OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 21 JUNE 1978 [1]

Mr President,
Members of the Court,

1. In 1975 the Union Française de Céréales dispatched a consignment of common wheat from Germany to Great Britain after obtaining the advance fixing of the "accession" compensatory amount, that is the special compensatory amount provided for in Article 55 (1) of the Act concerning the conditions of accession and the adjustments to the Treaties, and subsequently governed by Regulation No 229/73 of the Council of 31 January 1973 and by Regulation No 269/73 of the Commission of the same date. However, the ship which was transporting the goods sank and thus the exporting undertaking was unable to furnish the proof required in Article 5 (2) of the said Regulation No 269/73 that the import formalities had been completed in the country of destination and that the duties and taxes had been paid. In the absence of such proof the German customs authorities refused to pay the "accession" compensatory amount.

The foregoing situation gave rise to a dispute which proceeded in two phases: the first before the Hauptzollamt (principal customs office) Hamburg-Jonas, which refused the claim submitted by the exporting undertaking, and the second in the form of proceedings currently pending before the Finanzgericht (Finance Court) Hamburg. That court has requested the Court of Justice by an order of 14 December 1977 under Article 177 of the EEC Treaty to reply to two preliminary questions, the first of which asks essentially whether the provisions in Article 6 (1) of Regulation No 192/75 of the Commission of 17 January 1975, which lays down detailed rules concerning export refunds on agricultural products, can be applied by analogy to "accession" compensatory amounts. Article 6 (1) provides *inter alia:* "In the following circumstances payment of the refund shall be conditional not only on the product having left the geographical territory of the Community but also — *save where it has perished in transit as a result of force majeure* — on its having been imported into a third country and where appropriate into a specific third country ...". The important factor here is clearly the exception provided for cases of *force majeure* in so far as it renders in- applicable the condition of arrival of the goods in the country of destination.

The court making the reference maintains that there is a lacuna in the law which justifies applying that provision by analogy; in this connexion it refers to the chronological sequence of the relevant Community provisions. It states that the right to receive the export refund in cases of destruction of the goods was for the first time expressly recognized in Regulation No 2110/74/EEC, that is, after the adoption of the said Regulation No 269/73 on the application of the system of "accession" compensatory amounts. Previously the procedures relating to *force majeure* were applied only where proof could not be furnished or could not be furnished within the time-limits prescribed (Regulation No 1041/67, Articles 4 (3) and 9 (2)). According to the German court it might thus be considered that the Community legislature had omitted to extend to

1 — Translated from the Italian.

"accession" compensatory amounts the derogative provision introduced with regard to refunds.

Naturally, the Finanzgericht Hamburg reached its conclusions on the assumption that the arrangements for and objectives of the grant of refunds on exports to third countries are similar to those in respect of the payment of "accession" compensatory amounts for exports to the new Member States. At the same time, the German court emphasizes that the derogation on grounds of *force majeure* is required in the interests of natural justice: it corresponds to a requirement of a general nature.

The Finanzgericht Hamburg submitted the second question only in case there should be an affirmative reply to the first question. In that case the Court of Justice is asked what compensatory amount is to be paid, and three possibilities are advanced: that the compensatory amount to be paid should be that laid down for the country of destination of the goods, or the lowest compensatory amount or the lowest refund. In this matter the court making the reference proceeds on the basis of the argument, which furthermore is not beyond dispute, that, pursuant to Article 11 of the said Regulation No 192/75, where the rate of refund varies according to destination and if the goods perish in circumstances of *force majeure* the lowest refund must be paid. Accordingly, taking account of the fact that the lowest rate of refund is less than the lowest rate of the compensatory amount, the German court considers that in the present case the exporting undertaking should in no circumstances obtain more than would be due to a person entitled to the refund; the undertaking is accordingly said to be entitled to obtain only the lowest rate of the refund granted at the time in question.

2. In order to verify the presence of the conditions necessary for the application by analogy suggested by the court making the reference an outline must be given of the provisions on which the two systems of aid in question are based.

Reference should be made first of all to Regulation No 139/67/EEC of the Council of 21 June 1967 laying down general rules for granting export refunds on cereals. In the preamble it is stated that such refunds are intended to "cover the difference between quotations and prices for those products within the Community and on the world market" (first recital).

It is also considered that "provision must be made for varying the amount of the refund according to the destination of the products, since markets in the countries of destination are at varying distances from Community markets and special conditions apply to imports in certain countries of destination"(fifth recital).

Regulation (EEC) No 87/75 of the Council of 13 January 1975 amending the said Regulation No 139/67, states in its recitals that "the refund constitutes an instrument for permitting the continuation of exports of cereal products towards third countries".

With regard to the "accession" compensatory amounts, I have already stated that they were established by the Act concerning the conditions of accession and the adjustments to the Treaties. Pursuant to Articles 51 and 52 of the Act the new Member States are permitted to maintain a level of prices differing from the common prices during the transitional period. Pursuant to Article 55 of the Act such differences shall be compensated by a system of compensatory amounts applicable in trade between the new Member States themselves and with the Community as originally constituted, levied by the importing State or granted by the exporting State.

In the recitals of the preamble to the said Regulation No 229/73, which lays down general rules for that system for cereals, the Council explains that the purpose of compensatory amounts in intra-Community trade is to promote the satisfactory circulation of products between Member States at different price levels. For that purpose the regulation creates the right in favour of persons exporting cereals from a Member State which maintains higher prices to receive a compensatory amount and inversely the duty on persons importing from a Member State which has a lower level of prices to pay a compensatory amount. The total of such amounts must correspond to the difference in prices existing between the Member States in question.

It is clear that those measures were intended to permit agricultural products from all Member States, original and new, to move freely throughout the entire area of the enlarged Community without encountering obstacles in the form of different price levels.

It is clear from Article 55 (6) that products imported from a State which has a policy of lower prices — as is the case with the new Member States and in particular the United Kingdom — must not be burdened with compensatory amounts in excess of the total amount levied by that State on imports from third countries. That provision is the embodiment of the general principle of Community preference which must naturally apply also in determining the arrangements applicable to products exported from the territory of the original Community to a new Member State.

3. In my view the basic function of the system of "accession" compensatory amounts, with regard to exports from the original Member State to the new Member States, is in substance identical to that of refunds on exports to third countries; in both cases it was intended to overcome, through the grant of aids to exporters, the obstacle to exports constituted by the higher level of prices in the Community area (in the original Community area, in the first case) compared with prices in the country of destination. On the other hand, with regard to imports into the original Member States of agricultural products coming from the new Member States, the "accession" compensatory amount performs a function reminiscent of that of the levy or customs duty in respect of products imported from third countries. This is the reason for the reference made by Article 4 (2) of the said Regulation No 269/73 to the system of customs duties and levies as far as it concerns the relevant day for the purpose of fixing the rate of the "accession" compensatory amount where such amount is to be levied on imported goods. However, this aspect of the system of compensatory amounts in question falls outside the scope of my examination, not only because it is irrelevant to the matter in hand but above all because the problem of the relevance of the circumstance of *force majeure* can arise only in connexion with compensatory amounts paid on exports from an original Member State to a new Member State. Indeed, that problem cannot in any event concern the compensatory amounts applied to products from new Member States imported into one of the original Member States of the Community, for the simple reason that such amounts are levied when customs clearance is completed in the importing State and accordingly could not be levied if the goods perished or disappeared before being imported.

The analogy between the two systems in question applies not only to their respective functions but also to the detailed rules for their application. The said Regulation No 269/73 of the Commission on the application of "accession" compensatory amounts in

fact adopts a whole series of provisions which are characteristic of the system of export refunds. In particular:

(a) Under Article 4 of Regulation No 269/73, for the purpose of fixing the compensatory amount to be granted, the day on which the customs service accepts the document by which the declarant states his intention to export a Community product to another Member State and qualify for a compensatory amount is treated as the day of exportation. Acceptance of the document referred to above is considered as constituting completion of the customs export formalities. The date of the day in question is the operative date for determining the quantity, nature and characteristics of the product exported.

That provision corresponds almost word for word to the provision in Article 2 of the said Regulation No 192/75 of the Commission, which re-affirmed and reorganized the previously-existing detailed rules for the application of export refunds for agricultural products.

(b) Article 5 (1) of Regulation No 269/73 reflects in substance the content of Article 3 of Regulation No 1041/67 of the Commission, which in its turn was adopted in Article 4 (1) of Regulation No 192/75 of the Commission. Article 5 (1) provides that the compensatory amount is to be paid only upon proof that the product in respect of which customs export formalities have been completed has left the territory of the Member State in which the formalities were completed.

It is important to emphasize that it thus appears that the two systems in question were guided by the criterion that the exportation of the product constitutes the essential condition for granting the refund or compensatory amount.

(c) Article 5 (2) of Regulation No 269/73 further provides that, where the compensatory amount is adjusted for the amount of customs duties, or where it is higher than the lowest export refund applicable to the product in question on the day of exportation, or where the compensatory amount is applicable for a product for which no refund is fixed, payment is subject to a second condition, namely proof that import formalities have been completed and duties and charges having equivalent effect payable in the Member State of destination have been collected.

That provision is reflected to some degree, with regard to export refunds, in the above-mentioned Article 6 of Regulation No 192/75 of the Commission, which also renders payment of the refund subject to the further condition of importation into a third country and, where appropriate, into a specific third country, whilst restricting that additional condition to two cases: where there is serious doubt as to the true destination of the product or where, by reason of the difference between the rate of the refund on the exported product and the import charge applicable to the like product on the day when customs export formalities are completed, it is possible that the product may be reintroduced into the Community.

The above-mentioned provisions are both clearly intended to avoid abuses, such as giving as the country of destination that with the highest rate of subsidy (in the form of refunds or "accession" compensatory amounts) and subsequently importing the goods into another country applying a lower rate of subsidy (and even, in certain cases, reintroducing the goods at a profit into the exporting country).

Accordingly we must not forget that the most significant difference between the two provisions which we have compared is that, as I have already emphasized, only Article 6 of Regulation No 192/75 contains the exception in respect of goods perishing in transit in circumstances of *force majeure*.

(d) Both the compensatory amount and the refund are to apply only to products of fair and sound merchantable quality which are in free circulation within the Community. Furthermore, in the case of products intended for human consumption, it is a condition that their use for that purpose is not precluded or substantially diminished because of their characteristics or condition (Article 7 of Regulation No 269/73; Article 6 of Regulation No 1041/67).

(e) Under Article 9 of Regulation No 269/73 and Article 12 of Regulation No 192/75 Member States may pay the exporter in advance all or part of the compensatory amount as soon as the customs export formalities are completed, on condition that security in the form of a guarantee is provided.

4. It thus seems to me beyond dispute that in matters of substance as well as of procedure the two systems under consideration display noteworthy similarities. Nevertheless the Commission has advanced certain objections to the argument based on those similarities; such objections must be considered.

First, the Commission maintains that the system of refunds on exports to third countries performs a function differing from that of the system of "accession" compensatory amounts; the former is based on the interest of the Community in ridding itself of surpluses by exporting them on the world market, so that the objectives of that system are attained merely by the departure of goods from the Community, whilst the other system is intended to facilitate the movement of products between two Member States with different levels of prices so that the moment of exportation is inseparably bound up with that of importation. This is said to explain why refunds are paid even in the case of accidental loss of the goods in transit, since they have at all events left the Community; on the other hand, in the same circumstances payment of "accession" compensatory amounts is unjustified since there has been no trade in the goods between the two Member States.

I should like to observe that, whilst the interest of the Community in ridding itself of surplus products may indeed constitute one of the reasons of policy which prompted the creation of the system of refunds on exports to third countries, such interest cannot take precedence as a factor distinguishing and characterizing that system for legal purposes. It does not appear to me that those objectives are discernible in the preambles to the regulations governing refunds. In any case, the Commission continues, that objective must be considered peculiar to the basic rate of refund alone. In fact the existence of different amounts of refund is to be explained not only by the different levels of prices prevailing in the various third countries but also in terms of choices of commercial policy and of the need to maintain traditional patterns of trade or to promote new outlets.

The Commission next maintains that another objection to the application by analogy of the said provision in Article 6 of Regulation No 192/75 consists in the fact that the provision for circumstances of *force majeure* therein contained permits the grant of the minimum rate of the refund alone, whilst the system of "accession" compensatory amounts, which is based on the determination of amounts which differ for each of the three new Member States, entirely disregards the criterion of a basic general rate.

It appears to me that this difference might perhaps be taken into account for the purposes of determining the quantitative effects of admitting cases of *force majeure* (and therefore in the context of the second preliminary question) but it cannot affect the answer

to the first question submitted by the court making the reference.

Finally, the Commission denies that the possibility of *force majeure* was taken into consideration for the first time in the context of Regulation No 192/75, that is after the entry into force of the system of "accession" compensatory amounts. The Commission recalls that Article 4 of Regulation No 1041/67 of the Commission gave due weight to *force majeure* without, however, mentioning the specific case of goods perishing in transit.

I must point out, however, that Article 4 (3) merely released the exporter from the obligation to furnish proof that the customs formalities in relation to the goods had been completed in the importing State where such proof could not be given owing to *force majeure*. A provision of that nature could also be interpreted to mean that the derogation which it permits refers to the means of proving that the importation has been effected and that it does not, on the other hand, concern the case of an importation which has not taken place at all.

The Commission itself has recognized that the application of the said Article 4 (3) has given rise to considerable uncertainty and differences between various Member States and for that very reason it provided, by means of Regulation No 2110/74 of 26 July 1974, for the case where goods perish in transit as a result of *force majeure* and laid down clearly that in such a case the further condition of actual importation is not required for payment of the refund. It accordingly maintains that the abovementioned fortuitous event may be said with certainly to have such an effect only as from the adoption of Regulation No 2110/74.

5. Nevertheless, I consider that it is sufficient to find that on a comparison of the two Community systems of subsidies for exports in question the similarities exceed the differences. If this is the case the frequently-mentioned provision contained in Article 6 of Regulation No 192/75 of the Commission can and should be applied by analogy in the context of the arrangements governing "accession" compensatory amounts in order to fill the lacuna constituted by the omission of provision for cases of the fortuitious destruction of goods.

At this point it is appropriate to take account also of certain general considerations which together show that the above-mentioned application by analogy is appropriate.

I have already had occasion to note that Article 55 (6) of the Act of Accession reinforces by implication the principle of Community preference which certainly constitutes an important element in the rules governing trade between Member States. If it were to be held that the system of "accession" compensatory amounts is not covered by the provision concerning the fortuitous destruction of goods in transit persons engaged in intra-Community trade would obtain less protection than exporters to third countries who benefit from refunds. This would be contrary to the rule (which follows logically from the principle of Community preference) that intra-Community trade must develop in more favourable conditions than trade with third countries. To put this in concrete terms: it would not have been profitable for a Community undertaking to export the goods in question to Great Britain, there to sell them at a price below the Community price (and probably, indeed, lower than the minimum price guaranteed by the Community intervention arrangements) unless it had been able to count on the "accession" compensatory amount; the undertaking would have been prompted to export instead to a third country if it could have foreseen that the conditions

for payment of the refunds were more favourable.

Another problem of a difference in treatment would arise, if the provision concerning the fortuitous destruction of the goods in transit were considered inapplicable, because of the arrangements for paying the "accession" compensatory amounts, which are governed by Article 5 of the said Regulation No 269/73.

In fact where the "accession" compensatory amount is lower than the lowest export refund applicable to the product in question on the day of exportation proof is not required that the import formalities in the Member State of destination have been completed. Accordingly, in a situation of this nature the exporter is entitled to collect the compensatory amount to which he is entitled even if, owing to the destruction of the goods in transit, he is not in a position to establish that they have arrived in the country of destination. Let us take as an example an undertaking in one of the original Member States which, at the time when the events in question occurred, exported a consignment of the same product to Denmark or Ireland; even if the goods had perished in transit, the undertaking would have been able to obtain the compensatory amounts laid down for exports to the countries in question (6 units of account per tonne for Denmark and 4.5 units of account for Ireland) since those amounts were lower than the minimum rate of refund then provided in respect of exports of the same goods to third countries (8 units of account per tonne). In this way export undertakings operating in the same field within the common market would be treated differently, depending on the country of destination of the goods within the Community.

If we now turn to consider the rationale of the provision, which requires proof that the goods have in fact been imported in order to establish the right to collect the "accession" compensatory amounts, we find that it provides yet another argument in favour of taking account of circumstances of *force majeure*, as I have frequently explained. I have already pointed out that in the two systems of export subsidies in question, that provision is intended to avoid abuses in that, where a refund or "accession" compensatory amount has been fixed in advance which does not correspond to the lowest rate of Community aid to exports, proof of completion of customs formalities in the country of destination serves to counter the danger that the goods will be redirected to countries where the rate of the refund or compensatory amount is lower (and thus the further danger of reimportation into the territory where the goods originated). If, however, the goods have perished in transit there is no risk of such abuse. Accordingly if, in exceptional circumstances such as the sinking of the vessel transporting the goods, the exporter is able to prove that he sold the goods to a purchaser in the country given as the country of destination and that the goods were duly dispatched, it does not appear to me reasonable to apply at the expense of the exporter a rule having a preventive purpose, pursuit of which is rendered pointless by the circumstances of the specific case. Indeed it is clear that exceptional circumstances are not amenable to regulation on the basis of criteria established for normal situations and conversely that the application of derogative provisions, such as those governing cases of *force majeure*, to exceptional situations does not hamper or disturb the normal operation of the system.

Finally, I should like to note that the recourse to application by analogy which is here in point by no means constitutes an innovation in the case-law of the Court of Justice. I would recall in particular that in its judgment of 20

February 1975 in Case 64/74 *Reich* v *Hauptzollamt Landau* ([1975] ECR 261) the Court recognized that it was possible to apply by analogy a provision which provided that delay caused by circumstances of *force majeure* should constitute an extenuating factor in cases of failure to observe the time-limit provided for in a licence in respect of imports from third countries with advance fixing of the levy. That provision was extended by analogy to cover cases of importations from other Member States provided that (as was the case in the transitional period governed by the EEC Treaty) a levy had been fixed in advance. As I have already had occasion to observe in my Opinion in Case 68/77 *IFG*, the Court proceeded on the basis that the case before it contained all the essential elements of the situation which the previous Community rules in that field recognized as constituting extenuating circumstances on grounds of *force majeure*, that is to say, the existence of an import licence with advance fixing of the levy and the obligation to comply with a predetermined time-limit.

6. I think, then, that the first question submitted by the German court should receive an affirmative reply. It remains to consider, in order to reply to the second preliminary question, what criterion is applicable in determining the rate of the compensatory amount to be paid to the exporter whose goods have perished in transit in circumstances of *force majeure*.

As I have already stated, the Commission maintains that the case of *force majeure* for which provision is made in Article 6 of Regulation No 192/75 permits only the basic rate of the refund to be paid and not any further amount fixed in connexion with the specific destination of the goods.

It does not seem to me that this interpretation is borne out by the wording of the provision. Where the said Article 6 (1) renders payment of the refund conditional on the furnishing of proof that the goods have been imported into a third country, express reference is also made to the requirement, where appropriate, that the goods were to have been imported "into a specific third country". I consider that it was thereby intended to include all amounts of refund, whether at the basic rate or at other higher rates, laid down for specific destinations. As we are indeed well aware, when provision is made for the importation of the product into a specific third country, the exporting undertaking is entitled to a refund in excess of that at the basic rate. In that case, then, the grant of payment pursuant to Article 6, even if the product has perished in transit in circumstances of *force majeure*, must amount to permitting payment of the entire amount of the refund due in respect of that specific destination.

The Commission has endeavoured to derive support for its argument from the provisions of the third subparagraph of Article 11 (1) of Regulation No 192/75 governing rates of refund which vary according to the destination of the goods. Those provisions permit reliance upon circumstances of *force majeure* (or, more properly, "circumstances beyond the control of the importer") where it is impossible to furnish the proof of completion of customs formalities which is, in principle, required in order to obtain payment of the amount of the refund in excess of the basic rate. Nevertheless, I consider that the existence of such provisions does not preclude reliance for the purposes of the said payment on the different and wider case of *force majeure* for which provision is made in Article 6. The very fact that Article 11 is concerned solely with circumstances of *force majeure* which have prevented the furnishing of proof of completion of the customs formalities, whilst Article 6 concerns the conditions of payment and the effect on

such conditions of *force majeure*, indicates that that provision cannot extend to circumstances where the goods have perished. Such circumstances, then, remain covered by the arrangements laid down in Article 6; and I must stress that that provision refers expressly to the general case of importation into a third country, or "into a specific third country". In view of those provisions it seems to me that Article 6 permits payment both of the basic amount of the refund and of the additional amount in respect of the specific destination of the goods exported.

This interpretation of Article 6 accordingly confirms the weakness of one of the arguments upon which the Commission endeavoured to rely in order to maintain that the said article cannot be applied by analogy in the field of "accession" compensatory amounts. On this interpretation, furthermore, it must be held that, on the basis of that analogy, only the first of the three hypotheses outlined by the national court in its second question is well-founded: namely that proposing payment of the entire compensatory amount laid down for the country of destination. It appears to me that only one reservation should be made: in appropriate cases it would be necessary to deduct from that amount any sum which was intended to cover the customs duties and other charges which would have been payable on importation of the product into the State of destination. That deduction would be justified since such sum would no longer be payable.

7. On the basis of the considerations which I have set out above I conclude by suggesting that the Court of Justice should give the following reply to the preliminary questions submitted by the Finanzgericht Hamburg by its order of 14 December 1977:

1. Article 6 (1) of Regulation No 192/75 of the Commission of 17 January 1975, which provides that an exported product which has perished in transit as a result of *force majeure* shall qualify for payment of the export refund, by way of derogation from the normal condition that the product should have been imported into a third country, shall apply by analogy to the "accession" compensatory amounts for which provision is made by Article 55 of the Act concerning the conditions of accession and the adjustments to the Treaties and which are governed by Regulation No 229/73 of the Council of 31 January 1973 and by Regulation No 269/73 of the Commission of the same date.

2. Where importation into a new Member State of goods for which an advance fixing of the "accession" compensatory amount was obtained has been rendered impossible as a result of the above-mentioned circumstances of *force majeure*, the person entitled must receive the compensatory amount fixed for the country for which the goods were in fact destined, subject to the deduction in advance of any amount which may have been intended to cover charges relating to custom clearance in the country of importation.