sought to have applied by analogy and, on the other hand, contain an omission which is incompatible with a general principle of Community law and which can be remedied by application by analogy of those other rules.

2. Article 3 (6) of Commission Regulation No 2655/82, laying down rules for implementing the import arrangements for 1982 for products falling within subheading 07.06 A of the Common Customs Tariff originating in third countries other than Thailand must be interpreted as applying to the case of importers of products falling within the said tariff subheading and originating in Thailand as provided for by Commission Regulation No 2029/82.

   If that were not so, importers of the said products originating in Thailand, who, until the adoption of Regulation No 2029/82, were subject to legal rules corresponding very closely to those governing importers of the same products originating in other non-member countries and who were therefore likely to benefit, on the same basis as the latter, from measures intended to protect legitimate expectation, would be placed in a situation which was contrary to the principle in Community law of equal treatment of traders in comparable situations.

   Article 3 (6) of Regulation No 2655/82 is to be applied to the importation of products falling within subheading 07.06 A of the Common Customs Tariff and originating in Thailand subject to the time-limits and other procedural requirements therein laid down.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 10 October 1985 *

Mr President,
Members of the Court,

A.1. The reference for a preliminary ruling in regard to which I am today delivering my Opinion turns on the amendment of the rules for the importation of manioc and the question of whether it was necessary, in view of that amendment, to provide for transitional measures in favour of traders affected by it.

Until the summer of 1982, manioc could be imported from countries which were members of the General Agreement on Tariffs and Trade (GATT) and other countries not members of the Communities with which the European Economic Community had negotiated a so-called 'most favoured nation clause', of which Thailand was one, [1] subject to 6% customs duty. The version of the Common Customs Tariff published in Regulation No 3300/81 of 16 November 1981 [2] provided for the said conventional rate of duty of 6% on products falling under subheading 07.06 A. The autonomous rate of customs duty was also fixed at 6% though the Common Tariff contained a note to the effect that such products were subject to a levy. The

* Translated from the German.

1 — Article 1 of the Cooperation Agreement between the European Economic Community and Indonesia, Malysia, the Philippines, Singapore and Thailand — member countries of the Association of South-East Asian Nations (OJ 1980, L 144, p. 2).

2 — OJ 1981, L 335, p. 1.

conventional rate of duty was based on a tariff concession that the Community had granted in the framework of GATT.

In view of the problems in the cereals market, characterized by a stationary or slightly decreasing internal demand with imports of cereal substitutes tending to rise, the Community felt obliged to begin negotiations with the countries principally responsible for supplying cereal substitutes with a view to limiting imports. In the 15th General Report on the Activities of the European Communities in 1981, published by the Commission in February 1982, it was mentioned that treaties had been initialled with Thailand and Indonesia and negotiations were under way with Brazil. [3]

Article 1 of Regulation No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals, [4] read together with Annex A to that regulation, provides that importation of manioc is covered by the common organization of that market. According to Article 12 of the said regulation, all imports of such goods are subject to an import licence being submitted. The issue of such licences is conditional on the lodging of a deposit guaranteeing that importation will be effected during the period of validity of the licence. The deposit is forfeited in whole or in part if the transaction is not effected, or is only partially effected, within that period (fourth paragraph of Article 12 (1) of Regulation No 2727/75). Two different forms of licence are generally available in regard to which the import levies are calculated in different ways:

In the case of simple licences, Article 15 (1) of Regulation No 2727/75 provides that the levy to be charged is that applicable on the day of importation.

With regard to licences in respect of which the levy is fixed in advance under Article 15 (2) of Regulation No 2727/75, the applicable levy is that in force on the day on which application for a licence is lodged, adjusted on the basis of the threshold price in force during the month of importation.

According to Article 15 (7) of the said regulation, where examination of the market situation shows that the application of the provisions concerning the advance fixing of the levy has given rise or may give rise to difficulties, application of those provisions may be suspended for the period strictly necessary.

On the basis of Article 15 (7) of Regulation No 2725/75, the Commission, in Regulation No 1147/82 of 13 May 1982 suspending advance fixing of the import levy for manioc, suspended from 14 to 28 May 1982 advance fixing in respect of products falling within subheading 07.06 A of the Common Customs Tariff. [5] Among the reasons on which that measure was based is the following:

'... there is a danger that, if existing arrangements are adhered to, levies could be fixed in advance in the short term for quantities considerably in excess of the quantities which might be expected under more normal conditions'.

By Regulation No 1230/82 [6] of 19 May 1982, the Commission laid down special detailed rules for the system of import

3 — Paragraph 413, p. 184.

4 — OJ 1975, L 281, p. 1.

5 — OJ 1982, L 132, p. 52; that period was later extended by Regulation Nos. 1390/82 (OJ 1982, L 155, p. 31) and 1500/82 (OJ 1982, L 181, p. 13).

6 — OJ 1982, L 141, p. 69.

licences for products falling within subheading 07.06 A of the Common Customs Tariff. Article 1 of that regulation provides firstly that the country of origin is to be entered in Section 14 of applications for import licences and of import licences for products falling within subheading 07.06 A of the Common Customs Tariff and then provides in the second sentence that:

'The licence shall carry the obligation to import products originating in the country stated'.

Among the reasons on which that regulation was based, the Commission stated the following:

'... the conclusion of agreements between the Community and the main exporting [countries] on the import of these products is envisaged; ... in order not to compromise the application of such agreements from the time of their conclusion, the detailed rules provided for in Regulation (EEC) No 2042/75 should be supplemented by measures to provide the Commission with information on the origin of the products imported'.

2. Krohn GmbH & Co. KG, the plaintiff in the main proceedings, is a cereals and feedingstuffs importer and wholesaler. On 21 May 1982, the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], the defendant in the main proceedings, granted the plaintiff's application for 20 import licences each in respect of 10 000 tonnes of manioc falling under subheading 07.06 A to be imported from Thailand. Under the fourth paragraph of Article 12 (1) of Regulation No 2727/75, deposits were to be lodged in respect of those 'simple' import licences. The licences were valid for the period from 21 May to 30 September 1982.

3. On 19 July 1982, the Council adopted the following three decisions:

Decision No 82/495/EEC on the conclusion of a Cooperation Agreement between the European Economic Community and the Kingdom of Thailand on manioc production, marketing and trade; [7]

Decision No 82/496/EEC on the conclusion of the Agreement in the form of an exchange of letters between the European Economic Community and the Republic of Indonesia concerning imports of manioc from Indonesia and from other supplier countries which are members of the General Agreement on Tariffs and Trade (GATT); [8]

Decision No 82/497/EEC on the conclusion of the Agreement in the form of an exchange of letters between the European Economic Community and the Federative Republic of Brazil concerning imports of manioc from Brazil and from other supplier countries which are members of the General Agreement on Tariffs and Trade (GATT). [9]

One feature common to those three agreements was that imports of manioc into the Community were to be limited. To that end, ceilings were fixed for the quantities which could still be imported into the Community under a levy fixed at a maximum of 6% *ad valorem*. The agreements differ however in regard to the procedures dealing with determination of the quota. While the agreements with Indonesia and Brazil contain no implementation rules, the Kingdom of Thailand undertook to itself ensure that the agreed limits were not exceeded.

The Commission adopted the following measures for the implementation of the new import rules:

Regulation No 2029/82 of 22 July 1982 laying down detailed rules for implementing

7 — OJ 1982, L 219, p. 52.
8 — OJ 1982, L 219, p. 66.
9 — OJ 1982, L 219, p. 58.

the import arrangements applicable to products falling within subheading 07.06 A of the Common Customs Tariff, originating in Thailand and exported from that country in 1982; [10]

Regulation No 2655/82 of 1 October 1982 laying down rules for implementing the import arrangements for 1982 for products falling within subheading 07.06 A of the Common Customs Tariff originating in third countries other than Thailand and amending Regulation (EEC) No 950/68 on the Common Customs Tariff. [11]

According to Article 1 of Regulation No 2029/82, products falling within subheading 07.06 A of the Common Customs Tariff originating in Thailand are to benefit from the arrangements provided for in the Cooperation Agreement if imported under cover of import licences issued upon submission of a certificate of export to the European Economic Community issued by the Department of Foreign Trade — Ministry of Commerce, Government of Thailand. Article 10 of the regulation provides that the provisions of Article 1 are to apply only to export certificates issued by the Thai authorities from 28 July until 31 December 1982.

According to Article 11 of the regulation, products exported from Thailand before 28 July 1982 could benefit from the limitation of the levy to 6% *ad valorem* if the importer had an import licence which did not entail advance fixing of the levy and if *inter alia* the products were placed in free circulation within 30 days following 28 July 1982. That time-limit was later extended to 55 days for certain types of goods by Commission Regulation No 2427/82 of 7 September 1982. [12]

Article 3 (6) of Regulation No 2655/82 of 1 October 1982 contains transitional provisions for persons holding licences for imports from non-member countries other than Thailand. Such persons could, within 30 days following the date of application of that regulation, submit a request to have licences issued prior to the date of application of that regulation cancelled and the security released. If the quantities for which the cancelled licences were issued were afloat on 1 October 1982 the interested parties could, if they so requested before 9 October 1982, be given priority in certain respects.

The Council had already laid down general rules for the importation of manioc in Regulation No 2646/82 of 30 September 1982 on the import system applicable in 1982 to products falling within subheading 07.06 A of the Common Customs Tariff. [13] In that regulation, the Council fixed the quantities which could be imported at a maximum levy of 6% *ad valorem*. According to Article 3, the regulation entered into force on the day of its publication in the *Official Journal of the European Communities*, that is to say, 1 October 1982. However, it applied from 1 January to 31 December 1982.

After the entry into force of those new import rules, therefore, importations of manioc were treated in several different ways. If they came within the quantities covered by the quotas, they were liable, as before, to a 6% *ad valorem* levy. If they were not covered by the agreements, they were subject to a variable levy whose average rate was about 60% *ad valorem*.

4. By 30 September 1982 the plaintiff in the main proceedings had only partially

10 — OJ 1982, L 218, p. 8.
11 — OJ 1982, L 280, p. 14.
12 — OJ 1982, L 260, p. 5.
13 — OJ 1982, L 279, p. 81.

made use of the licences issued to it. By letter dated 4 October 1982 the plaintiff returned the licences to the defendant in the main proceedings and requested the release of the securities. By a decision of 8 October 1982 the defendant declared the securities forfeit *pro rata*, namely in the amount of DM 173 190. By letter dated 13 December 1982 the plaintiff lodged an objection against that decision and, referring to the rules contained in Regulation No 2655/82, expressly requested the cancellation of the import licences as far as concerned the unused portions. By decision of 28 December 1982 the defendant refused to cancel the licences on the ground that, in view of its wording, Article 3 (6) of Regulation No 2655/82 had to be applied strictly and an application by analogy was thus excluded. The plaintiff could also not plead *force majeure*. It had no right to expect that the possibility of importing unlimited quantities of goods at a rate of levy of 6% *ad valorem* would remain in existence. Moreover, the amendment to the rules did not entirely prevent imports of manioc from Thailand. Such imports were not completely impossible, all that had happened was that the plaintiff was no longer able to import at the low rate of levy of 6%.

5. The Verwaltungsgericht [Administrative Court] Frankfurt, before which an appeal against that rejection was brought, stayed the proceedings and referred the following three questions to the Court of Justice for a preliminary ruling:

'(1) Do the overriding legal principles proscribing arbitrariness and requiring equal treatment necessitate an application by analogy of Article 3 (6) of Commission Regulation (EEC) No 2655/82 of 1 October 1982 (Official Journal, L 280 of 2 October 1982, p. 14), which deals with the import arrangements for products falling under subheading 07.06 A of the Common Customs Tariff originating in non-member countries other than Thailand, to imports of products falling under the same subheading originating in Thailand?

(2) If so, which time-limits and other procedural rules laid down in Regulation No 2655/82 are relevant for the purposes of such analogous application?

(3) If the answer to Question 1 is in the negative, do the import arrangements concluded for 1982 for products falling under subheading 07.06 A of the Common Customs Tariff constitute *force majeure* in so far as they increased by many times the 6% *ad valorem* levy on products not falling within a specific quota?

The Verwaltungsgericht accepts that the Commission has a certain discretion when enacting or applying transitional or hardship rules for holders of import licences. Once it has made use of that discretion by adopting specific rules, the legislature has more or less bound itself, in the Verwaltungsgericht's view, since by virtue of the overriding legal principle of equal treatment, those specific provisions must be applied to other comparable situations.

If the Court of Justice were to hold that an analogous application to products from Thailand of the rules applying to products from other countries is not permissible, the Verwaltungsgericht has doubts as to whether the newly-enacted and more onerous import conditions for licence holders do not constitute extraordinary and unforeseeable circumstances constituting a case of *force majeure* and requiring the licence holder to be discharged from his obligation to import the products.

6. The plaintiff in the main proceedings and the Commission of the European Communities have submitted observations on the above questions to the Court.

(a) The *plaintiff* in the main proceedings claims firstly that its previously issued licences can no longer be used in an economically rational way as a result of the cooperation agreement and the implementation measures adopted thereunder. As those licences were issued without advance fixing of the levy, it has only been able, since the new rules came into effect, to use its previously issued licences to import manioc at the higher rate of levy, which is prohibitive. In its legal argument, it presents its observations on Questions 1 and 3 referred by the Verwaltungsgericht together. The absence of transitional measures for holders of import licences for manioc originating in Thailand can only be explained as a lacuna in the law or an oversight due to the haste with which Commission Regulation No 2029/82 of 22 July 1982 laying down detailed rules for implementing the agreement in Thailand which had been reached two days earlier, was drafted. In the third recital in the preamble to Regulation No 2655/82, the Commission stated that:

'... in the light of the special situation of holders of import licences issued prior to the entry into force of Regulation (EEC) No 2646/82, such holders should be entitled to request the cancellation of the licences in question and the return of the security'.

The 'special situation' of the holders of import licences in question was precisely that they could not reasonably have expected the rules for the import of manioc to be changed completely during the period of validity of the licences. It was in order to take account of that case of *force majeure* and to protect the legitimate expectation of the persons concerned that the Commission laid down transitional rules in Article 3 (6) of Regulation No 2655/82. There is no apparent reason why holders of import licences for manioc originating in Thailand should not be regarded as being in the same 'special situation' after the entry into force of the cooperation agreement with that country. The three agreements concluded between the Community and non-member countries deal with the same subject, namely the limitation of imports of manioc into the Community. For that reason, the interests of import licence holders on the entry into force of the various agreements are the same and must be accorded the same protection.

With regard to Question 2, the plaintiff is of the opinion that such analogous application entails that the provisions of Regulation No 2655/82 must be applied in a like manner to all importers of products falling under subheading 07.06 A of the Common Customs Tariff. After the entry into force of Regulation No 2029/82 of 22 July 1982, importers whose import licences were likely to expire without being used up did not yet have any possibility of obtaining the release of their security. It was only from the entry into force of the transitional rules laid down in Regulation No 2655/82, which provided that the import licences could be cancelled and the corresponding securities released within 30 days following the date of application of the regulation, that importers could take appropriate measures and apply for such relief. Application by analogy of Regulation No 2655/82 means that the time-limit of 30 days from 1 October 1982 must also be applied by analogy.

The plaintiff also considers that the period of validity of the licences granted to it lends support to the application of the abovementioned time-limit. If it had applied

for cancellation of its licences and release of the securities while those licences were still valid, the defendant in the main proceedings would have been perfectly entitled to object that it had acted prematurely because it had not sought to obtain export certificates from the Thai authorities. However, that was precisely what the plaintiff did and it was only after the period of validity of its licences had expired when it would have been senseless to seek such export certificates that it returned the licences and sought the release of the securities.

During the oral procedure, the plaintiff dealt with the Commission's argument that the Thai authorities had in fact been applying the new export rules from 1 January 1982. The plaintiff disputes that and also points out that a distinction must be drawn between the Thai export rules and the Community import rules. It is the latter which were decisive in regard to the use of the plaintiff's licences and it was not until 28 July 1982 that they required submission of a Thai export certificate. For that reason, the plaintiff had no reason to apply to the Thai authorities for such export certificates before the abovementioned date.

Furthermore, when the Commission justifies the different transitional provisions for previously issued licences on the ground that such licences were treated differently, it is a classic case of circular reasoning. The difference between the rules in question cannot be used to justify those rules.

In conclusion, the plaintiff proposes that the following reply be given to the Verwaltungsgericht's questions:

'1. (a) The rules adopted in July 1982 concerning the importation of products falling under subheading 07.06 A of the Common Customs Tariff, which limited the quantity of manioc that could be imported at the rate of levy of 6% *ad valorem* applying theretofore and increased the rate of levy on additional quantities to a multiple of the above constitute a case of *force majeure.*

(b) For that reason, account must be taken of the special situation of import licences issued before the entry into force of Commission Regulation (EEC) No 2092/82 of 22 July 1982 by extending the application of the transitional provisions contained in Article 4 (6) of Commission Regulation (EEC) No 2655/82 of 1 October 1982 to products originating in Thailand and falling under subheading 07.06 A of the Common Customs Tariff.

2. The 30-day time-limit for submitting applications for release of the security, as laid down in Article 3 (6) of Commission Regulation (EEC) No 2655/82 of 1 October 1982, applies in this case by analogy also to imports from Thailand only from the date of application of Regulation (EEC) No 2655/82 of 1 October 1982. There are no particular requirements as to form for the application for release of the security.'

(b) The *Commission* states that there cannot properly be said to exist a breach of the principle of equal treatment and that, consequently, an application by analogy of Article 3 (6) of Regulation No 2655/82 to imports of products originating in Thailand, is not possible because the agreement between the EEC and Thailand and Regulation No 2029/82 of 22 July 1982 implementing it lay down rules different from those contained in the agreements between the EEC and Indonesia, Brazil and other non-member countries and Regulation No 2655/82 implementing those agreements.

What both series of import rules have in common is that as from 1982 a ceiling was fixed for the formerly unlimited quantities that could be imported at the rate of 6% *ad valorem*, consolidated in GATT, and that for additional quantities the importer had to pay the full rate of levy for barley. Differences exist, however, in regard to the entry into force of the various bodies of rules, the way in which they are applied and the provisions applying to pre-existing licences.

As regards management of the quotas, the agreement with Thailand provides that the entire responsibility for the issue of certificates for export and for supervision of the quantities exported is in the hands of the Thai authorities. The importation of manioc at the preferential rate is possible only upon presentation of a consecutively numbered export certificate issued by the Thai authorities; for their part the authorities in the Member States merely verify the existence of that certificate. If such a certificate is produced and if the goods being imported into the Community are identical to those exported from Thailand, the authorities in the Member States must in principle grant an import licence for the quantities described in the Thai export certificate. Those rules, which were in fact introduced on 1 January 1982, that is to say, before the agreement between the EEC and Thailand came into effect in July, made it possible to keep the quantities imported within the quota which had been agreed on for imports at the preferential rate of levy in 1982. With regard to imports from Indonesia, Brazil and other non-member countries, on the other hand, management of the annual quota was entirely in the hands of the Community.

No systematic record was kept of licences for imports from countries other than Thailand which had already been issued when the various agreements with the EEC came into effect but which had not been used up. The legislature could not therefore exclude the possibility that many unused import licences were still in existence on 1 October 1982. Having regard to the uncertainty as to the number of such licences, which were no longer of any interest to importers who had reckoned with a 6% levy, the Commission considered it appropriate to allow them to be cancelled and the security to be released.

On the other hand, licences previously issued for imports from Thailand could still be in existence only if the importer had not complied with the Thai export rules. In those circumstances, the only transitional rules required were for cases in which certain quantities of manioc had already left Thai ports on 28 July 1982. In order to rule out attempts to circumvent the provisions, the Commission cancelled only previously issued licences in respect of which the importer could produce a Thai export certificate.

The Commission therefore proposes that the reply to Question 1 be as follows:

'Even in the light of the principle of equality, it does not appear to be permissible to apply the provisions contained in the first paragraph of Article 3 (6) of Regulation No 2655/82 on the cancellation of unused import licences for manioc from Indonesia, Brazil and other supplier countries except Thailand to the import rules laid down in Regulation No 2029/82 for manioc products originating in Thailand.'

Having regard to its proposal that the Question 1 be answered in the negative, the Commission considers that Question 2 has lost its purpose.

In the Commission's view, Question 3 should also be answered in the negative.

The amendment of the import rules for products originating in Thailand cannot constitute an unusual or unforeseeable circumstance. Having regard to the practice followed by the Thai authorities from January 1982 and to the fact that in May 1982, the Commission, in the preamble to Regulation No 1230/82 laying down special detailed rules for the system of import licences for products falling within subheading 07.06 A of the Common Customs Tariff, had referred to the impending conclusion of the agreement in question, interested parties should have expected an amendment of the rules and made the necessary adjustments. The plaintiff had also failed to approach the situation with all due care since it must have been aware of the risk inherent in applying for an import licence after the adoption of Regulation No 1147/82, which abolished the possibility of advance fixing of the import levy.

The Commission therefore proposes that Question 3 be answered as follows:

'The amendment of import rules by which the formerly applicable 6% *ad valorem* levy is increased severalfold is not a case of *force majeure* when signs of an amendment had long been discernible to the persons concerned who could have taken steps to adapt to the new import rules.'

B. In my Opinion on this reference for a preliminary ruling I should first like to deal with the question of whether the amendment of rules regarding trade policy can constitute a case of *force majeure* within the meaning of Article 36 of Commission Regulation No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products, [14] when the transaction under consideration is not rendered legally impossible by the amendment but no longer makes economic sense. In that connection, I must once again draw attention to the fact that in regard to the importation of quantities of manioc which do not form part of the quota, the rate of levy is no longer 6% *ad valorem* but varies, as the Commission explained, between 50 and 60% *ad valorem*. If such a modification of the legal situation constituted a case of *force majeure*, a reply to the first two questions referred to the Court by the Verwaltungsgericht Frankfurt would be unnecessary.

1. There have been many decisions of the Court on the concept of *force majeure*. In its judgment of 11 July 1968 in Case 4/68, [15] the Court decided that that concept was not altogether identical in the different branches and fields of application of the law and that the significance of it had to be determined on the basis of the legal framework within which it was intended to take effect. In that decision, the Court held that in regard to agriculture, an importer who had shown the necessary diligence was in principle released from the obligation to import when circumstances outside his control made it impossible for him to effect the importation within the required period. Such was the case when the event which rendered impossible the performance in due time of a contract which, under normal circumstances, ought to have enabled the importer to fulfil his obligation to import, was so unusual that it would have had

14 — OJ 1980, L 338, p. 1.

15 — Judgment of 11 July 1968 in Case 4/68 *Schwarzwaldmilch GmbH* v *Einfuhr- und Vorratsstelle für Fette* [1968] ECR 377, at p. 386 *et seq.*

to be considered as improbable by a prudent businessman exercising all due care. The concept of *force majeure* was not to be understood in the sense of referring to an absolute impossibility, but to unusual difficulties which were independent of the will of importers and which arose during the performance of the contracts. Furthermore, recognition of a case of *force majeure* presupposed not only the occurrence of an unusual event but also that the consequences of that event could not be avoided.

In his Opinion of 5 December 1979, [16] Mr Advocate General Capotorti summarized the concept of *force majeure* which has been developed in the case-law of the Court with reference to agriculture by saying that that concept contained two elements: first, an objective element, namely the occurrence of an extraordinary event beyond the influence of the person concerned and secondly a subjective element, namely the requirement that everything possible was done by the person concerned, acting with care, prudence and diligence, in order to avoid the occurrence of that event. In his opinion of 17 November 1983, [17] Mr Advocate General Reischl, in defining the concept of *force majeure*, said that important factors were whether all requisite care has been taken, whether there were circumstances outside the influence of the person under the obligation and whether an event was to be regarded as so unusual that its occurrence would have to be considered as improbable by a prudent person acting with the circumspection of a diligent businessman.

16 — Opinion of 5 December 1979 in Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78 and 39, 31, 83 and 85/79 *Ferriera Valsabbia SpA and Others* v *Commission* [1980] ECR 1035, at p. 1067 *et seq.*

17 — Opinion of 17 November 1983 in Case 284/82 *Acciaierie e Ferriere Busseni SpA* v *Commission* [1984] ECR 568, at p. 571.

In its most recently published judgment on the question of *force majeure*, the Court, in its judgment of 9 February 1984 [18] decided as follows:

'It is apparent from the established case-law of the Court that apart from special cases in specific areas in which it is used, the concept of *force majeure* essentially covers unusual circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties, independent of the will of the person concerned and apparently inevitable even if all due care is taken.'

When applying those principles to the present case, it must first be noted that application of the concept of *force majeure* is not automatically excluded by the fact that the import transactions envisaged by the plaintiff are still legally possible. They are still legally possible but only under economic conditions which, as was intended by the Community, are in fact prohibitive. As we have seen, there is no need for there to be complete impossibility, it is sufficient that a transaction no longer makes economic sense and has therefore become economically impossible.

The question arises, however, whether the modification of the underlying trade policy was really unforeseeable. It becomes very doubtful as soon as one looks at the version of the Common Customs Tariff applicable in 1982. [19] It provides for two different rates of duty for subheading 07.06 A: a

18 — Judgment of 9 February 1984 in Case 284/82 *Acciaierie e Ferriere Busseni SpA* v *Commission* [1984] ECR 557, at p. 566.

19 — Regulation No 3300/81, OJ 1981, L 335, p. 1.

conventional rate of duty of 6% and an autonomous rate of 6% with a note to the effect, however, that in the latter case the goods in question were subject to payment of a levy. The possibility of imposing a levy in addition to customs duty was thus already provided for in the Common Customs Tariff in relation to the autonomous rates of duty. An amendment of the conventional rates of duty by way of an agreed modification of customs concessions leading to the conventional rate of duty being fixed at the same level as the autonomous rate certainly cannot be regarded as so unusual that a prudent businessman exercising all due care would have considered it improbable.

That assessment is further supported by the fact that before the new trade rules came into effect, there were a number of indications which should have warned the traders concerned to be particularly careful.

As the Commission stated in the 15th General Report on the Activities of the European Communities, total production of cereals in the Community was characterized up until 1981 by a slight increase whereas consumption was stable or declining slightly. At the same time, imports of substitutes for fodder grain had increased significantly. In the same general report, published in February 1982, the Commission also stated that negotiations with the Community's main manioc suppliers were sufficiently advanced for agreements limiting imports to be concluded. Draft agreements had been initialled with Thailand and Indonesia. Negotiations were in progress with Brazil. [20]

Regulation No 1147/82 of 13 May 1982 was then adopted suspending the advance fixing of the import levy for manioc roots and tubers. That regulation, published on 14 May 1982, contained no reference to the imminent conclusion of voluntary restraint agreements. However, it did refer to difficulties in the market and pointed out that if existing arrangements were adhered to, levies could be fixed in advance for quantities considerably in excess of the quantities which might be expected under more normal conditions. [21]

The Commission's purpose in adopting that measure was to withdraw the possibility for the traders concerned of obtaining import licences providing them with a secure legal position, that is to say, licences in which the levy had been fixed in advance.

In the preamble to Regulation No 1230/82 of 19 May 1982, published on 20 May 1982, the Commission referred to the imminent conclusion of the voluntary restraint agreements. In reply to a question from the Court, the plaintiff stated that it applied for and obtained the import licences at issue one day after the publication of that regulation.

Taking together all those circumstances, namely production and consumption on the Community cereals market, the development of imports of cereal substitutes and the openly expressed intention of the Commission to negotiate voluntary restraint agreements and to bring into force the rules necessary to give effect to them, it can be seen that an amendment of the trading rules was clearly foreseeable. Even though the actual content and form of the voluntary restraint agreements could not be known in

20 — Pages 164-165.

21 — OJ 1982, L 132, p. 52.

detail to the traders concerned, rules to limit imports were to be expected. It must also be noted that the quantities which could still be imported at the former rate of levy of 6% generally corresponded to the quantities which had previously been imported. It was only in respect of additional quantities that the rules concerning levies were introduced, that is to say, the rules applied were those which had already applied for the autonomous rates of duty.

All of the foregoing confirms me in my view that the amendment to the trading rules for the import of manioc does not constitute *force majeure* within the meaning of Article 36 of Regulation No 3183/80.

2. Let me now turn my attention to the question of whether the legal principle of equal treatment or the prohibition of arbitrary acts requires that the transitional rules concerning import licences for manioc from countries other than Thailand contained in Article 3 (6) of Regulation No 2655/82 be applied by analogy to import licences for manioc from Thailand.

Let me first refer to two decisions in which the Court filled gaps in Community regulations by applying by analogy legal provisions contained in other regulations. In its judgment of 22 February 1975 [22] it applied by analogy a provision [23] which afforded relief from the consequences of failure to observe a time-limit provided for in a licence for the importation of goods from non-member countries by reason of *force majeure*. Those provisions were applied by analogy to importations from other Member States in regard to which the applicable regulation [24] did not contain any special provisions for cases of *force majeure*.

The Court's decision in its judgment of 11 July 1978 [25] is similar. In that decision, the Court decided that where goods exported from one of the original Member States to a new Member State perished in transit as a result of *force majeure*, payment of accession compensatory amounts was justified even though such payment was not provided for in the applicable regulation. [26] To that end, it applied by analogy the rules dealing with export refunds. [27]

In both decisions, the Court found that gaps existed in the applicable legal provisions and then decided that application by analogy of legal provisions which were not in fact applicable was unobjectionable because of the parallels it discerned both in the situations of fact and in the legal provisions.

In my opinion, it cannot really be disputed that the situation of a person holding a previously issued licence for the import of manioc from Thailand is comparable to that of a person holding a previously issued licence for the importation from other non-member countries when their licences cover

22 — Case 64/74 *Firma Adolf Reich* v *Hauptzollamt Landau* [1975] ECR 261.

23 — Article 8 of Regulation No 87 of the Commission laying down implementing measures in regard to import and export licences for cereals and cereal products (OJ 1962, p. 1894).

24 — Regulation No 31/63 of the Council 1963 of 2 April laying down rules derogating from Article 17 of Regulation No 19 of the Council in regard to the advance fixing of the levy in respect of certain products (OJ 1963, p. 1225).

25 — Case 6/78 *Union Française des Céréales* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 1675.

26 — Regulation No 269/73 of the Commission of 31 January 1973 laying down detailed rules for the application of the system of "accesion" compensatory amounts, OJ 1973, L 30, p. 73.

27 — Article 6 (1) of Regulation No 192/75 of the Commission of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products, OJ 1975, L 25, p. 1.

goods not forming part of the quota in respect of which the tariff concession has been granted. Both groups of traders obtained their licences at a time when it was possible to import an unlimited quantity of the goods in question at the 6% rate of duty consolidated in GATT. Although they did not have as secure a legal position as the holders of import licences in respect of which the levy had been fixed in advance, if the rate of duty consolidated in GATT was in fact maintained in existence, they had an almost identical expectation.

The original 'expectation' was destroyed by the Community when it concluded the agreements restricting imports and adopted the measures implementing those agreements. Even after the adoption of import restrictions, both groups of traders were still in comparable situations: they held import licences which *required* them to import under penalty of forfeiting the security they had put up when applying for the licences. However, it was no longer possible for them to carry out the importations under economically rational conditions.

It is only at that point that the treatment of the two groups of traders by the Commission begins to differ.

In Regulation No 2092/82, the Commission laid down transitional provisions for the importation of manioc from Thailand only in respect of goods which had been exported from Thailand before 28 July 1982. It was only in that case, and even then only if further conditions were satisfied, that the importer qualified for the lower rate of levy, 6% *ad valorem* (Article 11 of the regulation). In all other cases, holders of previously issued licences for importation from Thailand had only two options, either to import at a rate of levy of 50 to 60% *ad valorem*, which did not make economic sense, and encumber the Community feedingstuffs market with undesirable imports, or not to use the licence and accept the forfeiture of the security lodged.

On the other hand, the Commission adopted different transitional provisions for holders of previously issued licences for imports from non-member countries other than Thailand in Regulation No 2655/82 of 1 October 1982. The first subparagraph of Article 3 (6) of that regulation provides as follows:

'Licences issued prior to the date of application of this Regulation shall be cancelled and the security released, provided that the interested parties submit a request to that effect within 30 days following the date of application of this Regulation.'

Those rules were adopted one day after the adoption of Council Regulation No 2646/82 of 30 September 1982 on the import system applicable in 1982 to products falling within subheading 07.06 A of the Common Customs Tariff, which limited the application of the import levy at a maximum of 6% *ad valorem* to a certain quantity of goods. In the preamble to Regulation No 2655/82, the Commission expressly refers to the aforementioned Council regulation and to the situation of holders of previously issued import licences, stating *inter alia*:

'in the light of the special situation of holders of import licences issued prior to the entry into force of Regulation (EEC) No 2646/82, such holders should be entitled to request the cancellation of the licences in question and the return of the security; whereas the status of goods afloat should be defined'.

The difference between the rules governing the fate of previously issued licences is so striking, in my opinion, that it should once again be set out clearly.

Three days after the Council decided on 19 July 1982 to conclude the agreement with Thailand, that is to say, on 22 July 1982, the Commission adopted Regulation No 2029/82 laying down detailed rules for implementing the import arrangements. That implementing regulation does not deal with the fate of previously issued licences in general but merely regulates the case of certain licences pursuant to which goods were exported from Thailand before 28 July 1982.

The rules dealing with previously issued licences for imports from countries other than Thailand are completely different. Although the Council also decided on 19 July 1982 to conclude agreements with Indonesia and Brazil and also published on 28 July 1982 the quantities which could still be imported at a favourable rate of levy, it was not until 30 September and 1 October that the internal Community implementing measures were adopted and the conventional rates of duty in the Common Customs Tariff amended. In contrast to the rules applicable to Thailand, Article 3 (6) of Regulation No 2655/82 made it possible for licences that had been issued earlier but had not been used to be surrendered.

I consider that difference of treatment all the more striking because the new rules for imports from *Thailand* came into force more or less *immediately* (agreement published in the Official Journal of 28 July 1982, special rules for exports applied only in respect of products exported from countries other than Thailand before 28 July 1982), whereas importers *from countries other than Thailand* had *more than two months*, that is to say until 30 September 1982, to adjust to the new rules and, notwithstanding that period, also had an opportunity under the rules laid down in Article 3 (6) of Regulation No 2655/82, to have their previously issued licences cancelled and the security returned.

The contrary solution would have seemed to me to be more logical, that is to say, transitional measures for imports from Thailand in respect of which the new trading rules entered into effect immediately, rather than for imports from other non-member countries in respect of which importers were allowed a longer period to adjust to the new rules.

The Commission justifies these different sets of rules by reference to differences in the dates on which the respective rules came into force, in the way in which they are administered and in regard to the previously issued licences.

I have already pointed out that the differences in regard to the entry into force of the different sets of rules suggest precisely the opposite solution to the one adopted. As regards the difference in the rules governing previously issued licences, I am obliged to agree with the plaintiff's statement that that argument is a classic case of circular reasoning. The Commission cannot justify differences in the treatment of various categories of previously issued licences on the basis of the different treatments themselves.

It thus remains to be considered whether the reference to differences in the way in which the quota is administered is valid.

In fact, the administration of the quota, that is to say, both the issuing of 'export certificates' giving a right to import into the Community at a favourable rate of duty and checking that the agreed quantities have not been exceeded, is, according to the agreement read in conjunction with the implementing regulation, in the hands of the Thai authorities. It may also be true that the Thai authorities issued such export certificates from the beginning of 1982 in anticipation of the conclusion of the agreement — as the Court is aware, that is disputed by the plaintiff. However, whether the plaintiff could, as the Commission claims, have obtained such a certificate is in

my view irrelevant in the present case. The decisive factor for the plaintiff in relation to importation into the Community was the Community's import rules and they were amended only with effect from 28 July 1982. Moreover, the fact that Article 10 of Regulation No 2029/82 expressly provides that Article 1 of the same regulation (the rules concerning the Thai export certificate) applies only to export certificates issued by the Thai authorities from 28 July until 31 December 1982 clearly runs counter to the Commission's argument. Thus, what the Thai authorities did before 28 July is not decisive in this case, nor is the question whether or not an importer complied with the Thai export rules, if they existed.

All that thus remains of the Commission's argument is the following two points: First, the question of who checks that the quotas are not exceeded and, secondly, the Commission's supposition as to how many licences were still in existence when Regulation No 2655/82 came into effect.

The question of who checks that the quota is not exceeded, or in simple terms, who counts the goods, can in my opinion provide no grounds for different treatment of previously issued licences. That is merely a technical process which is certainly important but not decisive in the legal evaluation of transitional measures, or the absence of such measures.

The Commission has also argued that different treatment of previously issued licences for imports from non-member countries other than Thailand was justified by the fact that on 1 October 1982, the day on which Regulation No 2655/82 came into effect, many ordinary licences, which had been applied for by importers in the expectation of carrying out imports at the 6% rate of levy consolidated in GATT, were still in existence. Although by virtue of those licences, according to Article 15 (1) of the basic regulation on cereals, importers only had a right to be charged the levy applicable on the day of importation, security had to be lodged, as for all licences, and was in danger of being forfeited if the licence was not used up. In view of the uncertainty as to the number of such licences, which were no longer economically attractive, the Commission considered it appropriate to provide in the first subparagraph of Article 3 (6) of Regulation No 2655/82 for the possibility of cancelling such licences and releasing the security.

But in my opinion, exactly the same process of reasoning applies to imports from Thailand. The Commission has told the Court that when it adopted the new import rules for manioc from Thailand, it had no information as to how many previously issued licences were still in existence and had not been used. The possibility could thus not be ruled out that many ordinary licences were still in existence. If the Commission wanted to honour the expectation that the rate of duty consolidated in GATT would be maintained in existence, it had to do so for all holders of previously issued licences. It cannot make a distinction on the basis of whether the consolidated rate of levy was based directly on the arrangements made in the context of GATT or on a bilateral agreement to apply most favoured nation treatment as was agreed in Article 1 of the Cooperation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand — member countries of the Association of South-East Asian Nations. [28]

28 — Annex to Council Regulation No 1440/80 of 30 May 1980, Official Journal 1980, L 144, p. 1.

I therefore come to the conclusion that holders of previously issued licences for the importation of manioc from Thailand are in a comparable situation to holders of previously issued licences for imports from other non-member countries. Different treatment of the two groups of importers does not appear to me to be justified. Consequently, the general principle of equality requires that both groups of importers be treated in the same way and that therefore the transitional rules contained in Article 3 (6) of Regulation No 2655/82 be applied by analogy to importers still in possession of previously issued licences for imports from Thailand.

I do not need to demonstrate further that the principle of equality is one of the general principles of Community law. In that connection, it is sufficient to refer to the fundamental judgments of 21 June 1958 [29] and 19 October 1977. [30]

Finally, I would like to point out that I expressly leave open the question of whether the Community was obliged to adopt any transitional provisions at all in favour of holders of previously issued licences. The licences entitled and required holders to import goods at the rate of levy applying at the date of importation and, legally speaking, that was still possible. None the less, the Community would be acting somewhat inconsistently if, on the one hand, it limited imports of manioc and, on the other, it required such imports by threatening forfeiture of the security. None the less, I do not believe that this problem needs to be gone into in more detail here since in any event, when transitional provisions are adopted for a particular group of traders, they must apply to all traders who are in a comparable situation.

3. I can deal fairly briefly with the question concerning the procedural rules and time-limits. The plaintiff has put forward convincing arguments on that point and the Commission, during the oral procedure, has stated that if an application by analogy of Article 3 (6) of Regulation No 2655/82 is held to be appropriate, it agrees with that submission.

Since the possibility of surrendering import licences and of the security being released was first provided for in Regulation No 2655/82 of 1 October 1982, I consider it appropriate to permit applications for that purpose to be submitted within the 30-day time-limit laid down in Article 3 (6) of that regulation. Thus, the consequence of the application by analogy of Commission Regulation No 2655/82 of 1 October 1982 is that the 30-day time-limit therein provided for commenced at the time of the entry into force of that regulation.

C. In the light of the foregoing I propose that the Court reply to the questions referred to it by the Verwaltungsgericht Frankfurt as follows:

(1) Article 3 (6) of Commission Regulation (EEC) No 2655/82 of 1 October 1982 laying down rules for implementing the import arrangements for 1982 for

29 — Judgment of 21 June 1958 in Case 8/57 *Groupement des Hauts Fourneaux et Aciéries Belges* v *High Authority of the ECSC* [1958] ECR 245, at p. 256.

30 — Judgment of 19 October 1977 in Joined Cases 117/76 and 16/77 *A. Ruckdeschel & Co. and Another* v *Hauptzollamt Hamburg-St. Annen; Diamalt AG* v *Hauptzollamt Itzehoe* [1977] ECR 1753, at p. 1769 *et seq.*

products falling within subheading 07.06 A of the Common Customs Tariff originating in third countries other than Thailand and amending Regulation (EEC) No 950/68 on the Common Customs Tariff is to be applied by analogy to licences for the importation of products falling within that subheading originating in Thailand if those licences had been issued before the entry into force of Commission Regulation (EEC) No 2029/82 of 22 July 1982 laying down detailed rules for implementing the import arrangements applicable to the products falling within subheading 07.06 A of the Common Customs Tariff, originating in Thailand and exported from that country in 1982.

(2) The 30-day time-limit for submitting requests for the cancellation of licences and the release of the security provided for in Article 3 (6) of Regulation (EEC) No 2655/82 commences from the date of entry into force of the said regulation.