

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Hessischer Verwaltungsgerichtshof by order of 17 August 1981, hereby rules:

Consideration of the question raised has disclosed no factor of such kind as to affect the validity of Commission Regulation No 1102/78 of 25 May 1978.

Touffait

Mackenzie Stuart

Everling

Delivered in open court in Luxembourg on 15 July 1982.

J. A. Pompe
Deputy Registrar

A. Touffait
President of the Third Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
DELIVERED ON 27 MAY 1982

My Lords,

This is a reference for a preliminary ruling from the Hessischer Verwaltungsgerichtshof. The proceedings before it

were commenced by a German undertaking which I shall call "Edeka". Edeka is a large German food retailer and, among its other commercial activities, it imports preserved mushrooms from Taiwan and South Korea. The dispute

before the referring court arises from the virtual exclusion of imports of preserved mushrooms into the Community from those two countries in 1979, and a severe restriction in respect of Taiwan for 1980 as a result of measures taken by the Commission in order to avoid a serious disturbance in the Community market for preserved mushrooms. The background to those measures is set out in my Opinion in Case 52/81 *Faust v Commission* to which I refer without repeating. Since, however, the issues raised in the two cases are not identical, and since different arguments have been put forward in the two cases, it seems to me right, and more convenient to the Court making this reference, that I should set out in this opinion the facts and matters upon which the arguments have been based even though this involves some repetition.

In brief the facts of the present case are as follows.

On 3 April 1978 a trade agreement was signed between the Community and China. Article 3 of the agreement provides, *inter alia*, that the two contracting parties "will make every effort to foster the harmonious expansion of their reciprocal trade". The agreement was published in the Official Journal on 11 May (OJ 1978, L 123, p. 2) and a fortnight later the Commission adopted Regulation No 1102/78 (OJ L 139, 26. 5. 1978, p. 26). This measure was based on Article 14 (2) of Regu-

lation No. 516/77, of 14 March 1977 (OJ L 73, 21. 3. 1977, p. 1) which gives the Commission power to adopt "what measures are necessary" where there is or is likely to be serious disturbance of the market in one or more of the products covered by the common organization of the market in products processed from fruit and vegetables. Article 1 (1) of Regulation No 1102/78 suspended the issue of import licences for preserved mushrooms. Article 2 (1) exempted from the suspension products originating in third countries "which the Commission accepts as being able to ensure that their exports to the Community do not exceed a level agreed by the Commission". Article 3 states that China "shall benefit under the terms of Article 2".

Commission Regulation No 1213/78 of 5 June 1978 (OJ L 150, 6. 6. 1978, p. 5) extended the benefit of exemption to products from Taiwan, but it was repealed just over three weeks later by Commission Regulation No 1449/78 of 28 June 1978 (OJ L 173, 29. 6. 1978, p. 25). Thereafter imports from Taiwan remained prohibited until April 1980. As far as preserved mushrooms from South Korea are concerned, it was not until November 1979 that the suspension of the issue of import licences was lifted (see Commission Regulation No 2447/79 of 7 November 1979, OJ L 279, 8. 11. 1979, p. 11). China, Taiwan and South Korea were at that time the three principal exporters of preserved mushrooms to the Community so that, with the exclusion of imports from Taiwan and South Korea for most of 1979, China was left as the sole substantial supplier. On 25 September 1979, at a time when imports from both those countries were still banned pursuant to

Regulation No 1102/78, Edeka applied to the competent German authority for the grant of import licences in respect of two part-consignments of preserved mushrooms, one from Taiwan of 73 920 kilogrammes and one from South Korea of 18 480 kilogrammes. The applications were refused on 4 October on the ground that their issue had been suspended by Article 1 of Regulation No 1102/78. Edeka objected, the objection was in its turn rejected, and, on 15 November 1979, it brought an action before the Verwaltungsgericht at Frankfurt against the Federal Republic of Germany, in the person of the Bundesamt für Ernährung und Forstwirtschaft.

The lawfulness of the decision rejecting the application for the import licences depended on Regulation No 1102/78 which Edeka argued was itself unlawful for the following reasons:

- (a) Article 1 violated the prohibition on discrimination contained in Article 40 (3) of the Treaty in so far as it ended the equal access of each importer to the market of third countries;
- (b) it infringed the principle of the freedom of external trade to be found in Articles 39 and 110 of the EEC Treaty;
- (c) it violated the principle of proportionality;
- (d) it violated the principle of equal competition with regard to restrictions on supplier countries.

The Verwaltungsgericht rejected Edeka's case and the latter appealed to the Verwaltungsgerichtshof which decided to make the order for reference. Clarifi-

cation is required, the order for reference says, as to whether the regulation was wholly appropriate and necessary in order to protect the Community market from being seriously disturbed by the importation of preserved mushrooms from Taiwan and South Korea or whether the measure offended against the prohibition of discrimination contained in Article 40 (3) of the Treaty because it introduced a general ban on the importation of preserved mushrooms from those countries without having regard to the traditional trade relations of individual importers. It is the national court's view that the general exclusion of importers from access to their previous suppliers could constitute an infringement of Article 40 (3) which might have been avoided if the protective measures introduced by the Commission had simply consisted of minimum import quotas for the importers concerned.

The question referred to the Court is in these terms: "Was Commission Regulation (EEC) No 1102/78 ... valid or did it offend against the prohibition of discrimination because, as the plaintiff believes, certain importers were in practice generally barred by the regulation from effecting imports from non-member countries?"

Edeka does not challenge the justification in fact for applying some protective measures at the material time. It accepts that it does not have, and never has had, an inalienable right to import goods from Taiwan and South Korea; and that the Commission could take account of a reorientation in the Communities' external trade policy when applying protective measures. Edeka's complaint is that, in the application of protective measures, it was unlawfully excluded from obtaining supplies of preserved mushrooms from Taiwan and South Korea. This constitutes, it is said,

“massive discrimination” against itself. The grounds relied on in support of this assertion are the following:

- (1) Edeka and other German importers of preserved mushrooms are in the same or a comparable position;
- (2) the effect of the protective measures was that Edeka could import nothing in 1979 whereas three of its competitors, who traded with China, were able to import almost 29 000 tonnes;
- (3) the measures adopted by the Commission provoked an imbalance in the conditions of competition as between Edeka itself and those of its competitors who traded with China because it gave them a virtual monopoly of the trade in preserved mushrooms;
- (4) there was no objective justification for this.

The only question raised in the Order for Reference concerns the validity of Regulation No 1102/78. Edeka, however, does not challenge the basic scheme of the regulation, i.e. Articles 1, 2 and 4. Its attack is directed, it seems, at the Commission's failure to exercise its power of exemption under Article 2 (1) at the time of the adoption of the regulation and later on, in other words, to include Taiwan and South Korea in Article 3.

It is agreed by the parties that the Commission considered exemption under Article 2 (1) on a yearly basis. That is to

say, the inclusion of China in Article 3 was based on an agreement as to the level of Chinese exports in 1978 only. A second agreement was reached for the year 1979 and a third for 1980. The same practice was followed in relation to Taiwan and South Korea. The exemption granted to Taiwan by Regulation No 1213/78 was based on an agreement covering the quantity of exports to be made in that year only. It was withdrawn by Regulation No 1449/79 because the Commission believed that the agreement had not been followed. No agreement was made with South Korea in 1978 because that country refused to limit its exports to the Community in that year to the amount proposed by the Commission. So far as can be seen, a second round of negotiations took place in 1979, but no agreement was at first reached with either Taiwan or South Korea. An agreement was made with China, it seems on 23 January 1979, and that is why Article 3 of Regulation No 1102/78 remained in force. In consequence, it seems that Edeka is really complaining not so much of the regulation itself but about the Commission's attitude to its negotiations with third country suppliers and its policy in regard to the exercise of its power under Article 2 (1) in 1979.

The Commission was asked certain questions concerning its application of Regulation No 1102/78 in the years 1978-1980 and it is on the information produced in answer to those questions that I base my opinion. If the facts ultimately found by the national court are different it will be necessary for it to consider whether the conclusions reached are affected.

In the Commission's view, the Community market could, under normal conditions, absorb about 32 000 tonnes of preserved mushrooms yearly from

third countries without risking any serious disturbances caused by imports alone (this amounted to about one third of the total imports into the Federal Republic of Germany). This assessment has not been challenged by Edeka. Negotiations on a limitation to the quantities to be exported to the Community took place at the beginning of 1978 with South Korea, in April with Taiwan and in May with China. The amounts initially offered by the Commission were 5 500, 11 500 and 15 500 tonnes respectively, which comes to 32 500 tonnes. South Korea made a counter offer of 7 000 tonnes, but licences had been granted for more than this amount by 24 May 1978. South Korea was not, apparently, prepared to limit its exports to the amount then reached and so no agreement was made in that year. It did in fact export some 9 831.4 tonnes to the Community in 1978, over three times the amount imported in the previous year and the average amount of each of the three previous years.

As far as China is concerned, the offer of 15 500 tonnes appears to have been based on the amount imported in 1977 (which was in fact 15 318.8 tonnes). China made a counter offer of 20 000 and an agreement was finally reached on 17 May 1978, just over a week before Regulation No 1102/78 was adopted, on an amount of 17 100 tonnes. According to counsel for the Commission, the following factors were taken into account when reaching agreement on this figure:

- (i) China had exported on average in each of the three previous years 18 000 tonnes (in fact, according to the figures submitted to the Court, the yearly average in 1975 to 1977 was only 15 931.3);

- (ii) China was the only country which had accepted a limitation on its exports;
- (iii) the trade agreement with China envisaged an increase in trade between it and the Community;
- (iv) the amount of the Community's exports to China exceeded imports from China

In the event, China exported some 18 218.9 tonnes to the Community in 1978. This was an increase of some 18.9% over the amount exported in 1977 and 14.4% over the yearly average in 1975 to 1977.

As far as Taiwan is concerned, negotiations started in April 1978 with a Commission offer of 11 500 tonnes, which was the amount in respect of which import licences had already been issued. In other words, the Commission wanted Taiwan to cease further exports to the Community. Taiwan refused to accept this unless all other supplying countries agreed to a similar restriction. By 24 May 1978 import licences for a total of 17 528 tonnes had been applied for. It was not until after the adoption of Regulation No 1102/78 that Taiwan agreed not to export more than had already been exported. At the hearing, however, counsel for the Commission accepted that, before it adopted Regulation No 1102/78, the Commission was aware of a telex, or its contents, sent on 23 May by the Taiwan producers' organization, TMPUEC ("TM"), to its European representative. This telex said, *inter alia*, "in order to show our good cooperation to EC (the Commission) we assure there will be no active selling to WG (West Germany) at present time and

we promise will consult with EC if we will take any new step". In that telex, TM accepted that it had sold 11 711 tonnes to the Community. The telex was sent in reply to one from its representative in which he had said that the Commission wanted a guarantee that there would be no further exports as from August, otherwise protective measures would be adopted.

Counsel for the Commission said that the 23 May telex came "too late" and that, had the Commission refrained from imposing protective measures, it would have had to allow into the Community all the 17 528 tonnes of Taiwan preserved mushrooms for which import licences had been applied up to 25 May. "Too late" may have meant that it was administratively impossible to include Taiwan alongside China in Article 3 of the regulation. If this was the case, the suspension of the issue of import licences in respect of goods from Taiwan that applied from 26 May until the position was remedied with the adoption of Regulation No 1213/78 on 5 June, was not, in my view, invalid. The validity of legislation, particularly in the field of economic law, cannot be considered in a vacuum. It would be both unrealistic and unduly formalistic to ignore the administrative practicalities of the legislative process.

Even if the real explanation is the Commission's fear that, if it accepted the Taiwan guarantee, it could not prevent the importation of 17 528 tonnes of preserved mushrooms, as opposed to the

11 711 mentioned in the 23 May telex, the regulation is still, in my opinion, to be considered valid. It is true, as has been urged on behalf of Edeka, that under the import licensing system then in force there was no necessary correlation between the quantities in respect of which import licences had been applied for and the quantities actually sold and exported by a given third country supplier. It was only in Regulation No 547/80 of 4 March 1980 (OJ L 60, 5. 3. 1980, p. 16) that the Commission resolved this problem by requiring applications for import licences to be accompanied by a document issued by, or under the authority of, the government of the exporting country, authorizing the export of a specified quantity of preserved mushrooms. However, in 1978, the only indicator of the possible level of imports that the Commission possessed was the number of applications for import licences. When the Commission compared the Taiwan guarantee, which mentioned sales of only 11 711 tonnes, with the quantities for which import licences had been applied, it was, in my opinion, entitled to have regard to the latter, at least until it could verify the figure by contacting the Taiwan producers. That would take time and, given the urgency of the situation, it was permissible for the Commission to act, as long as it took steps to check the guarantee. This it seems to have done within a reasonable time because Regulation No 1213/78 was adopted less than a fortnight after Regulation No 1102/78.

Turning to the question of discrimination, there is no indication that, in the conduct of negotiations with third countries in 1978 for the limitation of their exports to the Community, the Commission discriminated against

Taiwan and South Korea. If one takes the Commission's April offer to Taiwan of 11 500 tonnes, that was 11.1% above the amount exported by Taiwan to the Community in 1977 and 5.1% less than the yearly average in 1975-1977. The Commission's offer to China was 1.2% above the level of its exports to the Community in 1977 and 2.7% less than the yearly average in 1975-1977. In contrast, the offer to South Korea, which was turned down, represented an increase of 85.7% and 118.3% respectively. The amount eventually agreed with China (17 100 tonnes) was 11.6% above the level of exports in 1977 and 7.3% above the yearly average in 1975-1977. If one takes as the amount agreed with Taiwan the figure of 12 600 tonnes, which was accepted in the *Faust* case, that represented an increase of 21.7% and 4% respectively.

At the end of the day, of course, there was different treatment of the third country suppliers because one, China, was exempted from the suspension of the issue of import licences while the other two, Taiwan and South Korea, were not. It follows from Case 55/75 *Balkan-Import-Export v HZA Berlin-Packhof* [1976] ECR 19 that the Commission was not, however, under a duty to accord equal treatment to them. The Court held in that case, at paragraph 14 of the judgment, that "in the Treaty there exists no general principle obliging the Community, in its external relations, to accord to third countries equal treatment in all respects and in any event traders do not have the right to rely on the existence of such a general principle". Any different treatment could, in any event, only constitute wrongful discrimination if the position of the countries in question were the same or comparable.

Under the system adopted in the regulation, the factor determining their different treatment was the existence or otherwise of an agreement on the self-limitation of exports. Exemption from the suspension of the issue of import licences which is justified on this basis is not discriminatory in itself because the respective positions of countries which have accepted a limitation on the level of their exports to the Community and those which have not are dissimilar. It is objectively justifiable to impose restrictions on imports from the latter and not the former because only imports from countries that have refused to limit their exports continue to constitute a threat to the market.

Edeka seeks to avoid this by relying on the second paragraph of Article 40 (3) of the Treaty, which provides that common organizations of agricultural markets "shall exclude any discrimination between producers or consumers within the Community". It is said that the discrimination is felt by importers and other operators based in the Community, some of whom trade with China and some with Taiwan and South Korea. The discrimination takes the form of a change in the conditions of competition within the Community with the effect that importers of preserved mushrooms from China are favoured by being given a virtual monopoly of trade in such goods.

That an importer may rely on the second paragraph of Article 40 (3) is clear from,

for example, Case 112/80 *Dürbeck v HZA Frankfurt-am-Main* [1981] ECR 1095, but, in any event, as the Court pointed out in Joined Cases 117/76 and 16/77 *Ruckdeschel v HZA Hamburg-St. Annen* [1977] ECR 1753 at paragraph 7 of the judgment, Article 40 (3) only sets out "a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law".

The crucial element in the circumstances of the present case, however, is the fact that some importers have dealings with countries which accept a limitation on their exports, while others have dealings with countries which do not. This shows that their respective positions are not in truth either the same or comparable; in addition it can, in my opinion, be regarded as an objective justification for any different treatment as between such importers and as an indication that it is not arbitrary. In consequence I do not think that the treatment of which Edeka complains can rightly be described as discrimination between consumers within the Community which is prohibited by the Treaty.

It is then said that Taiwan and South Korea could not be totally excluded from supplying the Community because this would be contrary to international law (sc. Article 4 (5) (c) of the Agreement relating to the interpretation and application of Articles VI, XVI and XXIII of the GATT) and the interests of those undertakings in the Community which have been supplied from these two

countries since 1961. As far as they are concerned, the total exclusion of imports is contrary to (i) the freedom of external trade (see Article 12 of the German Constitution and Articles 110 and 222 of the Treaty); (ii) the principle of proportionality (see Article 14 of Regulation No 516/77); and (iii) the general principle that traditional trading links must be maintained (see Article 12 (2) of Council Regulation No 926/79 of 8 May 1979, OJ L 131, 29. 5. 1979, p. 15 and Article XIII (2) of the GATT).

The Agreement relating to the interpretation and application of Articles VI, XVI and XXIII of the GATT was made on 12 April 1979 and was not therefore in force at the material time. In any event, there is nothing in it which, in my opinion, establishes the existence of a principle of international law relevant to this case. Moreover, it is well established that the spirit, general scheme and terms of the GATT indicate that it does not confer on the citizens of the Community rights on which they can rely when challenging the validity of a measure adopted by a Community institution (see, for example, Joined Cases 21-24/72 *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219, and Case 9/73 *Schlüter v HZA Lörrach* (1973) ECR 1135) so the last point made must also, to this extent, be rejected. The adoption of Regulation No 1102/78 was notified to the contracting parties to the GATT pursuant to Article XIX but, according to counsel for the Commission, no objection was ever raised to it. No right to trade with third countries can in my view be derived from Article 110 of the Treaty (see the *Dürbeck* case at paragraph 44 of the judgment) or from Article 222. Even if such a principle can be drawn from

Article 12 of the German Constitution, which is by no means agreed, it is well established that the validity of a measure adopted by a Community institution is to be determined in the light of Community law, not the law of one particular Member State (see, for example, Joined Cases 41, 121 and 796/79 *Testa v Bundesanstalt für Arbeit* (1980) ECR 1979). In the absence of any conclusive authority in Community law, the existence of such a right must be rejected. In the same way, Article 12 (2) of Regulation No 926/79 is insufficient authority for the existence of a general principle that traditional trading links must be maintained.

That leaves the principle of proportionality.

In brief, it is said that, if the Commission was prepared to let in imports at all, it should have done so by using a reference quantity system, thus giving every importer a fair chance. By excluding imports altogether from South Korea and Taiwan it imposed an excessive and unnecessary burden on importers from those countries. Since China is a State-trading country, it was in practice impossible for them to import at all and the result of the Commission's measures was to create a monopoly of trade in preserved mushrooms with adverse effects on the competitive structure of the Community.

In the *Dürbeck* case the Court accepted that it was compatible with the principle of proportionality to attempt to secure the agreement of exporting countries to a voluntary restriction of their exports to

the Community before resorting to coercive measures (see paragraphs 39 and 40 of the judgment). Clearly, if an exporting country has agreed to limit its exports, the imposition of protective measures is not strictly necessary in order to avoid a serious disturbance of the market. It could therefore be contrary to the principle of proportionality to adopt a reference quantity or quota system in so far as goods from that country are concerned. Moreover, it cannot be said, from the information concerning the negotiations conducted by the Commission in 1978, that it was seeking to impose a disproportionate burden on importers from Taiwan or South Korea.

Next it is argued that the regulation violated the principle of the protection of legitimate expectations because traders were entitled to expect that existing trade flows would be respected when protective measures were imposed. This, too, must be rejected. The trade agreement with China, which was published in the Official Journal, put traders on notice that commercial relations between it and the Community were on a different footing to those between the Community and other third countries, such as Taiwan and South Korea, with whom there were no such agreements. This, coupled with the absence of a duty to accord equal treatment in relations with third countries (see the *Balkan-Import-Export* case) negatives the existence of any such legitimate expectation.

Then it is said that the reasons for treating China differently from other exporting countries should have been set out in the preamble to Regulation No 1102/78 in accordance with Article 190

of the Treaty. The Commission should have mentioned the quantities which it would accept from supplying countries as the basis for lifting the suspension of the issue on import licences and should have given details of the agreement that had been reached with China and of the failure to reach agreement with Taiwan and South Korea. It was not in my view necessary to mention any of these factors in the preamble in order to give a sufficient indication of the reasons which prompted the Commission to adopt the regulation. The quantities which it might accept as the basis for lifting import restrictions cannot be considered part of the reasoning which led to the adoption of the regulation and could in any event be expected to change in accordance with developments in the market so it is understandable why the Commission declined to tie itself down to a specific figure. For the purposes of explaining Article 3 of the regulation it was sufficient to state, as was done, that China had agreed to limit its exports to the Community.

In its written observations Edeka raised the point that the Commission could not take account of external trade policy considerations when exercising its powers to impose protective measures. At the hearing counsel for Edeka did not pursue that argument, relying rather on the proposition that a reorientation of the Community's external trade policy cannot completely exclude traditional trading partners. As I have already indicated, no authority has been produced which, in my view, establishes the existence of a principle of Community law that traditional trading links must be maintained. The question whether the Commission is entitled to

take external trade policy considerations into account when adopting protective measures is dealt with in my Opinion in the *Faust* case and I do not think it necessary to repeat what I said there.

In conclusion, none of the arguments addressed to the Court has, in my view, revealed any factor indicating that, at the time it was adopted, Regulation No 1102/78 was invalid. It has not been suggested or established that there was no justification in fact for applying protective measures at all in 1979 so it cannot be argued that Regulation No 1102/78 could no longer be applied at all in that year or that it ceased to have effect.

Can it be said that the regulation became invalid because some importers could in practice be barred from effecting imports from third countries or because in fact when Edeka submitted its applications in September 1979 these were refused because neither Taiwan nor South Korea had been granted exemption from the suspension of the issue of import licences? Since, in my view, it was lawful for the Commission to adopt the test which was adopted (i.e. satisfaction as to effective self-limitation) it is difficult to see how the way the regulation was applied can make the regulation itself invalid. Whether the regulation was unlawfully applied is a different question and not the one referred in this case. It

would be different if the regulation made unlawful discrimination inevitable which, as already indicated, in my view it did not.

Assuming, however, that the way the Commission exercised its discretion could invalidate the regulation, what are the facts in respect of 1979 and 1980?

An agreement was reached with China on 23 January 1979 for a limitation of its exports to the Community to 20 000 tonnes. This took account of the 1978 trade agreement and the balance of trade between the Community and China. Both parties, however, agreed that the quantity could be raised or lowered should the market allow or require it. Negotiations took place with South Korea on 11 April. South Korea initially proposed to limit itself to 6 500 tonnes but the Commission was only prepared to accept an annual limit of 4 000 tonnes in the event that the market situation returned to normal. No agreement was therefore reached at this time. In July further negotiations took place with China resulting in an increase in the amount agreed by 2 500 tonnes. This was due to the fact that the Commission estimated that the market could absorb a further 4 000 tonnes without there being any further disturbance. It is unclear whether, but possible that, this amount was that initially offered to, and turned down by, South Korea. In August the Commission allowed the import of a further 6 000 tonnes from China. This consisted of preserved mushrooms which were in the course of shipment to the Community. At the end of September, agreement was reached with South Korea on a limitation of its exports to 1 500 tonnes, apparently the amount remaining after the July agreement with

China. South Korea does not seem to have taken this up and at the end of the year the Commission began negotiating with Taiwan for a limitation of its exports to 1 000 tonnes. The Taiwan producers had apparently suggested exporting to the Community 11 000 tonnes, but it seems they were prepared to negotiate on the figure. Nevertheless, according to the information before the Court, the Commission made no offer before the end of the year on the ground that, because of the flood of imports in the previous year, the amount agreed with China and the amounts actually delivered by it, the market situation did not warrant further imports. According to the Commission, no agreement was in fact reached with Taiwan until 4 February 1980 but, since protective measures were only lifted in April, after agreement that 1 000 tonnes would be imported in that year, it may be that any agreement was reached later.

According to the figures submitted to the Court, in 1979 China in fact exported some 29 604.9 tonnes to the Community, South Korea 37.3 and Taiwan 55.3 tonnes.

The amount of 20 000 tonnes initially agreed with China represented an increase of 30.6% over the quantity exported by it to the Community in 1977. The quantity actually exported in 1979 was 93.3% higher. The Commission's offer (4 000 tonnes to South Korea (which was not accepted)) was 35% higher than the quantity exported by South Korea to the Community in 1977, which was the year with the highest level of South Korean exports since 1974, apart from the peak year of 1978. In contrast, the offer made to Taiwan of 1 000 tonnes represented a cut-back in its exports of 90.3% in

comparison with the level of exports in 1977 (in fact, the only year, since the early 1960s, in which Taiwan had exported less than 10 000 tonnes to the Community was 1976).

On these facts I do not think that it can be urged that there was any cause for complaint on the decision in respect of South Korea, though the limitations in respect of Taiwan have not been, to my mind, satisfactorily explained.

I do not consider that the principle of proportionality really comes into play since it is accepted that an overall limit could be fixed, and that this must essentially be for the Commission to decide. I do not think it is seriously suggested that the overall limit imposed was disproportionate to the requirements of the Community market at the time. The real question to my mind was whether there was unlawful discrimination against Taiwan and thereby against importers who shipped goods

from Taiwan, which itself rendered the regulation invalid. In the light of the Court's decision in Case 55/75 *Balkan-Import-Export* (supra) it does not seem to me that any decision to discriminate between third countries in the amounts offered is unlawful or can invalidate the regulation. Where traders within the Community import primarily or exclusively from particular countries which are excluded from trade, or which are given very small quantities, they will of course suffer in their trade. If direct discrimination against a third country is not unlawful, I do not consider that the consequences which affect some traders, but not others, make the regulation unlawful, at any rate unless it is shown that the discrimination is directed against those traders themselves. That is not the case here. Accordingly, it does not seem to me that the fact that some traders, but not others, will find their business reduced by the application of the regulation makes the regulation invalid.

In the result, for the reasons I have given, I am of the opinion that the request for a preliminary ruling should be answered to the effect that the reference has not revealed any factor which renders Regulation No 1102/78 invalid and it is not shown to have been, or to have become, invalid (as being in breach of a principle of non-discrimination) even if certain importers were in the result generally barred by the regulation from effecting imports from one or more third countries.