created between the Commision and the importers special legal relations on which the importers might rely in their business transactions.

Dürbeck's *fourth submission* is that, according to Article 37 thereof, Regulation No 1035/72 must be so applied that "appropriate account is taken, at the same time, of the objectives set out in Articles 39 and 110 of the Treaty".

The objectives of Article 39 were disregarded by the protective measure although the importation of Chilean apples would not have exposed them to any risk. The first paragraph of Article 110, which provides that the Community and the Member States shall contribute to the progressive abolition of restrictions on international trade, was disregarded in an even more flagrant manner. That also involves, moreover, disregard of the undertakings assumed under GATT.

Dürbeck's *fifth submission* is that in the context of the general relations between the Community and non-member countries there has been a breach of the principle of non-discrimination inasmuch as the import quota granted to Chile has, for no valid reason, been reduced proportionately to a much greater extent than the import quota granted to other countries.

Further, by authorizing in Regulation No 1152/79 the importation of goods which were not in transit so the Community when the protective measure was adopted the Commision disregarded the special principle of non-discrimination laid down in Article 40 (3) of the EEC Treaty. That regulation practically amounted to a special rule for a single German undertaking which shipped the goods after the protected measure was adopted.

In its reply, Dürbeck discusses in particular the question of the burden of proof since the Commission repeatedly stressed that certain facts alleged by the applicant had not been proved.

Dürbeck concedes that, according to decisions of the Court of Justice, there is a presumption that regulations adopted

by the institutions of the Community are lawful; a party seeking directly or indirectly to challenge a regulation must therefore prove that the Commission has acted on false premises. However, Dürbeck considers that that presumption of legality applies only if

The Commission states in the regulation itself that it had regard to the requirements laid down by law; or

Where the first condition is not satisfied, the facts stated in the reasons given for the regulation should be conclusive and relevant; or

Where the aforementioned conditions are not satisfied, the Commission can prove that it has given careful consideration to the conditions for recourse to the protective measure and that it has exhausted all possible sources of information.

Dürbeck considers that none of these conditions has been satisfied in the present case.

The requirement that the reasons must be expressly stated has not been satisfied, since Regulation No 687/79 makes no reference to Regulation No 2707/72 which determines the criteria for adopting the protective measures.

The reasons given for Regulation No 687/79 are not conclusive, complete, correct or clear. No mention is made of certain essential facts, such as the situation of stocks when the protective measure was adopted, the compliance of the dessert apples whose prices were investigated with quality standards and the marketing effect of the dessert apples imported from the southern hemisphere;

Finally, the Commission did not properly fulfil its obligation to establish the facts in relation to all the criteria affecting the protective clause. If, however, the Commission has no precise knowledge of the market when protective measures are adopted it should not rely on uncertain information in order to take such action. Should it nevertheless do so, then it must prove the facts on which it relies and thus justify the protective measures.

Dürbeck adds that the Commission, as an 'impartial authority', must not act as an ordinary party, but in cases before the Court must produce all documents relating to information made available to it by the Member States pursuant to legal provisions, since such documents, in view of their confidential nature, are not available to private parties.

The *Commission* first of all challenges the applicant's conduct of the proceedings and states that even if the action is strictly admissible Dürbeck ought to have awaited the conclusion of the reference for a preliminary ruling in Case 112/80 before bringing its action for damages.

Although the Commission takes the view that there is no call in the present case to discuss once again the question of the validity of Regulations Nos 687/79, 797/79, and 1152/79 which both parties fully ventilated in Case 112/80, it nevertheless makes certain observations in relation thereto.

Thus it stresses that certain issues upon which the applicant still insists — such as the amount of goods in transit, the exhaustion of the quotas by producer countries other than Chile and the size of the harvest in the Community in 1978

— were settled at the latest by the Commission's answer of 7 January 1981 to questions put to it by the Court in Case 112/80.

The Commission further contends that the applicant has adduced no evidence or only very flimsy evidence in support of its claims; that applies even to the most serious claims such as the claim that 70% of the apples in storage from the 1978 harvest were not fit for intervention. The Commission moreover categorically rejects the applicant's view that it is for the Commission to prove the circumstances which constitute the basis for its regulations.

As regards Dürbeck's *first submission,* it says that although there are no express provisions empowering it to make agreements with non-member countries on voluntary restrictions, it has the power to adopt protective measures pursuant to Article 29 of Regulation No 1035/72 of the Council of 18 May 1972 on the common organization of the market in food and vegetables.

Those measures may be adopted only to the extent and for the period absolutely necessary, so that they may not be adopted against non-member countries which have declared themselves ready to restrict their exports to the Community in order to prevent a disturbance of the market. It is therefore quite proper for the Commission to ask non-member countries whether they are prepared to give such an undertaking; that does not amount to a formal trade agreement within the meaning of Article 113 of the EEC Treaty. Every non-member country is at liberty to decide whether to give such an undertaking; protective measures may not be taken against a non-member country simply because it refuses to give such an undertaking. A country which is not prepared to restrict its exports cannot however rely on the fact that because other non-member countries have accepted export restrictions its own exports no longer disturb the Community market.

The Commission considers the applicant's submissions concerning the invalidity of the contested regulations to be completely unfounded. *Ex abundanti cautela,* in case the Court should take another view, the Commission makes certain observations on the question of its liability in an action for damages and on the applicant's assessment of the damage.

It follows from the wording of Articles 1 and 2 of Regulation No 2707/72 ('account shall be taken of' or 'account shall be taken in particular of') that the criteria set out there are not all binding upon the Commission and are not absolutely mandatory. Similarly, Article 3 states that certain measures *may* be taken. All this implies relatively wide discretion on the part of the Commission.

As regards the *second submission,* the Commission observes that the very detailed preamble to Regulation No 687/79 adopts the principal criteria which must be satisfied pursuant to Regulation No 2707/72 before provisional measures may be adopted under the first subparagraph of Article 29 (1) of Regulation No 1035/72, so that it is not possible to claim that the absence of an express reference to Regulation No 2702/72 constitutes a failure to state reasons as required by Article 190 of the EEC Treaty.

As regards the *third submission,* the Commission feels obliged to deny most emphatically the complaints made against it by the applicant in relation to an

alleged failure to fulfil its obligation to acquaint itself with the actual facts capable of justifying the adoption of protective measures.

In substance, the applicant is not complaining that the Commission failed to acquaint itself with the facts but that it drew the wrong conclusions from the information obtained.

After making those observations the Commission challenges in detail certain claims made by the applicant. Dürbeck's statements concerning the capacity of non-member countries to exhaust their export quotas are rebutted by the official figures on imports for 1979 and by the relevant statements of the Member States. It is apparent from those figures and statements that none of the supplier countries had any difficulty in using up its export quotas.

The statement to the effect that 70% of the dessert apples stored in March and April 1979 did not satisfy the quality criteria required for intervention is also without foundation. Apart from the fact that apples of different varieties and sizes (and not only golden delicious larger than 70 mm) may qualify for intervention buying, if such a statement were true it would mean that almost all the Member States had disregarded Community law. The applicant alone has the burden of proving such a systematic and serious breach. For its part, the Commission has no evidence warranting the allegation. In view of the very serious standard which the Commission has adopted in auditing the Member States' final accounts for the European Agricultural Guidance and Guarantee Fund it is most unlikely that the Member States would systematically disregard the Community rules concerning fruit and vegetables.

As for the fraudulent transactions of certain producers in the Netherlands in reintroducing on to the market apples which had already benefited from intervention, the Commission observes that those transactions took place in 1980, not 1979, so that they cannot be relied upon in judging the lawfulness of measures adopted by the Commission in 1979.

The Commission also challenges Dürbeck's claims regarding storage possibilities and states that certain late varieties of apples can be kept until the end of May in well-aired underground stores without their organoleptic quality being affected and that in controlled-atmosphere, refrigerated stores it is possible to keep them until July and August.

With regard to the quantities in transit, the Commission stresses that the Chilean authorities could not give precise information and that the method of surveillance proposed by certain importers could not be accepted in the absence of sufficient means of control.

As for the statement in the third recital to Regulation No 687/79 to the effect that imports from non-member countries could "in all probability [theoretisch] lead to an increase in the quantities to be withdrawn from the market", the Commission admits that the wording in German is somewhat unfortunate since it is not only in theory but also in practice that imports cause increased recourse to intervention in respect of apples of Community origin.

The Commission is firmly of the opinion that imported goods take the place on the market, to some extent at least, of Community produce. Although to a certain restricted extent the existence of the marketing effect referred to by the applicant may be accepted, it is nevertheless true that as soon as certain

import ceilings are exceeded the fact that fresh imported produce largely takes the place of domestic produce is no longer compensated for by an increase in total sales. That is confirmed by the price trend for the 1979 marketing year, prices having fallen sharply when imports of dessert apples from the southern hemisphere became available.

The Commission considers that it did not exceed its discretion, as regards the small quantities which might still be imported, by giving priority to goods in transit to the Community and then to goods which had already reached a Community port. It categorically denies intending to favour specific undertakings. It also states that from the outset it had informed the Chilean authorities of its intention not to allow the importation of Chilean apples beyond 25 April 1979, *if*, contrary to expectations, the quantity specified was not attained.

In such circumstances the Community is not liable unless the institution in question is guilty of grave and manifest disregard of the limits imposed on the exercise of its discretion with the result that its conduct could be regarded as arbitrary. However, even if the Court of Justice took an exceptionally strict view and found that the protective measure adopted to the Commission was an arbitrary exercise of discretion it would not be possible in view of the urgency of the decisions in question to charge the Commission with misuse of powers. Therefore it is not possible to allege that the Commission manifestly and gravely disregarded the limits of its powers. Moreover, the applicant was not affected by the protective measures in question differently from, or more seriously than, other importers.

Finally, the Commission sets out certain objections to the amount of damages claimed by the applicant. It makes the following observations:

The applicant has so far paid no damages to third parties by reason of the cancellation of the contract of sale or the charterparty and if it is not in a position to prove at least that it has had to recognize claims to compensation or has been found liable to some payment it has at present no right to quantifiable damages.

The fact that it calculates the damages for lost profits in US Dollars indicates that the applicant is apparently speculating in secret currency profits.

In seeking compensation for damage suffered to its goodwill and to its position on the market as a result of the protective measure adopted by the Commission, the applicant must first of all show precisely how far its business relations actually suffered in the following year; any complaint that the applicant does not have sufficiently good relations with the EEC would be quite unjustified since it would obviously be based on ignorance of the circumstances in the Community institutions and at most could affect the applicant's reputation only slightly.

The Commission observes in conclusion that the applicant is partly responsible for

any damage it claims to have suffered since in the contracts which it made with the Chilean firms it omitted to include a clause providing for cancellation of the contract in the event of the Community's adopting protective measures.

IV — Oral Procedure

The parties presented oral argument at the hearing on 19 November 1981.

Dürbeck took note of the judgment given by the Court on 5 May 1981 in Case 112/81. It accordingly abandoned the first second and fourth submissions pleaded in its application. As regards the third submission based on the principle of the protection of legitimate expectation, it stressed that henceforth it was relying solely on the fact that the Commission disregarded that principle by not adhering to its statements that it would abide strictly by Regulation No 687/79 and only allow the importation of goods which were already in transit to the Community when the protective measure was adopted. As regards the fifth submission alleging breach of the principle of non-discrimination, it admitted that there was no breach of that principle when goods already in transit to the Community were exempted from a protective measure but maintained that in fact the Commission authorized the importation of goods which were not in transit.

Dürbeck put forward a fresh submission, based on the fundamental principle of the protection of the right to property, to the effect that if the result of a measure lawfully adopted by Community institutions is akin to expropriation in effect individuals affected by that measure are entitled to compensation.

The *Commission* first of all most emphatically challenged the admissibility of the new submission and argued that the applicant had had the opportunity of relying on it, if only in the alternative, in its application and had not done so.

As for the alleged breach of the principle of non-discrimination, the Commission observed that quantities of apples shipped after the protective measure was adopted were first of all held up in customs warehouses and their importation was authorized only when it was found that part of the apples already imported were to be re-exported outside the Community. It added that the small additional quantity which it thus became possible to import could not reasonably be shared between a large number of undertakings and the preference reasonably given in the circumstances to goods which had already reached a Community port involved no discrimination.

The Commission also denied infringing the principle of legitimate expectation since it could not know in advance whether, by reason of any re-exportations that there might be, subsequent imports would become possible.

The Advocate General delivered his opinion on 21 January 1982.

Decision

1 By application lodged at the Court Registry on 21 January 1981 the undertaking Anton Dürbeck (hereinafter referred to as "Dürbeck"), whose registered office is in Frankfurt am Main, brought an action under the second paragraph of Article 215 of the EEC Treaty for compensation for damage which it considered it had suffered or would suffer as a result of protective measures applicable to the importation of dessert apples originating from Chile adopted by Commission Regulation No 687/79 of 5 April 1979 (Official Journal, L 86, p. 18) as amended by Commission Regulations Nos 797/79 of 23 April 1979 (Official Journal, L 101, p. 7) and 1152/79 of 12 June 1979 (Official Journal, L 144, p. 13).

2 In support of its action Dürbeck submits that Regulation No 687/79, by which the protective measures were adopted, and Regulations Nos 797/79 and 1152/79, in so far as they did not contain transitional provisions of which the applicant in particular might have taken advantage, were unlawful for the following reasons:

Lack of legal basis for the conclusion of agreements on voluntary restraint;

Breach of Article 29 of Regulation No 1035/72 in conjunction with Articles 1, 2 and 3 of Regulation No 2707/72;

Breach of the principle of the protection of legitimate expectation;

Breach of Article 37 of Regulation No 1035/72 in conjunction with Articles 39 and 110 of the EEC Treaty;

Breach of the general principle of non-discrimination.

3 On 5 May 1981 in Case 112/80 the Court ruled, in reply to a preliminary question put to it by the Hessisches Finanzgericht [Finance Court, Hesse] on the validity of the regulations, that: "Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Commission Regulations Nos 687/79, 797/79 and 1152/79".

4 At the hearing on 19 November 1981 Dürbeck stated that in view of the judgment given by the Court in Case 112/80 it was abandoning its submission in Case 11/81 that Regulations Nos 687/79, 797/79 and 1152/79 were invalid. It nevertheless maintained its claim for compensation, arguing that some of the submissions pleaded in its application, in particular the submissions based on breach of the principles of non-discrimination and the protection of legitimate expectation, could be relied upon even without challenging the validity of the aforementioned regulations. It also put forward a fresh submission relating to the possibility of holding the Community liable even for lawful measures.

5 In these circumstances it is necessary first of all to determine whether the submissions which the applicant states it is pursuing in fact correspond to the submissions made in its application or whether they are indeed fresh submissions raised in the course of the proceedings, which, to be accepted, must satisfy the conditions laid down by Article 42 (2) of the Rules of Procedure. It is also necessary to emphasize that any submission which amounts to challenging the validity of Regulations Nos 687/79, 797/79 and 1152/79 for reasons identical to those which the Court has already considered and dismissed in its judgment of 5 May 1981 must be rejected.

Breach of the principle of non-discrimination

6 The applicant claims that the finding in paragraphs 52 to 54 of the judgment of 5 May 1981 that Regulations Nos 797/79 and 1152/79 were designed solely to adjust the application of the protective measures to goods already in transit to the Community within the meaning of Article 3(3) of Regulation No 2707/72 is based partly on a factual error because it is in fact well known that the goods allowed to be imported pursuant to Regulation No 1152/79 were not in transit to the Community until after 12 April 1979, by which date, according to Regulation No 797/79, the dessert apples ought to have left Chile.

7 In this respect, Dürbeck stresses that by telex message of 10 April 1979 it asked the Commission for authorization to import before 10 or 15 May 1979 some 2 000 tonnes of Chilean dessert apples which were ready to be shipped and the Commission, the same day, refused, saying that the goods referred

to in the applicant's telex message could not be regarded as goods in transit to the Community.

8 The above-mentioned submission was included in the application and is therefore admissible. Moreover, although it amounts in substance to challenging Regulation No 1152/79 as discriminatory, it is based on a factor which was not taken into account in Case 112/80. It is right therefore to consider the submission in the present action.

9 The Commission has rightly observed that the treatment of Dürbeck is not discriminatory. It explained at the hearing that the Chilean apples shipped after 12 April 1979 had first of all been held up in the customs warehouses of a Member State and their importation was subsequently authorized only on objective grounds not connected with the identity of the undertakings concerned after it had been found that part of the apples already imported would be re-exported outside the Community. The small additional quantity of apples which it thus became possible to import could not reasonably have been shared among a large number of firms and it accordingly appeared reasonable to give preference to goods which had already reached a Community port.

10 The solution adopted by the Commission does not exceed the limits of the discretion which it enjoys in the performance of the tasks entrusted to it by Regulation No 1035/72 of the Council on the common organization of the market in fruit and vegetables.

11 In those circumstances Regulation No 1152/79 cannot be regarded as discriminatory and the submission must accordingly be rejected.

Breach of the principle of the protection of legitimate expectation

12 Dürbeck submits that the Commission was in breach of the principle of the protection of legitimate expectation by neglecting to inform it that a certain quantity of apples might still be imported in the event of its subsequently being found that quantities of apples already imported were not intended for the Community market.

13 That claim does not correspond to that put forward in the application, which sought to show that the legitimate expectation of the applicant was disregarded by the Commission by the very adoption of the protective measures; it must therefore be regarded as a fresh submission.

14 Article 42(2) of the Rules of Procedure of the Court provides that: "No fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure." In the present case the applicant has put forward no fresh matter of law or fact within the meaning of the aforementioned provision. The submission is therefore not admissible.

Possible liability of the Commission as a result of the adoption of lawful measures

15 It must be observed that this issue was raised only during the oral procedure and is therefore also a fresh submission based on the judgment of the Court of 5 May 1981.

16 The judgment given by the Court in Case 112/80 cannot however be regarded as a factor allowing a fresh issue to be raised pursuant to the aforesaid Article 42(2).

17 For a new fact to be able to justify the raising of a fresh issue during the proceedings the fact must not have existed or must not have been known to the applicant when the action was commenced. Since measures adopted by the Community institutions are presumed to be valid until such time as the Court may declare them incompatible with the treaties establishing the Communities, the judgment given by the Court in Case 112/80 merely confirmed the law which was known to the applicant when it brought its action.

18 In those circumstances Dürbeck could have safeguarded its position only by pleading in the application claims in the alternative which it considered it would still be able to argue if the contested measures were declared lawful.

19 This submission must therefore also be declared inadmissible.

Costs

20 Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. In the present case the applicant has failed in its submissions and must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber),

hereby:

1. **Dismisses the action as unfounded, so far as the submission relating to the breach of the principle of non-discrimination is concerned;**

2. **Dismisses the action as inadmissible, so far as the applicant's other submissions are concerned;**

3. **Orders the applicant to pay the costs.**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 1 April 1982.

J. A. Pompe
Deputy Registrar

G. Bosco
President of the First Chamber