

Meats would not have received its entitlement.

refers to the arguments set out in the rejoinder in Case C-106/90.

4. In its rejoinder, the *Commission* points out that following the application for interim measures this action has become redundant, and in any event the Commission is not liable at all for the alleged loss. Moreover, it

F. A. Schockweiler  
Judge-Rapporteur

## REPORT FOR THE HEARING in Case C-129/91<sup>\*</sup>

### I — Legislative background

1. Article 1 of Council Regulation (EEC) No 3838/90 of 20 December 1990 opening and providing for the administration of a Community tariff quota for meat of bovine animals, frozen, falling within CN code 0202 and products falling within CN code 0206 29 91 (1991) (OJ 1990 L 367, p. 3) opens for 1991 a Community tariff quota totalling 53 000 tonnes expressed in weight of boned or boneless meat.

Pursuant to Article 2 of Regulation No 3838/90, the quota of 53 000 tonnes is to be divided into two parts as follows:

'(a) the first, equal to 85% or 45 050 tonnes, shall be apportioned between importers who can prove they have imported frozen meat

falling within CN code 0202 or products falling within CN code 0206 29 91 to which these import arrangements apply during the last three years;

(b) the second, equal to 15% or 7 950 tonnes, shall be apportioned between operators who can prove that they engage in trade, involving a minimum quantity and for a period to be determined, with third countries in beef and veal other than that to which these import arrangements apply and excluding meat which is the subject of inward or outward processing traffic.'

Article 3(1) of Regulation No 3838/90 provides that quantities which have not been covered by an import licence application at 31 August 1991 are to be the subject of a further allocation during the fourth quarter of that year, without account necessarily been taken of the apportionment referred to in Article 2. Pursuant to Article 3(2) thereof, Member States are to notify the Commis-

<sup>\*</sup> Language of the case: English.

sion, before 16 September 1991, of quantities not applied for at 31 August of that year.

Under the terms of paragraphs 4 and 5 of Article 1,

2. Pursuant to Article 4 of Regulation No 3838/90, the Commission on 27 December 1990 adopted Regulation (EEC) No 3885/90 laying down detailed rules for the application of the import arrangements provided for in Council Regulation (EEC) No 3838/90 for frozen meat of bovine animals covered by CN code 0202 and products covered by CN code 0206 29 91 (OJ 1990 L 367, p. 136). Article 1(1) and (2) thereof include the criteria for the allocation of the two parts of the tariff quota as provided for in Article 2 of Regulation No 3838/90, whilst providing that the second part, that is 7 950 tonnes, is to be reserved for operators who can furnish proof of having imported and/or exported during 1989 and 1990, at least 50 tonnes per year of beef.

‘the 45 050 tonnes shall be allocated between the various importers in proportion to their imports during the reference years’

and

‘the 7 950 tonnes shall be allocated in proportion to the quantities applied for by importers.’

Article 1(3) of Regulation No 3885/90 provides that:

‘the proof referred to in paragraphs 1 and 2 shall be provided by means of the customs document of release for free circulation or export document’,

and that

‘for reference years 1988 and 1989 Member States may provide that the proof of import may be furnished by the holder whose name appears in box 4 of import licences.’

Article 4(1) of Regulation No 3885/90 provides that importers are to present to the competent authorities the application for an import licence together with the proof referred to in Article 1(3) by 25 January 1991 at the latest, and that the Member States are to forward to the Commission by 7 February 1991 at the latest a list of importers containing in particular the importers’ names and addresses and the quantities of meat imported under the quota referred to in Regulation (EEC) No 3838/90, mentioned above, during each of the years in question. In accordance with Article 4(2), the same time limits are applicable to applications made in respect of the quota of 7 950 tonnes reserved for operators who have engaged during the two preceding years in trade with non-member States in meat of bovine animals other than that covered by Regulation No 3838/90. However, applications lodged by the same party under paragraph 2 may relate to an overall quantity not exceeding 50 tonnes of frozen meat, product weight.

In accordance with the first paragraph of Article 5 of Regulation No 3885/90, licence applications are admissible only where the applicant declares in writing that he has not lodged and undertakes not to lodge any application under the same special arrangements in any Member State other than that in which application is lodged. If an applicant lodges applications in respect of the same special arrangements in two or more Member States, none of those applications are admissible.

Article 6(1) of Regulation No 3885/90 is worded as follows:

‘The Commission shall decide to what extent applications may be accepted.

Subject to the Commission having decided that applications be accepted, import licences shall be issued from 18 February 1991.’

3. Article 1 of Commission Regulation (EEC) No 519/91 of 1 March 1991 determining the extent to which applications in the beef and veal sector for the issue of import licences lodged pursuant to Regulation (EEC) No 3885/90 may be accepted (OJ 1990 L 56, p. 12), provides as follows:

‘1. Every application for an import licence lodged in accordance with Regulation (EEC) No 3885/90 shall be granted to the following extent:

(a) 291 104 kg per tonne imported in 1988, 1989 and 1990 for importers as defined in Article 1(1) of Regulation (EEC) No 3885/90;

(b) 14 722 kg per application in the case of importers as defined in Article 1(2) of Regulation (EEC) No 3885/90.

2. Member States shall issue the import licences as from 11 March 1991.’

In order to prevent, where two or more traders claim to have imported the same reference quantity, the said quantity from being counted more than once in the context of the allocation of the 45 050 tonnes amongst the various importers who have applied therefor in accordance with Article 1(1) of Regulation No 3885/90, the Commission decided to require the importers in question to lodge a guarantee which is to be released only once the national authorities have definitively recognized that the trader concerned was actually the importer. To that end Article 2 of Regulation No 519/91 provides as follows:

‘1. Where it becomes apparent that two or more importers within the meaning of Article 1(1) of Regulation (EEC) No 3885/90 are invoking the same reference quantity within the meaning of paragraph 4 of the said Arti-

cle, import licences in relation to this reference quantity may only be issued once the importers concerned have lodged a guarantee of an amount equivalent to the basic import levy applicable for the meat in question at the moment of the delivery of the licence, plus 10%.

2. The guarantee shall be lodged when the import licences referred to in the second subparagraph of Article 6(1) of Regulation (EEC) No 3885/90 are issued.

It shall be released once the trader who lodged it has been definitively identified as the actual importer of the reference quantity in question.'

4. Owing to the fact that by a decision of 9 July 1991 the Irish High Court declared that the companies considered by the Irish authorities to be importers of certain quantities of meat under the GATT quota in 1987 and 1988 were not the real importers of those quantities, the Commission considered that the Irish authorities had to revise those companies' entitlements to the 1990 quota which, in accordance with Council Regulation (EEC) No 3889/89 of 11 December 1989 opening and providing for the administration of a Community tariff quota for meat of bovine animals, frozen, falling within CN code 0202 and products falling within CN code 0206 29 91 (1990) (OJ 1989 L 378, p. 16) were based on the quantities imported in 1987 and 1988 in particular and, further, that the quantities corresponding to those revised entitlements were to be regarded as having in fact been imported in 1990 and as being the reference quantities for that year for the purposes of Regulations Nos 3838/90 and 3885/90. It was for that reason

that the Commission, by Regulation (EEC) No 3021/91 of 16 October 1991 amending Regulation (EEC) No 3885/90 laying down detailed rules for the application of the import arrangements provided for in Council Regulation (EEC) No 3838/90 for frozen meat of bovine animals falling within CN code 0202 and products falling within CN code 0206 29 91 (OJ 1990 L 287, p. 11), inserted a new Article 1(a) having the following wording, into Regulation No 3885/90:

'The Irish authorities shall revise the entitlements to the GATT quota in 1990 and the imports eligible pursuant to Regulation (EEC) No 3889/89 in the light of the judgment of the Irish High Court of 9 July 1991. They shall communicate their decision to the Commission and to the other Member States.

Notwithstanding Article 1(1) and (3), that decision shall determine the reference quantity for 1990 for the importers concerned pursuant to Article 1(1).'

## II — Facts and procedure before the Court

1. Emerald Meats Limited (hereinafter 'Emerald Meats') is an undertaking established in Ireland which, *inter alia*, has been engaged in the importation of meat products into the Community since 1983.

2. In January 1990 Emerald Meats lodged with the Irish Department of Agriculture and Food (hereinafter the 'Department of Agriculture'), applications for allocations

under the Community tariff quota for frozen meat of bovine animals falling within CN code 0202 and products falling within CN code 0206 29 91 of 1990, whose management was governed by Council Regulation No 3889/89, mentioned above, and Commission Regulation (EEC) No 4024/89 of 21 December 1989 laying down detailed rules for the application of the import arrangements provided for in Council Regulation (EEC) No 3889/89 for frozen meat of bovine animals covered by CN code 0202 and products covered by CN code 0206 29 91 (OJ 1989 L 382, p. 53). The detailed rules for the management of the quota for 1990 were essentially identical to those applicable to the 1991 quota, as laid down in the abovementioned Council Regulation 3838/90 and Commission Regulation No 3885/90. The Department of Agriculture rejected Emerald Meats' applications in so far as they were based on imports effected during the 1987 and 1988 reference years, on the ground that Emerald Meats effected those imports only as agent for approved meat processors to whom the import licences had been granted. On 31 January 1990 it communicated to the Commission in accordance with Article 4 of Regulation No 4024/89 a list in which Emerald Meats appeared only in respect of the quantities declared for 1989 and where the meat processors in question appeared in respect of the quantities which Emerald Meats alleged it had imported in 1987 and 1988. Emerald Meats thereupon brought proceedings before the High Court in Dublin against the decision by the Minister for Agriculture not to regard it as the importer of all the quantities which it had declared. Emerald Meats also informed the Commission that the list communicated to it by the Department of Agriculture was incorrect, and forwarded to it documents proving that Emerald Meats was to be regarded as the importer within the meaning of Article 1 of Regulation No 4024/89 of all the quantities declared. On 8 February 1990 the Commission nevertheless adopted Regulation (EEC) No

337/90 determining the extent to which applications in the beef and veal sector for the issue of import licences lodged pursuant to Regulation (EEC) No 4024/89 may be accepted (OJ 1989 L 37, p. 11), on the basis of the information communicated to it in the list from the Department of Agriculture. Considering that in doing so the Commission introduced into its own regulation incorrect information based on an unlawful interpretation of the relevant Community rules, although it had been informed thereof and had available to it proof of imports in 1987 and 1988 provided by Emerald Meats, and thus administered and managed the quota in 1990 in an incorrect manner, Emerald Meats, by application registered at the Court on 18 April 1990, brought an action for annulment and for the establishment of non-contractual liability against the Commission (Case C-106/90).

3. Although Regulations No 3838/90 and 3885/90 were published only on 29 December 1990, Emerald Meats had knowledge of the text thereof on 20 December 1990. It then sent, on 21 December 1990, a letter to the Commission's Directorate General for Agriculture, and to the Commission's agent in Case C-106/90, in which it stated that, apart from a small amendment to the second sentence of Article 1(3), the Commission did not appear to have made any provision to avoid a repetition of the events of 1990. It pointed out, in particular, that no special provision had been made to deal with Emerald Meats' lawful entitlement to quota in 1990, despite the fact that the Commission had instituted proceedings under Article

169 of the Treaty against Ireland, so that Emerald Meats was again likely to be severely prejudiced in 1991. Emerald Meats added that it would be obliged to bring fresh proceedings if the Commission did not ensure that it received the quantities to which it was entitled in 1991.

4. By a letter of 11 January 1991 the Commission confirmed to Emerald Meats that on 19 December 1990 it had addressed to Ireland under the first paragraph of Article 169 of the Treaty a formal letter concerning the infringements alleged with regard to the 1990 quota. The Commission indicated that that letter had been carefully worded so as to cover Ireland's failure to comply generally with its obligations under the annual GATT tariff quota regime for beef, and not specifically in relation to the regulations applicable in 1990, so that it would be possible to continue the proceedings in 1991 and that any infringement committed by Ireland in 1991 would also be covered. The Commission also stated that in its formal letter it declared that 'where a company is referred to as the consignee in the single administrative document, that clearly constitutes proof within the meaning of Article 1(3) of Regulation No 4024/89 that the company was the importer; that such proof could only be rebutted by strong evidence; and that in this case the Commission is not aware of any evidence which would suggest that Emerald Meats was only the agent of the importer of the quantities concerned.' It added that it followed that, unless such evidence were produced to the Commission, it would continue to take the view that Emerald Meats was to be deemed to have imported in

1990 the quantities to which they were then entitled on the above basis, when calculating their quota for 1991.

5. By a letter of 15 January 1991 Emerald Meats asked the Department of Agriculture whether, in the event of its lodging any application for 1991 quota, the Department of Agriculture would henceforth be prepared to accept as proof of its imports in 1988, pursuant to Article 1(3) of Regulation No 3885/90, the fact that its name appears as consignee on the single administrative document, and to regard Emerald Meats as having imported in 1990 the quantities to which it was entitled but had not received, namely approximately 200 tonnes.

6. By a letter of 24 January 1991, the Department of Agriculture replied that it would continue to deal with applications for imports in accordance with the terms of the relevant Community regulations, and referred to a circular, annexed to the letter, dated 16 January 1991 concerning the 1991 quota. That circular stated, *inter alia*, that an importer is 'the user of a certificate or licence issued in accordance with the terms of Regulation (EEC) No 3719/88,<sup>1</sup> i. e. the titular holder or a person to whom the rights have been transferred in accordance

<sup>1</sup> — Commission Regulation (EEC) No 3719/88 of 16 November 1988 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (OJ 1988 L 331, p. 1).

with the terms of Article 9 of Regulation (EEC) No 3719/88.’

7. Meanwhile, on 22 January 1991 Emerald Meats had lodged import applications with the United Kingdom authorities. The application lodged in respect of the part of the tariff quota mentioned in Article 1(1) of Regulation No 3885/90 was based on proof of imports during the three previous years totalling 1 024 190 kg, that is to say 385 872 kg for 1988, 325 444 kg for 1989 and 313 004 kg for 1990. The last figure included the quantity of 196 180 kg corresponding to the tonnage which, in accordance with the Commission’s letter of 11 January 1991 annexed by Emerald Meats to its application, Emerald Meats was to be regarded as having imported in 1990.

8. By a letter of 25 January 1991 Emerald Meats forwarded copies of its applications and documents by way of proof which it had annexed thereto to the Commission’s Directorate General for Agriculture and to the Commission’s agent in Case C-106/90.

9. On 6 February 1990 the Director General of the Directorate General for Agriculture of the Commission sent to the competent authorities in Ireland and the United Kingdom a telex concerning the issue of import licences in the context of the tariff quota for 1991. In that telex the Commission pointed out that certain legal proceedings brought in Ireland by Emerald Meats in connection with the allocation of the 1990 quota had not been concluded, and that in respect of

1991 Emerald Meats had lodged applications for licences in the United Kingdom. In view of those circumstances, the Commission considered that applications both in the United Kingdom and in Ireland under Regulation (EEC) No 3885/90 should be treated in such a way as to avoid double use of the same quantity. Thus the Irish and United Kingdom authorities were requested to identify all the applications concerned by the abovementioned legal proceedings and to forward to the Commission before 7 February 1991, the date provided for in Article 4 of Regulation No 3885/90 for the communication of lists of importers, copies of those applications together with any documents of proof accompanying them. The Commission added, first, that in deciding on the results of the application, it would seek to ensure that no reference quantities were counted twice and, secondly, that as part of the regulation determining the extent to which applications for import licences may be accepted, the Commission intended to provide that licences based on the applications in question might be issued only if a guarantee were lodged, such guarantee to be released only for those licences which can be considered as real GATT licences following the final outcome of the legal proceedings in Ireland.

10. In a letter of 7 February 1991 addressed to the Commission’s Directorate General for Agriculture and to the Commission’s Agent in Case C-106/90, Emerald Meats requested the Commission to undertake by 11 February 1991 at the latest to observe Regulation No 3885/90, and to allocate to Emerald Meats its full entitlement for 1991, without awaiting the outcome of proceedings pending at national level or making provision for any guarantee or additional surcharge, con-

trary to what it had envisaged in the above-mentioned telex of 6 February 1991. In that letter Emerald Meats also claimed, first, that the Commission had threatened the United Kingdom authorities — which had communicated to it on the same day a list of importers provided for in Article 4 of Regulation No 3885/90 containing the name of Emerald Meats — that it would hold them responsible for delaying the allocation of the whole GATT quota for 1991, unless they complied with the instructions given in that telex and, secondly, that it had forced the United Kingdom authorities to coordinate with the Department of Agriculture concerning the identification of any overlap between applications.

11. By a letter of 12 February 1991, the United Kingdom authorities confirmed to the Commission the quantities to which Emerald Meats' application related and stated that they regarded that application as valid in the absence of evidence to show that the certified copies of the customs import documents were not genuine. They added, nevertheless, in response to the Commission's request, that they had met representatives of the Irish authorities and had identified the following quantities subject to application in both Ireland and the United Kingdom: 361 742 kg for 1988, 4 208 kg for 1989 and, for 1990, 196 180 kg representing the quantity claimed in the United Kingdom in respect of the imports which would have been effected in 1990 if the Irish authorities had issued licences. The United Kingdom authorities finally requested the Commission to take a decision on the validity of the application in question.

12. By an application lodged at the Court Registry on 15 February 1991, Emerald Meats requested the annulment of that telex, which it described as a decision, together with damages against the Commission for the loss occasioned to it by the Commission and for future loss (Case C-66/91).

13. By a separate document lodged at the Court Registry on the same date, Emerald Meats brought an application under Articles 185 and 186 of the Treaty for interim measures in which it sought an order by the Court suspending the operation of the decision subject to the action for annulment and prohibiting the Commission from implementing that decision by a subsequent decision and/or by a policy based on that decision (Case C-66/91 R).

14. Since it had been unable to adopt the regulation determining the extent to which applications might be accepted for the issue of import licences on 18 February 1991, as provided for in Article 6(1) of Regulation No 3885/90, the Commission sent a telex on 21 February 1991 to all Member States authorizing them to issue as from 25 February 1991 the import licences in accordance with Regulations No 3838/90 and 3885/90 and the draft regulation submitted to the beef management committee on 15 February 1991. In that telex the Commission stated that imports effected prior to the formal approval by the Commission of the draft regulation were to be subject to the lodging of a guarantee equal to the normal levy applicable on the date of import, such guarantee to be released immediately after the entry into force of the draft regulation in question.

15. By a separate document lodged at the Court Registry on 22 February 1991 Emerald Meats formally requested the Court to order the Commission to withdraw that telex which it regarded as having no legal foundation and as obstructing the proceedings which it had brought before the Court, at least until such time as the Court had given a decision on its application for interim measures in Case C-66/91R.

16. On 1 March 1991 the Commission adopted Regulation No 519/91, mentioned above, determining the extent to which applications for the issue of import licences lodged pursuant to Regulation No 3885/90 might be accepted.

17. On 6 March 1991 the United Kingdom authorities confirmed to Emerald Meats that in accordance with Regulation No 519/91:

- its 1991 allocation amounted to 298 146 kg;
- import licences could not be issued until 11 March 1991;
- 163 586 kg of its allocation could be issued only after a guarantee had been lodged in an amount equivalent to the basic import levy applicable for the meat in question on the date of application for the licence, plus 10%.

The United Kingdom authorities added that they regarded Emerald Meats' application

for the 1991 quota as valid and that they awaited the Commission's decision in that connection in the light of Article 2(2) of Regulation No 519/91.

18. On 7 March 1991 the Commission informed Emerald Meats that the period allowed for Ireland to reply to the formal letter sent to it on 19 December 1990 pursuant to Article 169 of the EEC Treaty had expired on 9 January 1991, and that it had not received Ireland's reply until 5 March 1991. The Commission indicated that it would consider whether it was appropriate to issue a reasoned opinion.

19. By order of 8 March 1991 the Court dismissed as inadmissible the applications in Cases C-66/91 and C-66/91R, including the application for an order suspending the operation of the telex of 21 February 1991. The Court considered that the telex of 6 February 1991 was not in the nature of a Commission act capable of being the subject of an application for annulment, and that neither the telex nor the Commission's underlying intention manifested therein could be regarded as an act or conduct likely to occasion loss to a third party.

20. By a letter of 25 March 1991 addressed to the Commission's agents in Cases C-66/91 and C-66/91R and to the Commission's Directorate General for Agriculture, Emerald Meats forwarded to the Commission copies of documents which it had received in the context of the proceedings before the Irish Courts and which had been produced for those purposes as purported applications by Irish meat processors in respect of the 1991 quota. Emerald Meats

indicated that those documents showed that only one applicant seem to have produced any proof in support of his application, though it was not annexed thereto. Emerald Meats also referred to its previous letters of 22 February and 7 March 1991 to which it had received no reply and in which it requested the Commission to confirm whether the Department of Agriculture had communicated to it a list of importers on the relevant date of 7 February 1991, and whether the Department of Agriculture had acted on the Commission's request in its telex of 6 February 1991 to forward to it by 7 February at the latest copies of the alleged dual applications, together with the accompanying proof. Finally, Emerald Meats pointed out that, owing to the fact that the United Kingdom authorities which had accepted its application as valid still awaited the Commission's decision in that respect, the import licences relating to the alleged dual applications were being blocked. Emerald Meats therefore once again called upon the Commission to take the necessary decision and thus to ensure that Emerald Meats might trade its full entitlement of 1991 quota allocation.

21. By an application lodged at the Court Registry on 9 May 1991 Emerald Meats brought this application.

22. By judgment of 9 July 1991 the High Court in Dublin held that the Department of Agriculture was obliged to accept as proof under Article 1(3) of Regulation No 4024/89, mentioned above, the documents produced by Emerald Meats in support of its import applications made in respect of the 1990 quota and that Emerald Meats was in particular entitled, in respect of the part of

the quota referred to in Article 1(1) of that regulation, to a quantity of 277 tonnes corresponding to imports of 863 tonnes during the three reference years of 1987, 1988 and 1989. Accordingly, the High Court awarded Emerald Meats damages amounting to IR£ 385 922, plus interest of IR£ 30 873.76, for the losses sustained by it on account of the fact that the Department of Agriculture had unlawfully denied it import licences for 177 tonnes out of the 277 tonnes to which it was entitled in 1990.

23. On 17 July 1991 the Commission sent to the United Kingdom authorities by fax a letter with the following contents:

'Following the judgment of 9.7.1991 delivered by Judge Costello of the Irish High Court in the "Emerald Meats" case, the Commission's services consider that "Emerald Meats" should definitively be recognized as the actual importer of the following quantities for the purposes of calculating and allocating the 1991-licences under Regulation (EEC) No 3885/90:

— 1988: 385 742 tonnes,

— 1989: 325 444 tonnes,

— 1990: 294 084 tonnes.

Accordingly, under Article 1(1) of Regulation (EEC) No 519/91, Emerald Meats should be declared entitled to import licences for 292 638 tonnes.'

24. By another letter of the same day the Commission forwarded to the Department of Agriculture a copy of the letter sent to the United Kingdom authorities. The Commission added that

'the Commission's Services expect the Irish competent authorities to take due account of Judge Costello's judgment in calculating and allocating the definitive GATT-licence entitlements for 1991 and future years, in particular by reviewing the reference quantities of the companies concerned by the judgment.'

25. On 8 August 1991 the Department of Agriculture appealed to the Supreme Court against the High Court judgment.

26. On 16 October 1991 the Commission adopted Regulation No 3021/91, mentioned above, which provides that the Irish authorities are to revise the entitlements allocated to importers for 1990 and 1991 in the light of the judgment of the High Court.

27. 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 enquiry.

### III — Forms of orders sought by the parties

1. *Emerald Meats*, the applicant, claims that the Court should:

- annul the Commission's decision pursuant to Article 6(1) of Commission Regulation (EEC) No 3885/90 deciding to what extent applications for import licences in respect of the Community tariff quota for frozen meat of bovine animals for 1991 are to be accepted;
- annul Commission Regulation (EEC) No 519/91, in so far as that regulation gives effect to the abovementioned decision;
- award damages against the European Community in favour of Emerald Meats for the loss which it has suffered or will suffer as a result of the Commission's acts and its failure to administer and manage the 1991 allocation of the said Community tariff quota in accordance with Community law;
- order that interest should be paid on the amount of damages awarded;
- order the Commission to pay the costs.

2. The *Commission*, the defendant, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

#### IV — Pleas and arguments of the parties

##### *Admissibility*

1. *Emerald Meats* argues that both the Commission's decision pursuant to Article 6(1) of Regulation No 3885/90, mentioned above, and Regulation No 519/91, mentioned above, are of direct and individual concern to it, and that it, therefore, has *locus standi* to challenge those two acts before the Court.

On the one hand, Member States are left with no margin of discretion, either as to which import applications to receive and communicate to the Commission, or as to the manner in which they are to give effect to the Community's decision deciding to what extent those applications are to be accepted. Similarly, in the case of dual applications, Article 2 of Regulation No 519/91 requires the Member States to obtain the guarantee and the additional duty in question prior to issuing the licences and to release the guarantee only in accordance with the provisions of that article. On the other hand, at the time when the Commission adopted the contested decision and regulation, there was a clearly defined fixed num-

ber of applications, and the Commission knew the importers' names and addresses and the quantities of meat which they had imported. Moreover, both the telex of 6 February 1991 and Article 2 of Regulation No 519/91 show that the two contested measures contain provisions specifically concerning the situation of *Emerald Meats*.

*Emerald Meats* adds that the contested decision and regulation constitute separate, albeit related acts. The Commission should first decide on the acceptance of the import figures put forward by the national authorities and on the apportionment of the quota by reference to previous imports, prior to communicating its decision to the Member States and traders concerned in the form of a regulation binding on those concerned.

2. According to the *Commission*, it is wholly artificial and indeed an abuse of process to treat the decision pursuant to Article 6(1) of Regulation No 3885/90 as being separate from Regulation No 519/91. In fact this 'decision' is enshrined in the regulation in question. Accordingly, the Court should not in any event grant the form of order sought by *Emerald Meats* whereby it seeks the annulment of the decision pursuant to Article 6(1) of Regulation No 3885/90.

##### *Substance*

1. *Emerald Meats* contends that the Commission's decision pursuant to Article 6(1) of Regulation No 3885/90, together with Regu-

lation No 519/91, are unlawful and contrary to the Treaty for the following reasons:

(a) First, the Commission cannot lawfully take a decision and adopt a regulation allocating the Community tariff quota for 1991 amongst the traders concerned, and then order that licences will not be issued to a certain category of applicants pending a national court ruling. The result of such an approach is that Emerald Meats does not receive its entitlement under the same conditions as other applicants, and that the implementation of Community regulations and measures may be suspended by the mere issue of proceedings before a national court. The Commission's approach amounts to a failure to pursue Community-wide management of the quota, ensuring that all traders obtain quota according to common and uniform principles. According to Emerald Meats, national administration of the tariff quota is contrary to Community law and, in order to comply with the Court's case-law, had to be replaced by a Community system of management. In that connection Emerald Meats refers to its written pleadings in Case C-106/90. It considers that in the present case the Commission should simply have verified that there were, in fact, dual applications, if necessary by requiring relevant proof to be provided, instead of evading its responsibilities and attempting to refer the question back to the Member States. The very fact that the United Kingdom and the Irish authorities differed in their assessments as to the existence of such dual applications clearly demonstrates that the final decision on that question ought to have been taken at Community level, by the Commission,

which was in a central coordinating position to do so.

(b) Secondly, the Commission's acts are based upon the erroneous premise that there are dual applications. There were no such dual applications in 1990 and there are none in 1991. For only Emerald Meats has filed a valid application, accompanied by the requisite proofs. According to Emerald Meats, at the time of adoption of the contested measures, the Commission knew and acknowledged that Emerald Meats was to be deemed, for the purposes of calculating its quota for 1991, to be the importer of the share which it applied for in 1990. That is clear from the Commission's letter of 11 January 1991 in which it informed Emerald Meats of the proceedings brought against Ireland under Article 169 of the Treaty and stated that only strong evidence to the contrary might induce it to change its view. No such proof has ever been supplied to the Commission which on the contrary knew that the 'applications' made by meat processors were not supported by the appropriate proof and were thus invalid. Accordingly, the Commission ought not to have inserted Article 2 into Regulation No 519/91.

(c) Thirdly, the suspension of Emerald Meats' rights until the final outcome of the national proceedings necessarily entails delays which are likely to have the consequence that Emerald Meats' entitlement will be unused in 1991. Emerald Meats will not in fact be able to claim its quota entitlement with payment of the guarantee/surcharge

because of the financial burden that imposes. Within the context of the Community administration of the quota the Commission ought to have taken a decision on the question of the alleged dual applications prior to adopting its decision and Regulation No 519/91.

figures supplied by the United Kingdom authorities in their communications of 7 and 12 February 1991 the figures appearing in Article 1 of Regulation No 519/91 may be incorrect.

(d) Fourthly, the guarantee and surcharge requirement is unlawful and, in the circumstances of the case, unreasonable. If the aim of the guarantee was to ensure that the reference quantity is only counted once, it has already been achieved through the measures of enquiry of the United Kingdom and Irish authorities. If, on the one other hand, the aim was to ensure that imports relying on the same 1991 GATT quota allocation are not made twice, account should be taken of the fact that the system presupposes that the parties concerned can all put up the requisite guarantee without difficulty. Yet owing to the fact that Emerald Meats' business has been brought to a standstill by the failure by the Commission to apply the Community regulations correctly in 1990, that is not the case, with the result that Emerald Meats risks not being able to obtain any allocation under the alleged dual applications if a judgment in its favour is appealed against. As regards the 10% surcharge in addition to the guarantee, Emerald Meats refutes that it may be justified by fluctuations in the rates of levy and questions why it is not reimbursable in the same way as the guarantee itself.

As regard its claim for damages, Emerald Meats emphasizes first of all that it is not seeking double damages for matters already covered by Case C-106/90, which concerned both losses in 1990 and continuing future losses. It adds that damages are unlikely to be adequate compensation for the loss suffered given that the very exercise of its business is in issue. On the basis of a market price of UK£ 1 500 per tonne, it estimates at UK£ 244 500 the losses which it will suffer in 1991 should it be deprived of the profit on trading the 163.5 tonnes in respect of which an import licence could only be issued after provision of the requisite guarantee. As far as continuing losses are concerned, stemming from the fact that imports in 1991 will be used as the basis for the entitlements allocated in ensuing years, a final calculation can only be made when the period of loss is defined. However, it appears from calculations relating to the period from 1990 to 2050 that, even if the GATT quota system were to continue in operation for that long, the difference between Emerald Meats' claimed entitlement and the quantity which the Department of Agriculture would be

(e) Emerald Meats argues finally that if the Commission did not take into account the

prepared to allocate to it would still not have resolved itself.

2. The *Commission* considers that the situation with which it was confronted when it adopted Regulation No 519/91 differed in two fundamental respects from that obtaining in February 1990, when it adopted Regulation No 337/90, mentioned above, which is in issue in Case C-106/90. In the first place, it had to contend for the first time with dual applications lodged by Emerald Meats and other operators in several Member States. Secondly, legal proceedings were pending before the Irish courts and before the Court, so that the Commission which was thenceforth aware of the magnitude and complexities of the questions in issue had no choice but to make a provisional arrangement for the quantities in question.

Referring to its written pleadings in Case C-106/90, the Commission goes on to submit that, when faced with applications relating to the same quantities appearing on lists communicated to it by two different Member States, the Commission does not have the power to treat one of them as null and void, especially when the questions connected with the validity of those applications are expected to be the subject of a judicial ruling within a short period. It is true that the Commission takes the view that the person who appears as the consignee in the single administrative document is to be regarded as the importer for the purposes of Article 1 of Regulation No 3885/90, and that such proof can only be rebutted by evidence to the contrary. In the present case the Commission was informed by the Irish authorities that they were in possession of such evidence which they had produced to the Irish

courts hearing the action brought by Emerald Meats. Since the questions involved were mixed questions of fact and Irish law it was preferable for them to be tried by an Irish judge.

The Commission confirms that the objective of the guarantee requirement as referred to in Article 2 of Regulation No 519/91, mentioned above, is to ensure that imports are not made twice on the basis of the same 1991 quota allocation. There was no other means of safeguarding the position of Emerald Meats and of operators who had declared imports in respect of the same quantities, without incurring the risk of unlawfully reducing the quantities allocated to the other traders in the Community. As to the 10% surcharge, it is justified in the light of the consideration that at the moment of importation the levy may be much higher than on the date of issue of the licence and the operator finally losing before the Irish courts should not be treated more favourably than a normal importer operating outside the GATT beef quota regime. Moreover, the Commission points out that the increase is subject to reimbursement as it forms part of the guarantee. Besides, it is not necessary to deposit the guarantee in cash, and Emerald Meats has not adduced any proof that it was unable to give a bank guarantee. The provision of such a bank guarantee does not represent an unreasonable burden on a company which is in a position such as that of Emerald Meats which, in spite of the problems which it has encountered, is entitled in 1991 to a quantity greater than that of 1990 in respect of which no guarantee has to be deposited.

Finally, the Commission states that the figures appearing in Article 1 of Regulation No 519/91 are based on information supplied to it in the fax dated 12 February 1991 from the United Kingdom authorities.

As regards the claim for damages, the Commission maintains that it has committed no act or omission such as to ground liability under the second paragraph of Article 215 of the Treaty, since it has acted lawfully and without fault throughout, and has even gone beyond the call of duty in seeking an early resolution of the disputed issues of fact. If the applicant is unable to make use of its entitlements under the 1991 quota, such damage would be the consequence of the wrongful administration by the Irish authorities of the 1990 regime.

As to the quantum of damages complex questions of assessment arise, given that Emerald Meats cannot obtain double damages for matters already covered by Case C-106/90. In any event, the Commission cannot accept Emerald Meats' assumption that the alleged loss of profits is the proper basis of compensation. Emerald Meats ought to have mitigated its loss by obtaining a bank guarantee enabling it to import under the contested regulation, with the result that if damages were to be awarded, they should not exceed the costs which Emerald Meats would have incurred in obtaining such a bank guarantee. Moreover, Emerald Meats' estimate of the continuing loss until 2050 is much too imprecise to serve as a reliable cal-

culuation of the damage, as required by the case-law of the Court.

3. In its reply, *Emerald Meats* stresses first that the judgment of the High Court in Dublin of 9 July 1991 confirms all the points which Emerald Meats has been making to the Commission since January 1990. Whilst maintaining the pleas and arguments put forward in its application, Emerald Meats notes that the Commission's decision definitively to recognize its rights as stated in its faxes of 17 July 1991 addressed to the United Kingdom and Irish authorities, has meant that it has in fact received its quota entitlement in 1991, so that its claim for damages henceforth relates only to the loss stemming from the fact that it was deprived of its 1991 entitlement from March to July 1991, and for the resulting disruption of business, together with costs. Emerald Meats also considers that the question of the legality of the guarantee and additional surcharge are now largely academic, because it has obtained its entitlement of 1991 quota without having to provide the guarantee required.

In reply to the Commission's argument that the Commission does not have power to verify the accuracy of lists communicated to it by national authorities under Article 4 of Regulation No 3885/90, Emerald Meats states that it is not claiming that the Commission must check all information received, but that it must at the very least specifically check information which it knows or ought reasonably to know are wrong. If that were not the case and if the relevant regulations did not entail such a specific verification obligation, enabling the Commission to base its own acts on accurate data derived from a uniform interpretation of the provisions, there would be no Community administra-

tion of the tariff quota in question. Emerald Meats then highlights the inconsistency between that argument and the Commission's actual approach. In fact, whilst maintaining that it was obliged to accept the assertion by the Department of Agriculture that there were dual applications, it in fact rejected the assertion to the contrary by the United Kingdom authorities that Emerald Meats's application was completely valid. Moreover, the Commission did precisely what it claimed not to have the power to do in requesting the Irish and United Kingdom authorities, in its telex of 6 February 1990, to verify the applications received for any dual applications, and by adopting provisional measures, first in its telex of 21 February 1991 and then in Regulation No 519/91. According to Emerald Meats, the Commission's obligation to ensure that its acts are based on correct information is all the greater since this case concerns an annual quota allocation for the whole Community, with the result that any wrongful Commission act may have repercussions on allocations in subsequent years and affect all operators in the Community.

4. In its rejoinder, the *Commission* considers that in view of the telexes of 17 July 1991 addressed to the United Kingdom and Irish authorities, the action for annulment has now become redundant.

As to the claim for damages, the Commission considers that, owing to the fact that

Emerald Meats did not appeal against the judgment of the High Court in Dublin which did not award it damages for losses for 1991, Emerald Meats has failed to mitigate as far as possible its loss, so that in actual fact it may be regarded as merely requesting payment of the costs which this application has occasioned it. The Commission points out, when adopting Regulation No 519/91, it did not wish to preempt the outcome of the proceedings before the Irish courts, and that once it had taken cognizance of the judgment of the High Court in Dublin it did not delay in drawing the consequences from it in its faxes of 17 July 1991. As to the guarantee requirement, the Commission considers that it was the sole means capable of safeguarding the rights not only of Emerald Meats but also of the other operators concerned and that it cannot be regarded as unlawful on the sole ground that Emerald Meats was not in a position to provide it. Accordingly, it maintains its position that it did not act unlawfully in adopting the contested regulation, and considers that in any event it cannot be regarded as having committed a sufficiently serious breach of a superior rule of law or as having manifestly disregarded the limits of its powers, in such a way for it to incur liability under the second paragraph of Article 215 of the Treaty.

F. A. Schockweiler

Judge-Rapporteur