OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 9 MARCH 1976

My Lords,

This case closely resembles Case 62/70 *Bock* v *Commission* (Rec. 1971 (2), p. 897), so much so that I was at one time tempted to say simply that Your Lordships should here follow that authority.

I do not however think that I can properly do that, if only because the arguments put forward by the parties in the present case differ to a substantial extent from those put forward in the *Bock* case. Partly this is due to the circumstance that, between the dates of the events that that case was concerned with and the dates of the events in the present case, the Commission, by a Decision of 12 May 1971 (71/202/EEC), which was amended by a further Decision of the Commission dated 9 March 1973 (73/55/EEC), introduced a formal system of authorisations for imports of goods of third-country origin from a Member State where those goods are in free circulation into a Member State where their importation is subject to restrictions.

With the background, Your Lordships are familiar.

Article 111 of the Treaty required Member States to coordinate their trade relations with third countries so as to bring about, by the end of the transitional period, the conditions needed for implementing a common policy in the field of external trade. Nonetheless there have remained since the end of that period certain sectors where the trade policies of Member States have differed. In particular there have been products whose importation into some Member States from third countries has been subject to no restriction but whose importation into one or more other Member States has been prohibited, or subjected to quotas or to voluntary restraint arrangements. In such a situation the commercial policy of the latter Member State or Member States can be obstructed unless it or they are empowered to prevent what Article 115 of the Treaty calls 'deflection of trade' — that is to say importations of such products from a third country via a Member State where such importations are unrestricted. In order to avoid such obstruction, Article 115 empowers the Commission, among other things, to 'authorize Member States to take the necessary protective measures'. Such measures, inevitably, operate by way of derogation from the provisions of the Treaty forbidding restrictions on trade between Member States.

The Decision of the Commission of 12 May 1971, by Article 1 (1), empowered or (and I say this because the applicant questions the validity of that Decision) purported to empower Member States:

'to make the importation of products originating in third countries and put into free circulation in other Member States subject to the granting of an import authorisation where:

— the importation into the Member State in question of such products directly from the third country concerned is subject, in conformity with the Treaty, to quantitative restrictions or to voluntary restraint on the part of the third country concerned under a trade agreement with the Member State in question; and

— deflection of trade is to be feared because of divergence between these measures and the measures of commercial policy applied in other Member States.' (OJ L 121 of 3. 6. 1971)

Article 1 (3) provides:

'Import authorisations shall be issued as promptly as possible and in any event not later than eight working days following submission of the application by the party concerned.' (OJ L 121 of 3. 6. 1971)

Article 2 (as substituted by Article 1 of the Decision of 9th March 1973) provides so far as material:

'1. If a Member State finds that a proposed importation is likely to cause such deflection of trade as could obstruct execution of any measure of commercial policy taken in conformity with the Treaty, it may withhold the import authorization applied for provided that, within the time limit specified in Article 1 (3), it lays before the Commission a request for implementation of the first paragraph of Article 115 of the Treaty.

The Member State shall forthwith inform the applicant for the inport authorization of its action.

2. .....

3. The Member State concerned shall take a decision whether or not to issue an import authorization as soon as it receives notification of the decision of the Commission concerning the implementation of the first paragraph of Article 115 of the Treaty, and in any event not later than 12 working days following submission of the application for an import authorization.' (OJ L 80 of 28. 3. 1973)

The facts of this case are as follows.

During 1974 and the early part of 1975 it was the policy of the Federal Republic of Germany to restrict imports of tinned beans 'in pod' originating from the People's Republic of China. There is nothing in the papers before the Court, nor was anything said at the hearing, to evince the reason or reasons for that policy. Its purpose may have been to protect German growers of beans, or to protect the German tinning industry, or simply to strengthen the hand of the Federal Government in trade negotiations with China. The policy may indeed have existed for some other reason. We do not know.

At all events, there were, during the same period, no restrictions on imports of Chinese tinned beans into Belgium or the Netherlands.

A Decision of the Commission dated 14 January 1974 (74/54/EEC), expressed to have been adopted under Article 115 of the Treaty, authorized the Federal Republic 'not to apply Community treatment' to imports of preparations or preserves of beans in pod 'where they originate in the People's Republic of China and are in free circulation in other Member States, and in respect of which applications for import licences were lodged after 2 January 1974'. By Article 2 of that Decision the period of its validity was to expire:

'upon the introduction of a Council Regulation on a uniform system of imports for products processed from fruit and vegetables and in any event not later than 30 June 1974.' (OJ L 33 of 6. 2. 1974)

The use of that formula is explained by the fact that, as was recited in the Decision, there was at the time before the Council a proposal from the Commission for a Regulation for such a uniform system.

A further Decision of the Commission dated 7 August 1974 (74/427/EEC), of which both the preamble and the operative part were in terms indistinguishable, save as regards the dates they mentioned, from those of the Decision of 14 January 1974, gave the same authorization to the Federal Republic in respect of the period 25 July to 31 December 1974.

On 2 January 1975, the applicant, a German company owning department stores in the Federal Republic and whose activities include importing tinned foods for sale in those stores, applied to the Bundesamt für Ernährung und Forstwirtschaft (the Federal Office for Food and Forestry), which I shall call the 'BEF', for an authorization to import 5 000 cases of tinned beans 'in pod' of Chinese origin which were in free circulation in the Netherlands. The weight of those cases was about 90 tons. Their value was DM 86 982·70.

On the same day the BEF received an application from another trader for authorization to import into Germany DM's 39 803 worth of similar beans, which were also in free circulation in the Netherlands. On 7 January 1975 the BEF received an application for authorization to import DM's 36 349 worth of such beans which were in free circulation in Belgium. As regards these two applications, we do not know the weight of the goods involved.

On 14 January 1975 the Federal Government sent a telex to the Commission (Annex I to the Defence) asking for authority under Article 115 of the Treaty to exclude from Community treatment preparations or preserves of beans in pod originating from the People's Republic of China and in free circulation in other Member States in so far as the relevant applications for import authorizations were subsequent to 1 January 1975. (By what I think was plainly a clerical error the date actually mentioned was 1 January 1974). The telex expressly referred to the three applications for import authorizations that had been received by the BEF and stated that further applications were to be expected. It also stated that it was the policy of the Federal Republic not to permit imports of such beans except for certain fairs, and that to allow the proposed importations would subvert that policy, of which the purpose was to reduce imports into the Federal Republic. Finally the telex asked that authority under Article 115 should not be limited to the rejection of the applications that had been received but should be given for the period up to 31 March 1975.

On 20 January 1975 the Commission adopted a Decision (75/71/EEC) again in precisely the same terms, except as regards dates, as those of 14 January 1974 and 7 August 1974. The Decision complied with the request of the Federal Republic inasmuch as it applied to applications for import authorizations lodged after 1 January 1975 and before 31 March 1975. The Decision was expressed, as had been its predecessors, to be addressed to the Federal Republic of Germany.

In substance, the claim of the applicant in this action is for a declaration that that Decision was void. On the strength of it the BEF on the same day (20 January 1975) rejected the applicant's application.

Before I turn to the parties' main arguments, I think it convenient to mention shortly two minor points.

First, the Commission, having regard to the Judgment of the Court in the *Bock* case, concedes that this action is admissible. In my opinion that concession is rightly made.

Secondly, among the contentions put forward on behalf of the applicant in the application, was a contention that, assuming the Commission's Decision of 12 May 1971 to be valid, the time limit of eight working days prescribed by Article 1 (3) of that Decision had not been observed. In the Defence, however, the Commission demonstrated, by reference to Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 'determining the rules applicable to periods, dates and time limits', that the time limit had been observed. In the Reply, the applicant, rightly I think, abstained from pressing the point.

In the forefront of its case the applicant put the contention that, in the field of trade in agricultural products, the powers of the Commission under Article 115 lapsed at the end of the transitional period, so that the Commission had no power to adopt the Decision of 20 January 1975.

The applicant did not go so far as to submit that Article 115 ceased to have effect altogether at the end of the transitional period. Such a submission would in my opinion have been unsustainable, for at least three reasons.

First it would have been inconsistent with the wording of Article 115 itself, the second paragraph of which, enabling Member States themselves to initiate protective measures, was expressly limited to the transitional period, but the first paragraph of which, the paragraph here in point, is not so limited.

Secondly, that submission would have been inconsistent with common sense. No doubt the Treaty required the Member States to have achieved, by the end of the transitional period, a situation in which they could adopt a common commercial policy, but the authors of the Treaty were practical men and it would, in my opinion, be unrealistic to attribute to them an expectation that, by the end of that period, all the Member States would be treating in precisely the same way imports of each and every kind of product from each and every third country. After all, to achieve that situation must involve, if nothing else, the renegotiation of a multiplicity of trade agreements and arrangements with a multiplicity of third countries, none of which was bound by the time limits contained in the Treaty. Indeed it is to be observed that Article 111 (5) of the Treaty required only that Member States should 'aim at securing as high a level of uniformity as possible between themselves as regards their liberalization lists in relation to third countries or groups of third countries'. Nor do I think negligible the point made by the Commission that the inevitable result, in practice, of the premature disappearance of the powers conferred by Article 115 must be the alignment of the whole Community, in each instance, on the policy of the most liberal Member State, with a consequent weakening of the Community's position in negotiations with third countries.

Lastly such a submission would have been inconsistent with the Judgment of this Court in the *Bock* case, where the continued applicability of the first paragraph of Article 115 after the end of the transitional period was implicitly recognized. But this criticism applies also to the more limited contention actually put forward on behalf of the applicant.

That contention is founded on the unexceptionable proposition that there is no room for the continued application of Article 115 in any sphere of trade where a common policy has been adopted. The applicant concedes, as it is manifestly bound to do, that, in January 1975, no common policy had yet been adopted as to imports of tinned beans from China. But, says the applicant, such a policy ought to have been adopted by then. Therefore, so runs its argument as I understand it, it was no longer open to the Commission to exercise, in relation to such imports, the powers conferred by Article 115.

In support of its submission that a common policy as to such imports ought to have been adopted by January 1975 the applicant refers in the first place to Article 40 (1) of the Treaty which provides that.

'Member States shall develop the common agricultural policy by degrees during the transitional period and shall bring it into force by the end of that period at the latest.'

The applicant also refers to Council Regulation (EEC) No 865/68 of 28 June

1968 on the common organization of the market in products processed from fruit and vegetables, Article 7 of which provided:

'The necessary provisions to coordinate and standardize the treatment accorded by each Member State to imports from third countries shall be adopted by the Council, acting ... on a proposal from the Commission, before 1 January 1969. These provisions shall be applied not later than 1 July 1969.' (OJ L 153 of 1. 7. 1968.)

In fact that deadline was not met. The provisions there foreshadowed were not adopted until 22 July 1975, which is the date of Council Regulation (EEC) No 1927/75 establishing 'the system of trade with third countries in the market in products processed from fruit and vegetables'. This I take to be the Regulation the proposal for which from the Commission to the Council was referred to in the Commission's Decisions of 14 January 1974, 7th August 1974 and 20 January 1975.

Since that Regulation became applicable the particular problem with which these proceedings are concerned can no longer arise and that is why (if I may open a parenthesis) the applicant, on 1 October 1975, made an application to the Court which, though procedurally misconceived, was understandable, to the effect that this action should not proceed to judgment and that the Court should exercise the discretion as to costs conferred on it by Article 69 (5) of the Rules of Procedure. That application having been rejected, and no agreement about costs having been made between the parties, the case was fixed for hearing and must now proceed to judgment. That is not to say however that Your Lordships' decision in the case will, in practice, be relevant only to costs. Some of the questions of law to which it gives rise are of considerable and lasting importance, and the Commission, at least, has made clear its wish to have them decided.

In further support of its argument the applicant referred to the Judgment of the Court in Case 48/74 *Charmasson* v *Ministre de l'Economie et des Finances* (1974) ECR 1383 and also to two Council Decisions, one of 19 December 1972 (72/455/EEC) 'laying down certain transitional measures for the progressive standardization of the import terms of Member States as regards third countries' and the other of 2 December 1974 (74/652/EEC) 'laying down the import arrangements applicable in the Member States to imports of products subject to quantitative restrictions from state-trading countries'.

I confess that I have found the applicant's argument impressive, particularly having regard to the terms of Article 115 itself which allow measures of commercial policy taken by a Member State to be protected thereunder only if they have been taken 'in accordance with this Treaty'.

But in the end I have come to the conclusion that the contrary argument of the Commission should prevail.

Once it is accepted that Article 111 of the Treaty, having regard to its wording, and to the realities of international trade, cannot be interpreted as meaning that, by the end of the transitional period, all Member States were expected to be applying precisely the same treatment to imports of all products from all third countries, and that the first paragraph of Article 115 must therefore remain applicable thereafter in those sectors where complete uniformity is not yet achieved, there is in my opinion no reason to make a distinction for this purpose between agricultural products and other products.

As the Commission points out, by virtue of Article 38 (2) of the Treaty, 'the rules laid down for the establishment of the common market', which include Article 115, are to apply to agricultural products 'save as otherwise provided in Articles 39

to 46'. The only provision of which it has been suggested that it 'otherwise provides' for present purposes is Article 40 (1). But this seems to me, on analysis, to be a general provision, in a sense parallel to Article 111, which is not inconsistent with the continued application of Article 115 in particular sectors after the end of the transitional period.

Nor do I think that that view is inconsistent with the Judgment in the *Charmasson* case. It must I think be borne in mind that the events giving rise to that case had occurred during the transitional period and that the question with which the Court was there concerned (so far as at all relevant here) was as to the extent to which the existence in a Member State, during that period, of a national market organization for a particular product precluded the application in that State of Article 33 of the Treaty, which provided for the progressive abolition during that period of import quotas as between Member States. In dealing with that question the Court adverted to what was to be the position after the end of the transitional period. What it said in this respect cannot, I think, be interpreted as meaning more than that a Member State would not then be entitled to rely on the de facto absence of a common organization of the market as justifying it in maintaining quantitative restrictions on imports from other Member States under its own market organization. That does not seem to me to be in point here. No-one suggests that the Federal Republic had, after the end of the transitional period, any ground for maintaining unilaterally quantitative restrictions on imports of tinned beans from other Member States. Article 30 of the Treaty was and is enough to deny it any such right. Indeed it is for that very reason that the Federal Republic invoked the powers of the Commission under Article 115. Similarly there is in my opinion nothing in the *Charmasson* Judgment to prevent the French Republic from invoking those powers in relation to indirect imports of bananas from third countries, if the circumstances should be appropriate.

I do not think the provisions of Regulation No 865/68 or those of the Decisions of the Council of 19 December 1972 and 2 December 1974 really assist the applicant's argument. They show the Council striving towards uniformity between the Member States, but not yet quite achieving it. So far as the sector that is here relevant is concerned that uniformity was not in fact achieved until Regulation No 1927/75 became applicable. It was in my opinion as from then, and only then, that Article 115 became spent as regards that sector.

I turn to the applicant's alternative arguments, which assume the continued existence in January 1975 of the Commission's powers under Article 115 in that sector.

Your Lordships will remember that in the *Bock* case the Court held that the provisions of Article 115, since they derogated from fundamental principles of the common market, must be interpreted and applied strictly, and that the Commission had gone beyond what those provisions permitted in authorizing the Federal Republic to prohibit importations of a total of 120 tons of tinned mushrooms of Chinese origin, when total German imports of tinned mushrooms in the previous year had amounted to 46 122 tons. Those importations were, the Court found, of negligible importance as regards the efficacy of the measure of German commercial policy concerned and their prohibition could not be 'necessary' within the meaning of that term in Article 115.

The applicant seizes upon that and submits that the same applies in this case. In the application it pointed out that it had asked to be allowed to import 90 tons, whereas total German imports of

tinned beans had been 108 000 tons in 1973 and were unlikely to have been less in 1974. Having learned from the defence of the other two applications for import authorizations to which I have referred, and not knowing the tonnages to which they related, the applicant, in the reply, put its case on the alternative footing that the three applications taken together were for importations amounting in value to about DM 163 000, whereas total German imports of tinned beans in the first eleven months of 1974 had amounted to about DM 63m.

In my opinion that approach is over simple.

In the first place I think that the decision of the Court in the *Bock* case must to some extent have been influenced by the circumstance that the applicant there had been unfairly treated. Certainly Mr Advocate-General Dutheillet de Lamothe based his reasoning largely on the element of 'retroactivity' in the Decision of the Commission there in question. Although the Court itself did not refer to 'retroactivity' as such, it did mention that the Decision was taken at a time when the principle of free circulation applied without restriction to the goods involved. In the present case, as the Commission points out, all traders had been fairly warned, by the Commission's adoption of its Decisions of 12 May 1971 and 9 March 1973 (whatever one may think of their validity) of the procedure that would be applied.

Secondly, I do not think that one can judge whether the prohibition of particular importations is 'necessary' to prevent obstruction of a particular policy unless one knows precisely what that policy is and the reasons for it. If, for example, a State, for sufficient reason, decides that, as from a specified date in a particular year, all importations of a particular product from a particular foreign country, except for a specified purpose, shall be absolutely prohibited, any importation thereafter of that product into that State from that country for any other purpose subverts that policy. Moreover to make, in such a case, an exception in favour of the first one or two traders who may apply to import only small quantities is unfair to other traders.

Both parties were of course conscious of these points.

The applicant contended that for the Federal Government to restrict German imports of Chinese tinned beans was in fact inconsistent with its avowed policy. The applicant referred in particular to a Commercial and Financial Agreement made between the Federal Republic and China on 5 July 1973 and to an answer given by the Parliamentary Secretary of State in the Federal Ministry of Economics on 9 December 1974 to a question about trade between the Federal Republic and China. In that answer, the Parliamentary Secretary noted a steady increase in such trade from 1973 onwards, and expressed the hope that it would be further stimulated as a result of fairs to be held in Cologne in June 1975 and in Peking in September 1975.

The Commission for its part asserted that the Federal Government had in the period covering January 1975 a strict policy of prohibiting imports of Chinese tinned beans, except for certain fairs, though it relaxed that policy from time to time by opening quotas. The Commission's case, in a nutshell — and this was strikingly confirmed by answers given at the hearing by its Counsel to questions put to him by one of Your Lordships and by me — was that, once it had been established that that was the Federal Government's policy and that that policy was 'in accordance with the Treaty', meaning thereby, as I understood it, that no common policy had yet been adopted in the relevant sector of trade, the Federal Government was virtually entitled, under Article 115, to be

authorized to take the measures it proposed to safeguard that policy. The Commission had very little discretion in the matter and, in particular, was not entitled to enquire into the reasons for the policy.

With all respect to the Commission, that seems to me quite the wrong approach.

Of course the Commission must be satisfied, before exercising its powers under Article 115, that no common policy has yet been adopted in the relevant sector of trade. But it must in my opinion be satisfied of much more than that. It must be satisfied that it fully understands the policy of the Member State concerned and the reasons for it, for, without that knowledge, the Commission cannot judge whether the measures proposed are 'necessary' for the protection of that policy nor whether, as required by the third paragraph of Article 115, they are those that will 'cause the least disturbance to the functioning of the common market'. Having been satisfied as to those things, the Commission must exercise its discretion carefully, bearing in mind that, as the Court pointed out in the *Bock* case, any exercise of the powers conferred on it by Article 115 involves a derogation from fundamental principles of the common market, so that those powers should be exercised sparingly.

It is clear that that is not what the Commission did in the present case. What it did was, in effect, to abandon its discretion and allow the Federal Government to decide what imports of Chinese tinned beans should be admitted into Germany. Evidence put in by the Commission itself (Annex II to the defence) shows that in the first eleven months of 1974 the Federal Government permitted imports of Chinese tinned beans worth in all DM 184 000. No-one suggests that all that was for fairs. It is moreover common ground between the parties that, in March 1975, the Federal Government opened a quota for such imports, under which, incidentally, the 90 tons for which the applicant had applied in 2 January were eventually allowed in. According to the applicant this quota was for DM 440 000; according to the Commission it was for DM 370 000. It seems that the difference between those figures reflects a difference in presentation, the applicant's figure including and the Commission's excluding a quota for fairs.

That is in my opinion enough to decide this case in favour of the applicant.

But there is in my view another ground on which the applicant is entitled to succeed, viz. that the Commission's Decision of 20 January 1975 was inadequately reasoned and so failed to comply with Article 190 of the Treaty.

I have already mentioned the fact that the preamble of that Decision is in the same terms (except as to dates) as the preambles of the Decisions of 14 January 1974 and 7 August 1974. The reason why this is so, despite a suggestion put forward on behalf of the Commission that the Federal Republic had in January 1975 adopted a more restrictive attitude than formerly towards imports of Chinese tinned beans, is that the preamble nowhere states what was the policy that the measures authorized by the Decision were designed to protect. The applicant contends that this at least the preamble of a Decision taken under Article 115 ought to state. I agree. It is noteworthy than on 17 April 1975 (after the application in this case had been lodged) the Commission adopted yet another Decision under Article 115 authorizing the Federal Republic, for the period 31 March 1975 to 30 September 1975, not to apply Community treatment to imports of preparations or preserves of beans in pod of Chinese origin in free circulation in the other Member States (Annex to the Rejoinder). This Decision, unlike its predecessors, did state in its preamble (though probably inaccurately)

what the policy of the Federal Republic was that called for protection.

I would however go further than the applicant and say that the preamble of such a Decision should also state the reasons for the adoption by the Member State concerned of the policy in question and why the measures authorized by the Decision are necessary for the protection of that policy. Otherwise, neither the persons to whom the Decision is of direct and individual concern (within the meaning of Article 173 of the Treaty) nor this Court can tell what are the considerations underlying the Decision. Indeed that has been, for me, the cause of much of the difficulty in the present case.

The Commission, in reliance on the Judgment of the Court in Case 13/72 *Netherlands* v *Commission* (1973) 1 ECR 27, argued that its Decision of 20 January 1975 was adequately reasoned because it was addressed only to the Federal Republic, at whose request it had been adopted and to whom it was not necessary to repeat what was contained in that request. In my opinion that argument overlooks the fact that, having regard to the Judgment of the Court in the *Bock* case, persons in the position of the present applicant are to be treated as if the Decision had been addressed to them and are therefore entitled to know the reasons for it.

It also overlooks the fact that this Court may, at the instance of such persons, be called upon to review such a Decision. Moreover, a wealth of material was contained in the documents leading to the Decisions in *Netherlands* v *Commission,* in comparison with which the information provided in the Federal Government's request in the present case was altogether inadequate.

In the result I am of the opinion that Your Lordships should:

(1) Declare the Commission's Decision of 20 January 1975 void; and

(2) Order the Commission to pay the costs of this action.