OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 21 JANUARY 1982 [1]

Mr President,
Members of the Court

We have today to concern ourselves with facts which, at least in their essential details, are already known from Case 112/80 *Firma Anton Dürbeck* v *Hauptzollamt Frankfurt am Main* [1981] ECR 1095.

They relate to protective measures against imports of apples from Chile which were adopted in the spring of 1979 by Regulations No 687/79 (Official Journal 1979, L 86, p. 18), No 797/79 (Official Journal 1979, L 101, p. 7) and No 1152/79 (Official Journal, L 144, p. 13).

The applicant in the present proceedings brought an action with regard to those regulations in the Hessisches Finanzgericht [Finance Court, Hesse], which by order dated 24 March 1980 requested this Court to rule on the validity of the said three regulations. After proceedings of which it must be said that they were conducted very thoroughly (the Court twice directed questions to the parties to clarify the facts), the preliminary ruling was given on 5 May 1981 to the effect that consideration of the question raised had disclosed no factor of such a kind as to affect the validity of the regulations.

Even before the conclusion of those proceedings, namely on 21 January 1981, the applicant brought a direct action for compensation before the Court based on Article 215 of the EEC Treaty, and it is that action with which we are concerned today. The object of the action is described on page one of the application. The action is concerned with compensation "for the damage which the applicant has suffered and will suffer through the introduction of protective measures against imports of dessert apples from Chile by means of Regulation No 687/79, as amended by Regulations Nos 797/79 and 1152/79".

In particular (cf. p. 10 et seq. of the application) the following damage is alleged to have been caused to the applicant by the Commission:

Because it did not take delivery of the remaining quantity for which it had contracted it had to pay its supplier in Chile 300 000 US dollars in damages.

It had to pay 100 000 US dollars for cancellation of a charterparty.

Because it did not have the remainder of the contracted amount to sell it lost a profit of DM 169 500 which at an exchange rate of DM 1.75 per US dollar represents a sum of 96 850 US dollars.

In addition it suffered losses amounting to 10 000 US dollars because a competitor was able as a result of the second amending regulation, namely Regulation No 1152/79, to import apples from Chile and thus become the

1 — Translated from the German.

only supplier of Chilean produce in the Common Market.

That amounts to a total of 506 850 US dollars. The main claim originally sought an order that the Commission pay the applicant that sum together with interest at 6% from the commencement of the proceedings. Subsequently, in view of the Commission's objection that the applicant had not suffered any damage, the applicant supplemented its claim in the reply by pleading in the alternative that the Commission must pay the said compensation when the applicant accepts such liability or is the subject of a court order to that effect.

Moreover, the applicant fears further damage since its Chilean supplier has given notice that the owners of the chartered ship are seeking compensation and in addition a certain sum is being sought by the Association for the Protection of German Shipowners, a claim which is still being contested in Chile. In this regard, the applicant is claiming a declaration that the defendant is under a duty to compensate it for any additional damage which may arise as a result of the introduction of the contested protective measures.

Those claims, which the Commission considers should be rejected as inadmissible or in any event unfounded, were maintained after the aforesaid preliminary ruling was given. At the hearing the applicant simply explained that it was not pursuing a number of submissions relating to the alleged unlawfulness of the measures adopted by the Commission. It remains, however, of the opinion that the Commission has disregarded the principle of the protection of legitimate expectation and the prohibition against discrimination and for that reason should pay compensation to the applicant. Moreover, it sought at the hearing to show that its claim is justified even if the conduct of the Commission is assumed to be lawful, because, since it is a case of expropriation and interference in trade, the Commission should compensate the applicant for the special damage suffered by the applicant over and above that affecting all other importers.

My opinion on the case is as follows:

1. It is clear that the action was originally and mainly conceived as a claim for compensation for the *unlawful* conduct of the Commission in unlawfully adopting the three regulations mentioned previously. That is apparent from the description of the subject-matter of the action at the head of the application. Also relevant in this respect is the fact that the damage pleaded by the applicant is said to have arisen as a result of the imposition of an import embargo and the refusal to introduce special transitional provisions and as a result of the fact that only a competing undertaking was licensed to import pursuant to the second amending regulation. The main grounds of the action, as set out in the application and the reply, relate to those matters. I need only refer to the statements on page 15 of the application, where there is reference to compensation for the damage caused as a result of the protective measures and where the

grounds are listed which are alleged to show that the protective measures and the refusal to adopt transitional provisions in favour of the applicant were unlawful. I might also refer to the statements in the reply that the introduction of the protective measure is to be regarded as a grave infringement of the law and that there is nothing to justify the protective measures, so that the Commission in adopting the aforesaid regulations manifestly exceeded its discretion.

2. Further, it is clear to me that in principle the applicant may not now reopen the findings in Case 112/80 to the effect that nothing had been disclosed of such a kind as to affect the *validity* of those three regulations; in the present proceedings the *lawfulness* of those regulations must be assumed and everything in the applicant's pleadings challenging the findings made in the preliminary ruling must be disregarded.

I consider such a strict view to be supported by the fact that in Case 112/80 there was sufficient opportunity to deal with the question of the validity of the three Commission regulations and in my view it is not possible to allow a party by suitably arranging proceedings (commencement of national proceedings with a reference under Article 177 on the one hand and subsequently an action for damages on the other) virtually to have an opportunity to appeal against a preliminary ruling. That would not accord with the system of legal protection set up by the Treaty; further, there would be considerable objections from the point of view of legal certainty, especially if, as happened here, the preliminary ruling were given by the full Court and the action for damages were then assigned to one of the Chambers.

At most it might be different if *new facts* were shown. There can be no question of that, however, in the present case. It is apparent that the applicant's submissions in the present proceedings accord with its observations in the reference for a preliminary ruling. In particular it is not possible to view as new facts those described in the reply as such, namely the reference to a conversation which took place in the middle of March 1979 between Commission officials and representatives of the import trade, wherein there was mention of certain quantities in transit, and the reference to a telex message from the General Secretary of the European Union of the Fresh Fruit and Vegetable Import, Export and Wholesale Trade of 4 April 1979 in which there was likewise mention of certain quantities in transit and the offer was made to the Commission to send it a daily review of the quantities in transit. In this respect it is important to note that the first matter was already referred to at the hearing on the reference for a preliminary ruling as is apparent from page 13 of the transcript of the hearing and the same would have been possible with regard to the telex message.

Moreover, it appears highly dubious whether the said information could have caused the Commission to make a different assessment of the quantities yet to be imported after 5 April 1979 and

thus create doubts as to the lawfulness of the first Commission regulation. Further, objection can scarcely be made to the fact that the Commission did not treat information from trade circles as sufficient but relied on the official information from the country of export, from which, however, it was clear that at the time the first regulation was adopted no definite conclusion could be reached regarding the quantities which were to enter the Community only as transit goods.

3. There is in any case reason to believe that even the applicant recognizes on the whole the justification for the principle formulated above. That appears at least to be the case in so far as the applicant made clear at the hearing that it did not wish to pursue grounds of action concerning the *validity* of the Commission regulations and its observations did not purport to cast doubt on the substance of the preliminary ruling of the Court in Case 112/80.

Therefore it is now necessary to consider at length whether the submissions still being pursued in fact keep within those bounds and whether as a result it is possible to award compensation for conduct of the Commission which did not lie in the said protective measure but had a certain relationship thereto, such as the correspondence conducted with the applicant, the *execution* of the subsequent amending regulations or the Commission's conduct *before* the protective measures were adopted.

4. There is no difficulty in reaching a firm conclusion regarding the applicant's arguments in respect of paragraphs 52 to 54 of the decision in Case 112/80.

Those paragraphs dealt with the question whether Regulations Nos 797/79 and 1152/79 are to be regarded as discriminatory because they made no allowance for imports for which the applicant had requested exemption from the protective measures adopted. That question was answered in the negative on the ground that the regulations were solely designed to adjust the application of the protective measures to goods which, at the time when the measures entered into force, were in transit within the meaning of Article 3 (2) of Regulation No 2707/72 (Official Journal, English Special Edition 1972 (28-30 December), p. 3). In this regard, however, the goods which the applicant sought to import were not in a comparable position.

When the applicant now argues that that finding is based on erroneous facts because it is well known that the goods allowed to be imported under Regulation No 1152/79 were in transit only after 12 April 1979, it aims to show that that regulation cannot be justified on the basis accepted by the Court but must be regarded as discriminatory and thus *unlawful* because it did not provide for the sharing of import quotas in a manner which would have allowed scope for the applicant. Those arguments can in fact no longer be heard if the views I have put forward are accepted.

It may, however, be added that the adjustment considered correct by the applicant would not necessarily lead to a finding of discrimination which could only have been avoided if the amounts which Regulation No 1152/79 allowed

to be imported had been distributed among all interested importers. In my opinion the Commission cannot be reproached for the fact that when at the beginning of May 1979, after obtaining clarification with regard to goods in transit, it found that the import quotas allowed for Chile were not exhausted, it had regard only to goods which were due within the Community very shortly and did not set up a complicated procedure sharing out a small residual quantity of a few thousand tonnes among a number of importers who for the most part had yet to make import arrangements.

In that respect I abide by my opinion in Case 112/80 that we are not concerned here with a form of discrimination amounting to an abuse of discretion and grossly unequal treatment which, over and above the assumption that the regulation is invalid, could also found a claim for public liability ([1981] ECR 1137).

5. A clear decision on the point in issue here — namely the admissibility of matters which really concern the *validity* of the protective measures adopted — is in my opinion also possible in relation to the complaint of *discrimination* which is still being pursued. On closer analysis it is apparent that it too in truth seeks to establish that the measures adopted are *unlawful* and consequently it too must now be disregarded.

That is undoubtedly the case in so far as in the application it is said that the measures adopted are contrary to the prohibition on discrimination because they are nothing other than a reaction to Chile's refusal to accept voluntary restraint and because they imposed a proportionately larger reduction on Chile than on other exporting countries of the southern hemisphere (p. 31 of the application). That requires no further mention and accordingly the applicant did not return to that issue at the hearing.

A similar conclusion must also apply in relation to the applicant's complaint that in spite of its application in telex messages of 10 and 12 April 1979 no special transitional provisions were adopted for it in respect of goods which were to be shipped between 18 and 20 April 1979 and could have arrived within the Community between 10 and 15 May 1979; the same may be said of its argument that the transitional measures contained in Regulation No 1152/79 favoured one importer although the applicant, as is apparent from a telex message of 9 May 1979, would have been in a position to bring the residual quantity for which it had contracted into the Community by 25 May. On the one hand, that amounts to an objection to the provisions, or in other words the *validity*, either of Regulation No 687/79 or of the first amending regulation, namely Regulation No 797/79, which we know was adopted in view of ships which had already been taken into consideration when Regulation No 687/79 was adopted but whose arrival had been delayed; secondly, this is obviously a question of the *validity* of the second amending regulation, namely Regulation No 1152/79. That is how the applicant's telex message of 12 April 1979 is to be understood; the same is apparent also from the statements in the application to the effect that the

applicant was wrongly excluded from the transitional measures which were adopted and that those measures were contrary to the prohibition against discrimination. The statement in the reply must be understood in the same sense, as for example when the applicant stresses that in adopting Regulation No 797/79 the Commission was guilty of arbitrary conduct which disregarded the applicant's interest or when it alleges that Regulation No 1152/79 allowed the import of goods which were not yet in transit when the first regulation was adopted and arbitrarily excluded the applicant from that provision, which favoured only one undertaking, although the applicant, had it been duly informed, would have been able to import under the conditions laid down in Regulation No 1152/79. Nor was any other impression to be gained from the observations made at the hearing, for they too simply relate to the complaints — which without doubt involved the *lawfulness* of the measures taken — to the effect that the Commission in two amending regulations had allowed goods to be imported which, when the first measure was adopted, were not yet in transit and that in doing so it had not had regard to the applicant and had neglected to provide in the amending regulations for the residual quantities referred to therein to be distributed equally among all importers.

6. It is not quite so easy to assess the arguments put forward in relation to the alleged *breach of the principle of the protection of legitimate expectation*, which has likewise been pursued.

(a) Doubtless it may be said of some of the arguments that they really relate to the *lawfulness* of the measures adopted by the Commission and thus no longer require to be considered.

That applies in my opinion to the view that when the Commission interferes with existing contracts and such action cannot be expected — as in the present case in view of the quantities imported in previous years — it is bound to adopt transitional rules and wrongly neglected to do so when it adopted the protective measures in the spring of 1979. It also applies to the complaint that the Commission did not have regard to that requirement when subsequently adjusting its protective measures because it refused to draft them so that it would have been possible for the applicant to import the remaining quantities for which it was under contract. The wording of the application makes it clear that questions of the *lawfulness* of the measures adopted are involved, for there is reference to disregard of the principle of the protection of legitimate expectation when the protective measures were *adopted* (p. 29) and it is stressed (p. 30) that the applicant's expectations were disappointed a second time by the subsequent amending regulations.

(b) The same must also apply in so far as the applicant claimed at the hearing, with reference to the protection of legitimate expectation, that it relied on the Commission's assurance that only goods already in transit would be allowed to be imported, an assurance which the Commission is alleged to have disregarded *when it adopted* the second amending regulation.

Should, however, the argument be understood at least in part to mean the Commission ought not by its answer to the applicant's telex messages have caused the applicant to adopt a particular course of conduct, namely to cancel its contracts, but ought to have intimated that the import embargo might not yet be final and that goods shipped after 12 April 1979 might yet be imported, then doubt would immediately arise as to whether the claim for compensation could in fact be justified in such a way. When the Commission replied to the telex messages which the applicant sent at the beginning of April 1979 it assumed — and no other view was possible for it, having regard to the particulars supplied by the Chilean Government — that the quantities which were leaving Chile on 12 April 1979 would exhaust the quota which could be contemplated for Chile. Any reservation as proposed by the applicant would not therefore have been appropriate and so its absence cannot be regarded as a wrongful omission. Moreover, it is difficult to see what the applicant could have gained from a *vague* hint at the mere possibility that further quantities would be allowed. That would probably not have kept the applicant from cancelling the contracts and so prevented the occurrence of the damage which that action led to.

(c) Finally, with regard to a third point relating to the alleged breach of the principle of the protection of legitimate expectation, it must indeed be conceded that it does not concern the *validity* of the protective measures adopted and is thus not to be excluded from consideration in the present proceedings, although, as is apparent from my opinion in Case 112/80 ([1981] ECR at p. 1135), it has already been discussed in the proceedings on the reference for a preliminary ruling. I am referring to the applicant's claim that it was possible for the Commission to make initial estimates of the harvest as early as October 1978 and that initial inquiries about the expected imports also took place at that time; I also have in mind the related complaint that the Commission made no mention of the intended protective measures either at the sessions of the Advisory Committee for Fruit in January and February 1979 or at a meeting in March 1979 between representatives of the Commission and the importers concerned.

However, it is clear that even with the help of the argument to the effect that if the Commission had provided information in time it could have saved the applicant from entering into contracts for the purchase of apples and the charter of a vessel and thus have prevented the ensuing consequences, a claim for compensation for the alleged damage — of which only a part could be based on that argument — is without foundation.

After what the applicant has itself stated (I refer to the application, in which it is stated that the contract of sale and the charterparty were made in October and November 1978 respectively, and to the telex message of 12 April 1979, where it was said that those contracts were made in December 1978 and January 1979) it is obvious that statements of the Commission at meetings of the Management Committee for Fruit in January and February 1979 would already have been too late. Yet the Commission cannot be reproached for not mentioning the possible adoption of protective measures in October 1978. It

is more plausible that a reliable judgment, as is necessary in many respects for the adoption of protective measures such as under Regulation No 2707/72, was possible only in March 1979 when there was a clear picture of the market situation in the Community (storage levels, market returns and price trends). The Commission, however, did not thereafter wrongfully delay the adoption of protective measures.

7. It is thus clear that the matters contained in the application and in the reply and the further arguments made at the hearing do not substantiate the claim for compensation for the damage caused to the applicant by the import embargo and by the allegedly discriminatory provisions of Regulation No 1152/79. There remains only the question of what view is to be taken of the new grounds put forward at the hearing to the effect that, even though the conduct of the Commission may have been *lawful*, there is an obligation on the Community to pay compensation because a special burden was placed on the applicant.

The applicant itself admits that this is a quite new ground of action based on the previous cases on the protection of property, on compensation for acts akin to expropriation and on the legal concept of interference with the conduct of business. There is in fact nothing of that in the application. Nor can it be said that such considerations are effectively introduced in the reply, for example with the complaint made incidentally in connection with the alleged unlawfulness of the measures adopted by the Commission to the effect that the Commission infringed the applicant's right under Articles 2 and 12 of the Basic Law of the Federal Republic of Germany freely to carry on its business or with the argument developed on page 41 of the reply to the effect that the applicant is entitled to compensation, even if Regulation No 687/79 is assumed to be valid, because of "patent and substantial breach of its legitimate expectations and breach of the principle of equal treatment".

(a) In this respect there first arises the question — also raised by the Commission — of the *admissibility* of this new submission which it is certainly possible to regard as an *amendment of the application*, even if, as the applicant contends, there is no departure from the scope of Article 215 of the EEC Treaty.

I have serious doubts about the admissibility of this submission, even if it is accepted in principle (there is no definite case-law on this problem as yet) that amendments of the application in the course of proceedings before the Court are not completely excluded. But at the very least the amendment of the application must be conducive to the expeditious conduct of the proceedings. (In German law the principle of "Sachdienlichkeit" [relevance, expediency] comes into operation here). The applicant's case, however, involves complicated legal questions requiring thorough investigation from the point of view of comparative law, there being as yet no relevant case-law apart from certain fleeting references in Joined Cases 54 to 60/76 [1] and Joined Cases

1 — *Compagnie Industrielle et Agricole du Comte de Loheac and Others v Council and Commission* [1977] ECR 645.

9 and 11/71 [1] to liability, in the event of exceptional and special damage, for conduct not in itself unlawful. The defendant cannot really be expected to discuss such questions of law only in the oral procedure. It is moreover also significant that that aspect was not yet apparent when the case was referred to the Chamber and it can scarcely be thought that the Court wished to leave the decision on the question of liability for lawful conduct to the Chamber after as recently as the judgment in Case 112/77 [2] a claim for compensation was rejected on the ground that the rules in question were valid.

On the other hand, the applicant's submission that when the action was brought the validity of the relevant regulations had not yet been determined and the necessity to argue on that basis was not apparent is surely untenable. The Commission was right to argue in reply that since obviously there was no danger that the period of limitation would expire the applicant was quite at liberty to wait, before bringing proceedings for compensation, until the proceedings on the validity of Regulations Nos 687/79, 797/79 and 1152/79 had been concluded.

(b) Moreover, I have the impression that the arguments put forward by the applicant are in any event no sufficient basis for judgment against the Commission. In my opinion the applicant has not clearly shown that the frustration of a business transaction (it is no more in the present case) is to be regarded as interference in established trade affecting its business relations with Chilean suppliers and its standing on the market; nor has it convincingly shown that such an act is to be regarded as interference equivalent to expropriation and giving rise to a duty to pay compensation. In particular it has not made it clear that there is a principle *common* to the legal systems of the Member States that there is a duty to pay compensation in such circumstances. I believe that no more need be said on this subject.

8. To summarize, I can only propose that the action, in so far as it is to be regarded as admissible at all, should be dismissed as unfounded and the applicant be ordered to pay the costs.

1 — *Compagnie d'Approvisionnement, de Transport et de Credit SA and Grands Moulins de Paris SA* v *Commission* [1972] ECR 391.

2 — *August Topfer & Co. GmbH* v *Commission* [1978] ECR 1019, at p. 1033.