OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 24 March 1994 *

Mr President,
Members of the Court,

1. The questions referred to you for a preliminary ruling both relate to the concept of *force majeure* in connection with agriculture. May a Council regulation adopting measures to implement an agreement between the EEC and the United States of America and amending the market conditions for an agricultural product (first question) or the conclusion of the agreement itself, in so far as it may entail a subsequent change in the market conditions (second question), be regarded as a case of *force majeure* which releases a trader from the obligations he entered into on the basis of an earlier regulation with a view to obtaining subsidies at the time when the product in question was placed in free circulation?

The relevant legislation

2. The background to the proceedings is Spain's accession to the Community on 1 January 1986. [1] In the relevant sector, namely the maize sector, accession led to the traditional trade between Spain and the United States ceasing, to the detriment of both former trading partners. The United States lost a market and Spain lost a source of cheap supply.

In order to avoid serious disruption to the markets of the two countries, the Community took special measures in relation to each of them: it negotiated with the United States within the framework of GATT and adopted specific regulations for the benefit of Spanish traders.

3. The negotiations between the Community and the United States under GATT Article XXIV.6 took place principally during 1986 and culminated in the signing of an agreement on 30 January 1987, [2] by which the Community undertook, *inter alia*, for the years 1987 to 1990, to ensure an annual

* Original language: French.

1 — Treaty (signed on 12 June 1985) between the Member States of the European Community and the Kingdom of Spain and the Portuguese Republic concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, OJ 1985 L 302, p. 9.

2 — Council Decision 87/224/EEC of 30 January 1987 concerning the Agreement between the European Economic Community and the United States of America for the conclusion of negotiations under GATT Article XXIV.6, OJ 1987 L 98, p. 1.

level of imports of 2 million metric tonnes of maize into Spain. The Agreement was announced in the press shortly after it was concluded but was not published in the *Official Journal of the European Communities* until April 1987.

4. In 1986, in the course of the negotiations, the Community authorities had to take a number of provisional measures. In particular, after an interim solution was found on 1 July 1986 between the Community and the United States, the Council adopted, on 16 September 1986, Council Regulation (EEC) No 2913/86 [3] introducing a derogation to Regulation (EEC) No 2727/75 [4] and providing that if American exports of maize into Spain fell significantly, a reduced levy could be fixed for imports of maize from third countries. Those measures were of limited duration (until 28 February 1987) and subject to specific monitoring of imports into Spain of products from the United States. Pursuant to that regulation, the Commission adopted, on 15 October 1986, Regulation (EEC) No 3140/86 [5] organizing an invitation to tender for quantities of maize originating in third countries which could be subject to a reduced import levy. Those measures also ended on 28 February 1987.

5. Following the conclusion of the final Agreement under the GATT, the Council adopted Regulation (EEC) No 1799/87 on 25 June 1987 [6] which is referred to in the national court's first question, and which provides for a reduction in the levy on imports into Spain of maize originating in third countries for the period 1987 to 1990. Implementing Regulation (EEC) No 2059/87 [7] was adopted by the Commission on 13 July 1987. Those measures took effect on the day the regulations were published in the *Official Journal of the European Communities*.

6. While the negotiations with the United States were going on, market conditions for maize in Spain were characterized by very high prices owing largely to a poor harvest. The Commission considered the difficulties to be sufficiently serious to justify the introduction of transitional measures aimed at lowering the price of maize, and on 26 November 1986 it adopted, pursuant to Article 90 of the Accession Treaty, Regulation (EEC) No 3593/86 [8] which forms the background to the main proceedings before the national court. Under that regulation a subsidy is granted for the import of maize into Spain. Half of the quantities imported originated in third countries and half originated in Member States with the exception

3 — Council Regulation (EEC) No 2913/86 of 16 September 1986 introducing a derogation to Regulation (EEC) No 2727/75 as regards the import levy applicable to certain quantities of maize and grain sorghum, OJ 1986 L 272, p. 1.

4 — Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals, OJ 1975 L 281, p. 1.

5 — Commission Regulation (EEC) No 3140/86 of 15 October 1986 on the issuing of an invitation to tender for the levy on imports of maize and sorghum from third countries, OJ 1986 L 292, p. 27.

6 — Council Regulation (EEC) No 1799/87 of 25 June 1987 on special arrangements for imports of maize and sorghum into Spain from 1987 to 1990, OJ 1987 L 170, p. 1.

7 — Commission Regulation (EEC) No 2059/87 of 13 July 1987 setting implementing rules for the special arrangements for maize and sorghum imports into Spain during the period 1987 to 1990, OJ 1987 L 193, p. 6.

8 — Commission Regulation (EEC) No 3593/86 of 26 November 1986 on the granting of a subsidy for the import of maize into Spain, OJ 1986 L 334, p. 21.

of Portugal. The subsidy for imports from third countries was to be a fixed amount to be deducted from the levy to be paid (second subparagraph of Article 1(1)). The measures which were described as 'transitional' were expressly justified by the high prices due in particular to a poor harvest (first recital in the preamble) and were of limited duration: only quantities of maize released for free circulation in Spain until 31 May 1987 qualified for the subsidy (Article 1(3)). Furthermore, the regulation laid down the maximum quantities that could qualify for the subsidy: 600 000 tonnes from third countries and 600 000 tonnes from the Member States with the exception of Portugal (Article 1(2)).

The proceedings before the national court

7. Like most schemes in the agricultural sector, Commission Regulation No 3593/86 provided for the lodging of a security (Article 2(3)). The Transáfrica company wished to import subsidized maize and, on 1 and 2 December 1986, it applied to the Servicio Nacional de Productos Agrarios ('SENPA'), the competent Spanish authority, for the release into free circulation of 125 000 tonnes of maize and lodged the required bank security. On 10 December 1986, SENPA issued import papers made out to Transáfrica, by virtue of which the company was bound to import the quantities applied for before 28 February 1987. On the basis of those papers, Transáfrica only put into free circulation part (31 587 tonnes) of the maize for which it had requested subsidies.

8. Transáfrica considered that the conclusion of the Agreement of 30 January 1987 between the Community and the United States had brought about a fundamental and unforeseeable change in the situation by causing a sudden drop in prices and, on 16 February 1987, it informed SENPA, that there was no point in importing subsidized maize and requested the release of the security which had been given. Having consulted the Commission, SENPA, by a decision of 14 September 1987, refused to release the security. An initial request made by Transáfrica was refused by the Minister for Agriculture on 6 September 1988, and Transáfrica then brought court proceedings on 11 November 1988 before the Audiencia Nacional (National High Court). By order of 23 March 1993, the Chamber for Contentious Administrative Proceedings of that court referred the following questions to the Court of Justice for a preliminary ruling:

(1) Can the measures adopted in Council Regulation (EEC) No 1799/87 of 25 June 1987 concerning arrangements for imports of maize into Spain from 1987 to 1990, by reason of the fact that they may lead to a reduction in the price of maize, adversely affect and hinder fulfilment of obligations entered into in return for subsidies granted for the import of maize into Spain under Commission Regulation (EEC) No 3593/86 of 26 November 1986 and thus constitute a case of *force majeure* making it impossible to comply with the obligations to release maize into free circulation and resulting in entitlement to the release of the security provided?

(2) Can the official announcements of the Agreements between the EEC and the

United States of America and the outcome of the GATT negotiations in the early months of 1987 on the undertaking concerning annual imports of maize and sorghum during the period 1987 to 1990, even before they were enshrined in written provisions, result in unavoidable and unforeseeable consequences to the extent of making compliance with a primary requirement impossible or difficult, constituting a case of *force majeure* which can be relied on for the purposes of Article 22 of Commission Regulation (EEC) No 2220/85 of 22 July 1985?

Submissions based on the protection of legitimate expectations

9. Although the national court's questions both relate to the concept of *force majeure*, the applicant has also put forward a submission based on the protection of legitimate expectations, claiming that the mention of *force majeure* by the Audiencia Nacional in its questions is to be understood as merely illustrative and asking the Court to take a broad approach to the questions, having regard to other provisions or principles of Community law.

The common factor in the submissions based on *force majeure* and those on the protection of legitimate expectations is that they both refer to the expectations of an individual. In the one case, however, the concept serves to free the individual of an obligation incumbent upon him whereas in the other, the concept serves to impose an obligation on a third party for the benefit of an individual. In the case of *force majeure*, account is taken of an unforeseeable change in the initial circumstances (an event was not or could not reasonably have been foreseen), whereas in the case of the protection of legitimate expectations, reliance is placed on an expectation derived from the conduct of a third party in circumstances such as to create a right for the benefit of an individual (the conduct of a third party was such that the individual was entitled to expect a relatively precise outcome).

10. I consider that the national court was correct in referring to the Court questions concerning the concept of *force majeure*. In the present case, the dispute between the parties relates to compliance, on the applicant's part, with obligations entered into when it requested subsidies for the import of maize. A finding of *force majeure* would enable the applicant to free itself of its obligations and to recover the security it has lodged. However, as the applicant has made submissions relating to the principle of the protection of legitimate expectations, I shall also assess the matter in the light of that principle.

11. The Court has only rarely accepted submissions based on the protection of legitimate expectations in the context of economic

intervention measures in markets. It allows Community authorities a wide discretion in that respect and interprets very strictly the conduct of the prudent and informed trader, that *bonus pater familias* of Community law. It has consistently been held that, whilst the principle of the protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained. [9] The Court has held that this is particularly true in an area such as the common organization of the markets whose purpose involves constant adjustments to meet changes in the economic situation, and applies all the more forcefully where the benefit in question is the result of special arrangements which depart from the normal rules of the market and were adopted in order to deal with exceptional circumstances. [10]

12. The present action is just such a case. The exceptional circumstance was the accession of Spain. All Spanish traders knew or ought to have known that negotiations were underway [11] between the Community and the United States with a view to attenuating the consequences of accession in the maize sector by introducing a transitional period: Council Regulation (EEC) No 2913/86 [12] referred to an interim solution found on 1 July 1986, and, moreover, probably anticipated the fairly imminent conclusion of a final agreement by providing that the measures were to expire on 28 February 1987. Furthermore, Commission Regulation (EEC) No 3593/86 [13] was expressly justified on the ground of the high price of maize due in particular to a poor harvest. The measures adopted by that regulation were described as 'transitional'; they were of strictly limited duration and related only to specific quantities of maize. Any trader would realize that conditions were changing on simply reading the regulations.

13. Even if Regulation No 3593/86 had created legitimate expectations for traders, *quod non*, I cannot see in any event how the Agreement concluded on 30 January 1987 between the EEC and the United States of America could have infringed those expectations. The Agreement did not have direct effect and was only transposed into the Community legal order by Regulation No 1799/87. [14] Contrary to the applicant's contention, the announcement of that Agreement did not have a clearly identifiable effect on the price of maize. Even the graph produced by the applicant in the Audiencia

9 — See the judgments in Case 245/81 *Edeka* v *Germany* [1982] ECR 2745, paragraph 27, Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27, Joined Cases 424/85 and 425/85 *Frico* v *Voedselvoorzienings In-en Verkoopbureau* [1987] ECR 2755, paragraph 33, Case 350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33, and Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraphs 34, 35 and 36.

10 — Judgment in Case C-350/88, *Delacre*, cited above, paragraph 36.

11 — See the judgment in Case 281/92 *Unifrex* v *Commission and Council* [1984] ECR 1969, paragraphs 26 and 27, on the effect of traders' presumed knowledge of Council negotiations on the existence of legitimate expectations.

12 — See above, paragraph 4.

13 — See above, paragraph 6.

14 — See above, paragraph 5.

Nacional, which comes from the same source (SENPA) as the one produced by the Commission in this Court [15] but covers a shorter period, shows that the price of maize was continually falling during December 1986 and January, February and March 1987. It is particularly clear from the graph produced by the Commission, which covers the period from July 1986 to June 1988, that it was from October 1986 that the price of maize started to fall, that is precisely from the adoption of Regulation No 3593/86, which was designed to bring about a fall in prices. The fall in prices in February 1987 was therefore not sudden. It was merely the foreseeable and desired logical result of the measures adopted in October 1986 and not a sudden market reaction to the Agreement concluded between the EEC and the United States.

14. It is even less clear how Regulation No 1799/87 of 25 June 1987 could have infringed traders' legitimate expectations with regard to market conditions in February 1987. The regulation did not have retroactive effect. It did not even apply during a period when subsidized maize was entering Spain pursuant to Regulation No 3593/86. It did not come into force until the end of June 1987, whereas only quantities of maize released into free circulation in Spain until 31 May 1987 qualified for the subsidy laid down in Regulation No 3593/86.

15 — The defendant took it from page 5 of SENPA's weekly publication for the last week of March 1987, 'Mercados Nacionales', as specified on page 15 of its application to the national court.

15. In conclusion, there is nothing to suggest that traders' expectations, had they existed and were they legitimate, could have been infringed either by the Agreement concluded between the EEC and the United States on 30 January 1987, by the announcement of that Agreement made at the beginning of February or by Regulation No 1799/87 of 25 June 1987 laying down measures for the implementation of that Agreement.

The submissions based on force majeure

16. The relevant provision is Article 22(1) of Commission Regulation (EEC) No 2220/85 laying down common detailed rules for the application of the system of securities for agricultural products, [16] as amended by Regulation (EEC) No 1181/87 of 29 April 1987, [17] under which:

'1. A security shall be forfeit in full for the quantity for which a primary requirement is not fulfilled, unless *force majeure* prevented fulfilment.'

16 — OJ 1985 L 205, p. 5.

17 — OJ 1987 L 113, p. 31. This amending regulation which dates from after the time when the security at issue in the present case was lodged, merely makes express provision for the possibility of relying on *force majeure*.

In respect of the concept of primary requirement, reference should be made to Article 5 of Regulation No 3593/86 which provides:

'The security referred to in Article 2(3) shall be released in respect of quantities:

— for which the application was not accepted or where the primary requirement has been fulfilled,

— released for free circulation in Spain during the period of validity of the document referred to in Article 3 and on submission of this document to the authority which issued it within two months of the date on which it expires.

This requirement is a primary requirement within the meaning of Article 20 of Commission Regulation (EEC) No 2220/85.'

The question here is whether either the Agreement of 30 January 1987 or Regulation No 1799/87 constitutes a case of *force majeure* which frees Transáfrica from its primary obligation to release the subsidized maize into free circulation before 28 February 1987.

17. The question referring to the June 1987 regulation as a circumstance rendering compliance impossible can be eliminated straightaway. Like the Commission, I find it difficult to see how a regulation adopted in June 1987 could have had the slightest effect on compliance with an obligation which should have been carried out in February 1987.

18. On several occasions, the Court has held that in the sphere of agricultural regulations, the concept of *force majeure* is not limited to the absolute impossibility of carrying out the obligation entered into. It has however consistently held that the concept must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the trader concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice. [18] In the present case, those conditions were not satisfied.

19. Quite apart from the question of principle whether a change in the law is capable of constituting *force majeure*, the first point to be noted here is that the conclusion of the Agreement of 30 January was not at all unforeseeable for traders. As has been explained, negotiations had been underway for many months and Regulation No 2913/86 referred moreover to an interim solution found on 1 July 1986. The press

18 — See most recently the judgment in Case C-124/92 *An Bord Bainne and Inter-Agra* v *Intervention Board for Agricultural Produce* [1993] ECR I-5061, paragraph 11.

articles submitted by the applicant to the national court make it clear that any reasonably well-informed trader could have realized that the question of imports of maize into Spain was one of the major issues in the negotiations between the EEC and the United States. The applicant knew, or ought to have known, that an agreement was necessary in order to avoid a trade war between the Community and the United States of America.

20. The applicant claims that the fall in prices, *caused by the announcement of the Agreement*, made it impossible or extremely difficult for it to fulfil its obligation to release the subsidized maize into free circulation. Whilst I agree that the price of maize did fall at that time, I am satisfied from the evidence presented in the context of the submissions regarding legitimate expectations that that fall in prices was not a sudden and unforeseeable reaction to the announcement of the Agreement of 30 January 1987 between the Community and the United States, but rather the foreseeable and desired logical result of the measures adopted in October 1986.

21. Was it absolutely impossible for Transáfrica to release the subsidized maize into free circulation? I think not. The goods were available. Clearly the operation had become less rewarding, economically speaking. However, that is a commercial risk and not a case of *force majeure*. Traders have to make certain choices and bear the consequences, namely the profits or the losses which flow from those choices. Transáfrica chose to buy a large quantity of subsidized maize under the conditions set out in Regulation No 3593/86 and it should have known, since it was written in the regulation itself, that that was a transitional measure, applying for a limited time and to limited quantities which met a specific need and was designed to bring about a fall in prices. Although Transáfrica received its import papers for 125 000 tonnes on 10 December 1986, it also chose to import only 31 587 tonnes and to wait before importing the rest. Although the price was particularly low in February and the announcement of the Agreement between the Community and the United States gave rise to the likelihood of a subsequent, even greater fall, that was only the materialization of an ordinary commercial risk and not an event constituting *force majeure*.

Conclusion

22. I cannot accept either the applicant's submissions relating to the protection of legitimate expectations or those relating to *force majeure*. I therefore propose that the Court should give the following reply to the national court's questions:

Neither the measures adopted by Council Regulation (EEC) No 1799/87 of 25 June 1987 on special arrangements for imports of maize into Spain from 1987 to 1990,

nor the official announcements in the early months of 1987 of the Agreement between the EEC and the United States of America and of the result of the GATT negotiations on the import arrangements may be relied upon by a trader as *force majeure* releasing him from the primary obligation to put subsidized maize into free circulation, which was entered into under Commission Regulation (EEC) No 3593/86 of 26 November 1986.