

OPINION OF ADVOCATE GENERAL
LA PERGOLA

delivered on 14 December 1999 *

I — Factual and legal context of the proceedings before the Court of First Instance

as regards Iraq and Kuwait (hereinafter 'the regulation').²

1. By appeal lodged on 6 July 1998, Dorsch Consult Ingenieurgesellschaft mbH (hereinafter 'DCI'), a company incorporated under German law, applied to the Court of Justice for the setting aside of the judgment delivered by the Court of First Instance in Case T-184/95 (hereinafter 'the contested judgment')¹ and for the relief sought by it at first instance, or, alternatively, for an order referring the case back to the Court of First Instance. By the contested judgment, the Court of First Instance rejected the claim for compensation for the damage allegedly suffered by DCI as a result of the adoption of Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community

2. Outstanding debts are owed to the appellant by the Iraqi Government by virtue of a contract for the supply of services relating to the organisation and supervision of works connected with the construction of Iraqi Expressway No 1, concluded on 30 January 1975 with the Ministry of Works and Housing of the Republic of Iraq for a period of six years and subsequently renewed several times (hereinafter 'the contract'). DCI maintains that recovery of the said debt has become

* Original language: Italian.

1 — Case T-184/95 *Dorsch Consult v Council and Commission* [1998] ECR II-667. See also the order of 16 September 1998 (not published in the European Court Reports) whereby the Court of First Instance proceeded under Article 84(1) of the Rules of Procedure to rectify paragraphs 80, 81 and 83 of the contested judgment.

2 — OJ 1990 L 213, p. 1 (amended by OJ 1990 L 216, p. 28). The regulation was adopted by the Council, on a proposal from the Commission, having regard to the serious situation resulting from the invasion of Kuwait by Iraq and following Resolution No 661 of 6 August 1990, whereby the Security Council of the United Nations (hereinafter 'the Security Council'), declaring that it was 'mindful of its responsibilities under the Charter of the United Nations for the maintenance of international peace and security' and noting that Iraq had not proceeded, in compliance with Resolution No 660 of 2 August 1990, immediately and unconditionally to withdraw its armed forces from the territory of Kuwait, had decided to impose an embargo on trade with Iraq and Kuwait. Article 1 of the regulation prohibited, as from 7 August 1990, the introduction into the territory of the Community of any product originating in, or coming from, the said States, and also the export to Iraq and Kuwait of all products originating in, or coming from, the Community. Moreover, under Article 2 of the regulation, as from that date, the following were prohibited: (a) all activities or commercial transactions, including all operations connected with transactions which had already been concluded or partially carried out, the object or effect of which was to promote the export of any product originating in, or coming from, the said States; (b) the sale or supply of any product, wherever it originated or came from, to any natural or legal person established in the said countries for the purposes of any commercial activity carried out in or from the territory of Iraq or Kuwait; and (c) any activity the object or effect of which was to promote such sales or supplies.

impossible following the adoption of Law No 57 on protection of Iraqi property, interests and rights in Iraq and elsewhere³ by the Higher Revolutionary Council of the Republic of Iraq. DCI therefore argued before the Court of First Instance that, since Law No 57 represented the response of the Iraqi authorities to the Community embargo measure adopted against them, and therefore had its origin in the adoption of the regulation, the Community was under an obligation to pay compensation to it in respect of the damage suffered as a result of the refusal of the Iraqi Government to honour its debt. According to DCI, Community liability for the damage thus sustained primarily arises by virtue of the principle of the Community's liability for lawful acts, in that it has suffered an impairment of its property rights equivalent to expropriation, or, alternatively, by virtue of the principle of the Community's liability for unlawful acts, inasmuch as the Community legislature failed to make provision, when adopting the regulation, for compensation in respect of the damage caused by it to the undertakings concerned.⁴

II — The contested judgment

3. In its judgment, the Court of First Instance pointed out, first of all, that any

person seeking to assert the non-contractual liability of the Community is required to prove the existence both of the damage allegedly suffered and of a causal link between that damage and the act attributable to the Community (see paragraph 59). Therefore, according to the Court of First Instance, in the circumstances of the present case it fell to the appellant to show, *inter alia*, that the adoption of Law No 57 constituted, as a retaliatory measure, an objectively foreseeable consequence, according to the normal course of events, of the adoption of the regulation. The contested judgment moreover ruled out the existence not only of actual and certain damage suffered by the appellant (see paragraphs 60 to 68) but also of a direct causal link between the adoption of the regulation and the aforementioned damage (see paragraphs 71 to 74).

4. According to the Court of First Instance, the evidence adduced by DCI was not such as to show, in a sufficiently clear way, that the Iraqi authorities had made a definitive refusal to pay their debts, prompted by the adoption of the regulation. In consequence, the possibility could not be ruled out that the failure to pay the outstanding debts due to the appellant was the result of a mere delay of an administrative nature, a temporary refusal to pay or temporary or permanent insolvency on the part of Iraq. In particular, the Court of First Instance observed that, even if Iraq's refusal to pay were really the result of the adoption of Law No 57, the fact that that Law was repealed with effect from 3 March 1991 must mean that, at least from that date, there no longer existed any obstacle preventing the Iraqi authorities from paying the debts in issue. Finally, the best evidence of the fact that the appellant itself did not consider that the abovementioned debt had

3 — Law No 57 was adopted on 16 September 1990 and entered into force with retroactive effect on 6 August 1990.

4 — DCI sought from the Court of First Instance an order requiring the Community to pay it DM 2 279 859.69, plus interest at the rate of 8% per annum as from 9 August 1990 (the date of the entry into force of the regulation), in return for an assignment of the balance of the appellant's claim in the same amount against Iraq.

become definitively irrecoverable was provided by the proposal, contained in the application (see footnote 4 above) for the assignment of the debt itself to the Council and the Commission in exchange for payment of the corresponding amount.

5. The Court of First Instance went on to point out that the appellant had not even discharged the burden of proving that the adoption of Law No 57 constituted a retaliatory measure, of an objectively foreseeable nature, against the adoption of the regulation. In particular, Law No 57 contained no reference either to the Community or to the regulation; its preamble merely indicates that that legislation was enacted in response to the adoption by 'certain governments' of 'arbitrary decisions' against Iraq. Moreover, according to the Court of First Instance, the Law in question could no longer be regarded as the cause of the refusal to pay the debts owed to DCI, at least from the date of its repeal (see paragraph 4 above). The contested judgment further pointed out that, in the final analysis, the embargo against Iraq had been ordered by a resolution of the Security Council. The alleged damage, flowing from the counter-measures adopted by the Iraqi Government, therefore resulted from the adoption not of the regulation but of the aforementioned resolution. As for the regulation, the Court of First Instance observed that it was adopted specifically in order to ensure uniform implementation, throughout the Community, of the measures concerning trade with Iraq and Kuwait decided upon by the Security Council. It is true that, under Article 25 of the United Nations Charter, the members of the United Nations are required to observe and apply the resolutions of the Security Council and were therefore required, in the present case, to take all

necessary measures to give effect to the embargo ordered by the latter body. Those of them which were also Member States of the European Community were nevertheless required, in fulfilling the obligation decided on within the framework of the United Nations, to do so in accordance with the Treaty which relates to and governs that Community: any measure of common commercial policy, such as the imposition of a trade embargo, falls, by virtue of Article 113 of the EC Treaty (now, after amendment, Article 133 EC), within the exclusive competence of the Community.

6. The Court of First Instance then ruled, without forming a view on the question whether or not the principle of Community liability deriving from a lawful act forms an accepted part of the Community legal order, that such liability can be incurred only if the damage claimed, in addition to being 'actual', (i) arises from a legislative measure not justified by any general interest, (ii) affects a particular category of economic operators in a disproportionate manner by comparison with others ('special' damage), and (iii) exceeds the economic risks ordinarily inherent in doing business in the sector concerned ('unusual' damage; see paragraphs 59 and 76 to 80).

In applying those criteria, the Court of First Instance rejected the possibility that the damage suffered by a Community undertaking whose claims against the government of a non-member country have become irrecoverable following the imposition by a Community regulation of a trade embargo against that country can be characterised as 'special', inasmuch as it was

not only the claims of the undertaking concerned that were affected by the retaliatory measures adopted by the debtor country but also those of all other Community undertakings which, when the embargo was imposed, had not yet been paid. According to the Court of First Instance, moreover, the fact that the debts due to DCI go back to a contract concluded in 1975 and are not covered by the guarantees subsequently introduced in Germany against commercial risks incurred in 'high-risk' countries like Iraq is not enough to distinguish the appellant's position from that of undertakings which did benefit from such guarantees. The appellant, the Court of First Instance held, had not succeeded in proving that it was the sole undertaking unable to benefit from the guarantees in question or that it belonged to a small group of economic operators affected by such a disadvantage (see paragraphs 81 and 82).

The Court of First Instance then decided that damage flowing from the suspension of payments on the part of a non-member country could not be regarded as 'unusual' damage, that is to say, damage exceeding the foreseeable risks inherent in the business of providing services in such a country. Referring to the previous decisions of the Court of Justice in *Grands Moulins de Paris* and *Bosphorus*,⁵ the Court of First Instance observed that rules intended, by the imposition of an embargo against a non-member country, to maintain international peace and security have, by definition, effects which affect the freedom to

pursue a trade or business and may thus cause harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions. The Court of First Instance concluded that such damage cannot give rise to Community liability since the objectives of general interest pursued by such rules are of such importance as to justify negative consequences, even of a substantial nature, for some operators (see paragraphs 83 to 88).

7. Finally, the Court of First Instance also rejected the appellant's alternative claim for compensation for the damage allegedly suffered as a result of an unlawful act (see point 2 above). The contested judgment stated, first, that that claim presupposed the existence of a right to compensation on the part of DCI and, second, that examination of the main claim had already shown that the appellant could not be recognised as being entitled to any compensation since it had not established, in particular, that it had suffered actual and certain damage (see paragraphs 96 to 100).

III — Analysis of the grounds of appeal put forward by DCI and of the arguments of the parties

8. The appeal forming the subject-matter of the present proceedings is founded on 18 pleas in law. Although DCI has identified in its appeal, point by point, the paragraphs of the contested judgment which it challenges, the legal arguments on which its application for the setting-aside of that judgment is

⁵ — See Joined Cases 9/71 and 11/71 *Compagnie d'Approvisionnement and Grands Moulins de Paris v Commission* [1972] ECR 391, paragraph 46, and Case C-84/95 *Bosphorus* [1996] ECR I-3953.

based are not always clearly defined. Without resorting in every case to the criterion of holding a plea to be inadmissible pursuant to the first paragraph of Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure,⁶ I have sought, as far as possible, to interpret the appellant's arguments, identifying in each case, as set out below, the infringements of Community law alleged by it or the procedural defects which the Court of First Instance is said to have perpetrated.

The existence of actual and certain damage (the first to third pleas)

9. By its *first and second pleas*, DCI criticises, in essence, the finding, contained in paragraph 68 of the judgment, that it had not succeeded in demonstrating to the requisite legal standard the actual and certain nature of the damage suffered. According to the appellant, on the basis of the facts found by the Court of First Instance, the opposite answer was called for, since: (i) the existence of actual and certain damage prejudicing the creditor does not depend on the definitive nature of the debtor's refusal to pay, and the impossibility of recovering the debt in

issue, giving rise to the damage which the appellant claims to have suffered, ought precisely to be regarded as temporary; (ii) mere delay in the payment of a debt which has already fallen due constitutes in itself actual damage, consisting of the loss of interest on the capital sum, and (iii) the damage complained of is certain since the Council and the Commission acknowledged the amount thereof in the course of the oral procedure. DCI adds that the statement contained in paragraph 66 of the contested judgment — to the effect that it could legitimately have instructed Iraqi lawyers, remunerating them for the services rendered, to take the appropriate protective measures provided for by the contract in issue, and could thereby have prompted the Iraqi authorities to adopt a definitive position regarding the non-payment of their debts — is founded on an incorrect interpretation by the Court of First Instance of Council Regulation (EEC) No 3155/90 of 29 October 1990 extending and amending Regulation No 2340/90.⁷ Finally, the documents in the case and the other findings contained in the contested judgment,⁸ it is argued, contradict the assertion

6 — As established by the settled case-law of the Court of Justice (see, *inter alia*, Case C-153/96 P *De Rijk v Commission* [1997] ECR I-2901, paragraph 15. See also Case C-257/98 P *Lucaccioni v Commission* [1999] ECR I-5251, paragraphs 61 and 62, according to which a plea whereby the appellant, while complaining of a finding contained in the judgment appealed against, fails to specify the legal basis on which the Court of First Instance should have reached a contrary finding, does not meet the requirements laid down in the provisions referred to in the text.

7 — OJ 1990 L 304, p. 1 (amended by OJ 1990 L 317, p. 63). According to Article x of the contract, in the event of differences arising between the parties as to the interpretation or performance of the contract, they were to endeavour to find an acceptable solution by conciliation, failing which they were to refer the matter to the Planning Board, without prejudice to their right to bring the same dispute before the competent Iraqi courts.

8 — The appellant has referred to the following documents: (i) the letter of 10 October 1990 sent to it by the Iraqi authorities when the unification of the Federal Republic of Germany and the German Democratic Republic was declared, containing statements of a general nature concerning the contribution which German undertakings might be able to make to the development of productive bilateral cooperation between Germany and Iraq (see paragraph 63 of the contested judgment); (ii) certain confidential reports which the assistant manager of its branch in Iraq had drawn up, showing that the Iraqi authorities were still refusing to settle the debts in issue because of the maintenance of the Community embargo (see paragraph 64 of the contested judgment); (iii) the decision of the central bank of the *Land* of Bavaria not to authorise the appellant to make a transfer in Iraqi dinars for the purpose of financing the requisite legal proceedings for recovery of the debt, and (iv) an exchange of letters between DCI and the German Federal Ministry for Economic Affairs, containing statements of a general nature on the effects produced by the embargo on the payment by Iraq of the claims of German undertakings.

that the appellant has not proven that it actually contacted, or at least attempted to contact, the appropriate Iraqi authorities or Rafidian Bank in order to clarify the reasons for which the orders for payment of its claims given by the competent Ministry to that bank in February 1990 had remained unexecuted (see paragraph 61 of the contested judgment).

10. Next, by its *third plea*, DCI complains in the alternative that the Court of First Instance, without any justification, failed to draw, from a series of pieces of evidence adduced by it (the testimony of its staff and an expert's report) the appropriate conclusions regarding the existence of actual and certain damage. The contested judgment is therefore vitiated by a breach of the fundamental rules of evidence and by the absence of an adequate statement of reasons in that regard.

11. I am not persuaded by any of the pleas referred to above. To speak, as the appellant maintains, of actual and certain damage in circumstances involving a merely temporary inability to perform on the part of the Iraqi authorities — even assuming that this is truly an 'inability'⁹ — is certainly not a valid argument. Nor,

moreover, is there any obstacle to the possible settlement of the debt in the future including payment of the accrued interest from the date of expiry of the contractual deadline for payment.

The argument relating to the alleged misinterpretation of Regulation No 3155/90 likewise appears to be unfounded. As the Court of First Instance correctly pointed out, that regulation prohibited from 29 October 1990 'the provision of non-financial services with the object or effect of promoting the economy of Iraq or Kuwait carried out *in or from Community territory*, including its air space', or by the intermediary of aircraft or ships flying the flag of a Member State, *or by any Community national*,¹⁰ but not the provision of services in Iraq to third parties by legal or natural persons established in that country. Therefore, contrary to what DCI maintains, the Community embargo regarding the provision of services in Iraq and Kuwait did not in any way prevent it from having recourse to Iraqi lawyers or legal representatives.

9 — As is apparent from paragraphs 61 to 66 of the contested judgment, DCI omitted to avail itself of the protection measures provided for under the contract, so as to prompt the Iraqi authorities to adopt a definitive position concerning the non-payment of the debts owed by them. Moreover, none of the documents relied on by the appellant shows that it actually contacted the Iraqi authorities or Rafidian Bank in order to clarify the reasons for which the latter had failed to act on the payment orders received (see point 9 above). On the contrary, the appellant expressly declared that it considered it inopportune to seek to accelerate the internal administrative execution of the orders in question, even following the repeal of Law No 57. In those circumstances, it seems arbitrary, in my opinion, to maintain that late performance of the payment obligation on the part of Iraq has become impossible, even temporarily. Nothing, therefore, seems to point to the debts being irrecoverable.

Finally, I consider that the complaint directed against paragraph 61 of the contested judgment and the third plea advanced in the appeal are inadmissible pursuant to Article 168a of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice. According to the settled case-law of

10 — See Article 1 of Regulation No 3155/90 (emphasis added).

the Court of Justice, an appeal may be based only on grounds relating to the infringement of rules of law and cannot concern itself with the findings of fact or the assessment of the evidence made by the Court of First Instance, unless it is established that the latter has committed an error of law.¹¹ It is therefore also necessary to reject the idea that the Court of First Instance, in the exercise of its exclusive jurisdiction to assess of the evidence adduced, should be required, when it holds that part of that evidence is insignificant or irrelevant, to give express reasons for its finding in that regard.

12. The conclusion which I have reached, namely that the pleas advanced in the

appeal concerning actual and certain damage cannot be accepted, is in itself enough to warrant the rejection of the entire appeal. I have already referred to the principle of the *cumulative* nature of the conditions needing to be fulfilled in order for the Community to incur liability in tort.¹² According to that principle, DCI's claims — both the principal claim and the alternative claim seeking compensation for the damage which the appellant alleges that it suffered as a result of an unlawful act — must be dismissed, regardless of the validity or otherwise of the further pleas concerning the causal link and the nature of the damage alleged. It is therefore only for the sake of completeness of the analysis that I propose also to deal with the other 15 pleas, in case the Court of Justice declines to adopt my proposal that the pleas concerning the existence of the alleged damage should be rejected.

11 — See, most recently, Case C-143/95 P *Commission v Socurta and Others* [1997] ECR I-1, paragraph 36, and *Lucaccioni* (cited in footnote 6 above), paragraph 31. The Court of First Instance has exclusive jurisdiction to determine the facts of the case, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts found, since that appraisal does not, save where the clear sense of the evidence adduced before the Court of First Instance has been distorted, constitute a point of law which is subject to review by the Court of Justice in the context of an appeal (see, *inter alia*, Case 390/95 P *Antillean Rice Mills and Others* [1999] ECR I-769, paragraph 29, and Case 119/97 P *Ufex and Others v Commission* [1999] ECR I-1341, paragraph 66). Therefore, provided that the evidence admitted by the Court of First Instance in support of the facts found by it has been properly obtained and the general principles of law and the procedural rules relating to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence adduced before it (see, *inter alia*, the order of 17 September 1996 in Case C-19/95 P *San Marco v Commission* [1996] ECR I-4435, paragraph 40, and the judgment in Case C-362/95 P *Blackspur and Others* [1997] ECR I-4775, paragraphs 26 to 30). A plea advanced in an appeal which is based on an alleged infringement of the right to a fair hearing, in particular failure by the Court of First Instance to take into consideration certain parts of the appellant's arguments, must therefore be declared inadmissible, inasmuch as it is aimed at obtaining a new assessment by the Court of Justice of the findings made by the Court of First Instance and to the extent that that plea does not concern any point of law but merely records disagreement on the facts found by the Court of First Instance and it is not shown that the alleged failure affected the outcome of the proceedings and so adversely affected the interests of the appellant (see Case C-221/97 P *Schröder and Others v Commission* [1998] ECR I-8255, paragraphs 25 and 26).

The existence of a direct and foreseeable causal link (fourth to sixth pleas)

13. By its *fourth and fifth* pleas, DCI is challenging, in essence, that part of the contested judgment (paragraphs 70 to 74) in which the Court of First Instance held that the existence of a causal link between the damage alleged and the adoption of the regulation had not been proven. According to the appellant, if the Court had correctly characterised the facts found, it should have concluded that the refusal by the Iraqi authorities to fulfil their obligations was linked in a direct and foreseeable manner to

12 — See, *inter alia*, *Lucaccioni* (cited in footnote 6 above), paragraphs 13 and 14.

the Community embargo. DCI emphasises, in this respect, that it was the regulation which rendered Resolution No 661 (1990) of the Security Council mandatory in respect of all persons, that resolution, *per se*, not being binding on economic operators. Next, the appellant maintains that the refusal of the Court of First Instance to make use of the expert's report produced by DCI, relating to the interpretation of Law No 57, constitutes a breach of the fundamental rules of evidence and resulted in defective reasoning in the contested judgment. That evidence would, it claims, have enabled the Court of First Instance to establish that the adoption of Law No 57 constituted, as a retaliatory measure, an objectively foreseeable consequence, in the normal course of events, of the adoption of the regulation.

By its *sixth plea*, advanced in the alternative, the appellant complains of a further breach of the fundamental rules of evidence and the insufficiency of the reasoning in the contested judgment concerning the existence of the causal link. The Court of First Instance, it is argued, failed without any justification to draw the proper conclusions from a series of pieces of evidence adduced by DCI (testimony of the Presidents of the Council and of the Commission at the material time, expert's report on Iraqi law and historical report).

14. As for the complaints concerning the assessment by the Court of First Instance of the relevance and significance of the evidence adduced by the appellant, I am bound to conclude that these are inadmissible, on the basis of the observations made previously in this regard (see point 11

above). I would further point out that the remaining arguments advanced by DCI in the context of the pleas in question give no convincing indication of any possible errors of law contained in paragraphs 70 to 74 of the contested judgment (see point 5 above). I therefore propose that, in the event that the Court of Justice considers it necessary to examine them (see point 12 above), it should also reject the pleas advanced in the appeal with regard to the causal link.

The existence of unusual and special damage (seventh to sixteenth pleas) and the right to compensation for damage caused by a lawful act (seventeenth plea)

15. As the Council and the Commission have observed, the *seventh plea*, whereby DCI complains of the erroneous 'inversion' in the contested judgment of the notions of 'special' and 'unusual' damage, must now be regarded as redundant, following the making by the Court of First Instance of the abovementioned rectification order (see footnote 1 above).¹³

16. By the *eighth to sixteenth pleas*, the appellant, in summary, challenges the finding of the Court of First Instance (see paragraphs 81 to 88 of the contested judgment) that the damage alleged by it, even if it were held to constitute actual

13 — The order in question provides that, in paragraph 80 of the contested judgment, the words 'special damage' should be read in place of 'unusual damage' and vice versa, and that, in paragraphs 81 and 83, 'special nature' should be read in place of 'unusual nature' and vice versa.

damage and to have been caused in a direct and foreseeable manner by the adoption of the regulation, lacks the characteristics of specialness and unusualness which constitute, according to the case-law of the Court of Justice, a condition precedent to any liability on the part of the Community to pay compensation for damage caused by a lawful act, such liability being, moreover, admitted only hypothetically.¹⁴ In particular, according to DCI, the Court of First Instance misinterpreted the facts of the case in that part of the contested judgment where it found that the appellant did not form part of a category of economic operators whose property interests were affected in a manner which set them apart from all other economic operators whose claims became irrecoverable as a result of the imposition of the Community embargo (see point 6 above). The appellant maintains that, contrary to the finding made by the Court of First Instance, its inability to obtain, upon the conclusion of the contract in issue, a State guarantee against the risks assumed under the contract was not due to a general refusal by Germany to cover the risks inherent in commercial activities in Iraq but to the purpose (consultancy) and duration (more than five years) of the contract in question.

As to the unusual nature of the damage alleged, DCI challenges the statement of the Court of First Instance (see paragraph 83 of the contested judgment) that, long before the invasion of Kuwait, Iraq was already regarded as a 'high-risk country' by reason

of its involvement in a war with Iran. That observation, according to the appellant, was not relevant, inasmuch as the contract in issue was concluded in 1975, that is to say, four years prior to the advent of the present regime in Iraq and five years before the beginning of the war against Iran.

Further, the *Bosphorus* judgment — referred to by the Court of First Instance (see paragraph 87 of the contested judgment) for the purpose of excluding the possibility that the damage complained of by DCI, even if it were held to be considerable, could involve liability on the part of the Community (see above, point 6) — confirms, according to the appellant, that the limits fixed by the property regime under Community law must be respected even within the framework of a legal policy of embargo. Finally, the appellant argues that, even the reference to the judgment of the Court of Justice in *Grands Moulins de Paris* (see point 6 above) is erroneous, in the circumstances of the present case, in that: (i) liability for unusual and special damage caused by a lawful act is provided for precisely in cases where the act in question pursues an objective of general interest, and (ii) in *Grands Moulins de Paris*, by contrast with what happened in the present dispute, the Community had spontaneously agreed to pay subsidies to the applicants by way of compensation, although the latter did not accept them, considering their amount to be inadequate.

By its *seventeenth* plea, DCI, drawing its conclusions in essence from the arguments advanced in support of the preceding pleas, challenges the contested judgment on the ground that the Court of First Instance

¹⁴ — See *Compagnie d'Approvisionnement and Grands Moulins de Paris* (cited in footnote 5 above), paragraphs 45 and 46; Case 59/83 *Bioulac v EEC* [1984] ECR 4057, paragraph 28; Case 267/82 *Developpement and Clemessy v Commission* [1986] ECR 1907, paragraph 33, and Case 81/86 *De Boer Buizen v Council and Commission* [1987] ECR 3677, paragraphs 16 and 17.

unlawfully declined to recognise the existence of a right on the part of the appellant to be compensated by the defendants for the damage caused to it by the adoption of the regulation (a lawful act).

17. In my view, the pleas referred to above cannot be accepted either. As the Council has observed, the appellant's arguments do not show that the conclusions which the Court of First Instance reached, finding that the damage of which it complained was not of a special and unusual nature, were vitiated by errors of law. First, the appellant has not succeeded in proving that it has made any particular or disproportionate sacrifice in comparison with the other operators which has benefited the general interest. As the Court of First Instance established, DCI is not, in fact, the only economic operator whose claims against the Iraqi authorities, not yet satisfied at the time of the adoption of Law No 57, were affected by the measure in question. Nor, moreover, has the appellant shown that it was the only undertaking or that it belonged to a small group of operators for which the benefit of State guarantees against commercial risks was available, so that its position was such as to distinguish it from the generality of undertakings whose claims were covered by that type of insurance. In the light of that finding, the true reason underlying the unavailability in Germany of that system of guarantees against risks arising from a contract such as that in issue, at the time when it was concluded and subsequently renewed, appears, all things considered, to be irrelevant.

18. Nor, in my opinion, is there any flaw in the statement by the Court of First Instance

that undertakings such as the appellant, which were unable to obtain guarantees from public bodies or insurance companies to cover risks associated with commercial operations with countries regarded as 'high-risk countries', merely accepted, in full knowledge, the increased risks involved, including that of a suspension of payments by the debtor State. As the Commission has observed, the fact that Iraq might not have been a 'high-risk' country in 1975 appears, regardless of its correctness, not to be relevant, since the contract in issue was subsequently renewed several times.

19. As for the criticism that the Court of First Instance misapplied the decisions of the Court of Justice in *Bosphorus* and *Grands Moulins de Paris*, referred to in the contested judgment, with regard to the criterion of the general interest which must justify the legislative measure from which the damage alleged derives, I would point out that, if anything, it is the appellant itself which has supplied an incorrect interpretation of these two judgments. In the *Bosphorus* case, the Court of Justice in fact applied to the case before it a body of settled case-law according to which even fundamental rights (in this case, the right to respect for property rights and the freedom to pursue commercial activities) do not constitute absolute prerogatives, so that their exercise may be subject to restrictions justified by objectives of general interest.¹⁵ Moreover, in *Grands Moulins de Paris*, the Court of Justice unequivocally confirmed that, if the legislative measure at the root of

15 — See *Bosphorus* (cited in footnote 5 above), paragraph 21.

the alleged damage is justified by some fundamental general interest (in that case, the economic interest in mitigating the consequences of the decision of the French Government to devalue the national currency, in particular to the benefit of French importers), there can be no question, even where unusual and special damage is involved, of that measure giving rise to financial liability on the part of the Community.¹⁶

On the basis of the foregoing remarks, I therefore propose that, should the Court of Justice hold it necessary to examine them (see point 12 above), it should also reject the pleas relating to the unusual and special nature of the damage complained of by the appellant.

The alternative claim for compensation for the damage suffered as a result of an unlawful act (eighteenth plea)

20. Finally, by its *eighteenth* and final plea, DCI challenges the ground of the contested

judgment (see paragraph 99) in which the Court of First Instance held that, since the appellant had not shown that it was entitled to compensation for damage caused by a lawful act of the Community, the alternative claim — which is in fact aimed, according to the Court of First Instance, at obtaining 'compensation for the same damage' — advanced by the appellant in order to obtain compensation for the damage suffered as a result of an unlawful act, should also be dismissed. According to DCI, that alternative claim should have been accepted since, at the time of the imposition of the embargo by way of the regulation, the Community legislature failed to exercise its discretion concerning the adoption of compensation measures in favour of the appellant and economic operators who found themselves in a similar position.

21. In my view, the Court of First Instance did not infringe any Community laws when it dismissed the appellant's alternative claim for compensation, in particular because the latter had not succeeded in proving, on the basis of the pleas advanced in support of its main claim, that it had suffered actual and certain damage. The dismissal of the first to third pleas in law, relating to the existence of actual and certain damage, which I have proposed to the Court of Justice above (see point 11) obliges me here to suggest a similar solution with regard to the final plea put forward by the appellant.

¹⁶ — See *Compagnie d'Approvisionnement and Grands Moulins de Paris* (cited in footnote 5 above), paragraphs 46 and 47.

IV — Conclusions

22. In the light of the foregoing, I propose that the Court of Justice should:

- dismiss the appeal lodged by Dorsch Consult Ingenieurgesellschaft mbH against the judgment delivered on 28 April 1998 by the Court of First Instance in Case T-184/95, and
- order the appellant to pay the costs.