On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Kutscher Sørensen Bosco

Donner Pescatore O'Keeffe Touffait

Delivered in open court in Luxembourg on 14 February 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 18 JANUARY 1978 [1]

Mr President,
Members of the Court,

1. This case raises the issue of the possible liability of the Commission in respect of measures adopted by it in regulations and of its treatment of a particular undertaking in connexion with the management of the common organization of the market in beef and veal.

Before summarizing the facts I think it would be useful to recall the more important features of the legislation which is relevant to a consideration of the case.

The common organization of the market in beef and veal is based on Regulation (EEC) No 805/68 of the Council of 27 June 1968. Article 21 of the regulation contained a provision enabling the Commission to apply appropriate measures in trade with third countries if, by reason of imports or exports, the Community market in one or more of the products listed in Article 1 of the regulation (live animals of the domestic bovine species, meat of that species, edible offals of bovine animals, prepared or preserved meat or meat offals of bovine animals, etc.)

1 — Translated from the Italian.

experienced or was threatened with serious disturbances which might endanger the objectives set out in Article 39 of the Treaty. It was on the basis of Article 21 that, in 1974 and 1975, the Commission adopted four successive regulations introducing and then gradually amending the protective measures which it considered to be required by the situation on the particular market in question. Specifically:

(a) In Regulation No 2668/74 of 21 October 1974 the Commission provided for the temporary suspension of the issue of import licences and advance fixing certificates in respect of the levy for the products listed in Artile 1 (a) of Regulation No 805/68 of the Council (live animals and meat of the domestic bovine species), referred to above.

Those protective measures were adopted in consideration of the fact that the prices of beef and veal on representative Community markets were markedly lower than the intervention price.

(b) Regulation No 610/75 of 7 March 1975 suspended the free circulation within the Community of third-country products consisting of 'prepared or preserved meat or meat offal ... Containing bovine meat or offal' coming under subheading 16.02 B III (b) 1 of the Common Customs Tariff, with the exception of prepared or preserved bovine meat or bovine meat offal put up in sealed containers weighing not more than 3 kg net.

The threat of disturbances, which was the stated ground for that regulation, arose from the fact (noted in the third recital of the preamble thereto) that products falling within the aforesaid customs subheading were tending to replace products for which import licences and advance fixing certificates could no longer be issued under the previous regulation, No 2668/74. In essence, therefore, Regulation No 610/75 did no more than extend the protective measures to products which had not originally been covered by them.

(c) On the other hand, Regulation No 1090/75 of 23 April 1975 was one of a series of measures introduced for the restructuring of the protective arrangements to allow a certain amount of trade to redevelop while maintaining the equilibrium of the Community market. It made it once more possible, subject to certain conditions, to import some of the products previously excluded. It provided that import licences should be issued for quantities equal to those already exported from the Community (the so-called 'EXIM' import system). Subparagraph (a) of the second paragraph of Article 1 of the regulation provided that no import licence was required for prepared or preserved beef and veal or beef and veal offal provided that they were in hermetically sealed containers weighing not more than 5 kg net.

(d) Finally, in Regulation No 2033/75 of 5 August 1975, the Commission, recognizing that the imports of seasoned beef and veal meats under subheading 16.02 B III (b) 1 of the Common Customs Tariff, which until then had been exempted from the protective measures, had reached a level incompatible with sound management of the market, provided that the EXIM import system introduced by Regulation No 1090/75 should also apply to those products.

2. Before that last regulation entered into force, that is to say, before 14 May 1975, the German undertaking IFG-Intercontinentale Fleischhandelsgesellschaft entered into a contract with a Romanian State undertaking for the purchase of 6 000 tonnes of prepared beef and veal. The place to which the product was to be delivered was not

stated in the contract. There does not, however, appear to be any doubt that IFG completed the purchase with a view to importing the meat into Germany, where it would have been used in the preparation of sausages. This is borne out, in particular, by the fact that, after supplying the vendor with machinery to be installed in Romania for preparing the meat, the purchaser requested and obtained the consent of the Federal Minister of Health in relation to that installation subject to prior health inspection by a veterinary officer authorized by the German authorities.

Half of the total consignments provided for under the contract was to have been delivered during June, July and August 1975 and the other half during the following six months. Accordingly, since the entry into force of Regulation No 2033/75 was fixed for 1 September of that year, IFG should, at that date, have received 3 000 tonnes of meat. In fact, however, it was possible for it to receive only 1 100 tonnes because the heavy floods which occurred in Romania in early summer caused damage to the machinery used for the preparation of the meat, resulted in the suspension of electricity supplies and the blocking of communications and, finally, made it necessary to obtain a fresh consent from the Federal Minister of Health subject to inspection by the veterinary officer authorized for the purpose. It was, accordingly, necessary for the processing of the meat in question to be suspended for a number of weeks and this delayed the consignments.

By a Telex message of 11 September 1975, IFG referred to these circumstances as a case of *force majeure* and asked the Commission for authorization, exceptionally and by way of derogation from the conditions laid down in Regulation No 2033/75, to import the remaining 1 900 tonnes of meat, which represented the quantity which under normal conditions ought to have been dispatched in time to be imported into the Federal Republic before 1 September. But by letter of 15 October, the Directorate-General for Agriculture of the Commission replied in the negative to this request, arguing that in a case of legislative amendments, especially those published well in advance of their entry into force, the risks connected with the observance of the terms for delivery of the goods were generally borne by the parties to whom the legislation applied; otherwise the Commission, which had frequently to introduce amendments to legislation on agricultural matters, would on each and every occasion have to take account of innumerable individual circumstances, to accommodate which would compromise the effectiveness of the measures adopted. IFG was accordingly invited to find a suitable means of solving its problem under the existing legislation applicable to importation.

Subsequent appeals by the party concerned on the above lines, made both to the national authorities and, once more, to the Commission, produced the same result.

On 2 June 1977, in view of these repeated refusals, IFG brought proceedings against the Commission under the second paragraph of Article 215 of the EEC Treaty. In the application initiating the proceedings, the applicant stated that the purpose of its action was to request the Court to:

1. Declare that the defendant is under a duty to guarantee performance of the contract entered into by the applicant on 14 May 1975 and that it should make good any damage which it has caused;

2. In the alternative, order the defendant to pay the applicant by way of damages the profit which it failed to make as a result of the non-performance of the contract of 14 May 1975.

In support of these claims, the applicant adduces various grounds to prove, on the one hand, that Regulation No 2033/75 is invalid and, on the other, that there has been an act or omission by the Commission for which it is liable.

In respect of the regulation it especially criticizes the defendant for not having adopted appropriate transitional measures to satisfy both the requirement of respect for legitimate expectations and the principle of equality of treatment.

With regard to the defendant's refusal to accede to the request for derogation respecting the importation of the quantity of meat which the applicant had contracted to import prior to 1 September 1975, the latter criticizes the Commission in particular for not having paid regard to the considerations of *force majeure* which prevented compliance with the time-limits for delivery; this constituted a breach of the general principle of law recognizing the legal effect of *force majeure,* especially in respect of failure to comply with a legal time-limit.

3. The defendant first raised an objection of inadmissibility against the first head of claim on the ground that its effect is to request it to exempt the applicant from the application of general rules, that is to say, to adopt a provision which the Commission has no power to adopt. Furthermore, again according to the defendant, the applicant is, by means of an action submitted in the form of an application for damages, attempting to obtain what it could and ought to have sought by means of an action for failure to act.

In my opinion, the contention that the Commission has no power to exempt an individual from compliance with general rules goes beyond the subject of admissibility and is of relevance rather to the substance of the action. However, careful consideration must be given to the objection which the Commission raises under Article 175 of the EEC Treaty relating to actions for failure to act and which in its rejoinder it relates also, and in my opinion more correctly, to Article 173, which governs actions for annulment.

It should be noted that, under the main head of its application, IFG is seeking a declaration that the rules introduced by Regulation No 2033/75 should apply to it. This is what the applicant calls 'reparation in kind'. The desired result is therefore the same as that sought in the Telex message to the Commission, referred to above, of 11 September 1975. As I stated earlier, the Commission replied in the negative to the application submitted on that occasion, in a clear, reasoned and definitive statement of its view. The letter of 15 October 1975, in which this view was communicated to IFG, constituted an individual decision of refusal which the applicant would have been legally entitled to contest, relying on all the grounds of illegality which it is invoking in these proceedings.

If, therefore, the subject-matter of the application now advanced pursuant to Article 215 of the EEC Treaty is the same as that which was answered by an express decision of the Commission refusing it, the present application is inadmissible since it is in effect seeking to call in question an act of an institution which has not been contested by means of proceedings for annulment, despite the fact that the person concerned had the right to bring such proceedings. This Court has often had occasion to declare that a party cannot be allowed by way of an application for damages to provide itself with a new means of redress for the purpose of calling in question the validity of acts which it failed to contest when it could have done so; reference should be made on this point to the judgments of 15 December 1966 in Case 59/65, *Schreckenberg* v *Commission* [1966] ECR

543; of 12 December 1967 in Case 4/67, *Muller* v *Commission* [1967] ECR 365; of 7 June 1972 in Case 20/71, *Sabbatini* v *European Parliament* [1972] ECR 345 and in Case 32/71, *Chollet* v *Commission [1972] ECR 363; and of 21 February 1974 in Case 15/73, Schots* v *Council and Commission of European Communities and the European Parliament* [1974] ECR 177. While it is true that these precedents were established in connexion with proceedings brought by officials of the Community, they hold good equally in the case of preceedings brought under Articles 173, 175 and 215 of the EEC Treaty in that the basic requirement on which those precedents are based also applies to those proceedings. The underlying consideration is to prevent individuals from being able to evade the rules laying down time-limits for certain types of action by bringing an action for damages in respect of an administrative measure which they would have been legally entitled to seek to have annulled but which they did not contest in time, in circumstances where the action seeks to achieve the same result as would have been produced by annulment of the measure. I should, moreover, point out that the Court has also expressly upheld this principle in the case of an application based on Article 215 of the EEC Treaty and therefore not subject to the procedural rules contained in Articles 90 and 91 of the Staff Regulations of Officials (see the judgment of 22 October 1975 in Case 9/75, *Meyer-Burckhardt* v *Commission* [1975] ECR 1172, and especially paragraph 13 of the decision at p. 1183).

In this case, the Commission has rightly pointed out that, if an application for a declaration that a regulation is not applicable and for the subjection of the person concerned to legislation previously in force can be described, as the applicant describes it, as an action for damages in the form of 'restitution', that would be the end of the distinction which should exist between an action for annulment and an action for failure to act, on the one hand, and an action for damages, on the other. An action for damages has a form of its own and a function which is different from and independent of the other two in that it is used to obtain financial compensation for damage inflicted by the Community institutions, that is to say, a result which is certainly not covered by Articles 173 and 175; it would no longer be an independent type of action if it were possible to employ the civil law concept of reparation in kind in order to bring within its ambit the adoption of an administrative or legislative measure by a Community institution.

In view, therefore, of the fact that the applicant's principal claim seeks to attain the very objective which it could have pursued at the appropriate time by contesting the decision of rejection of the Commission of 15 October 1975, such an application, which is designed to evade the time-limits laid down in Articles 173 and 175 of the Treaty is, in my view, rightly to be considered inadmissible.

4. Consideration must now be given to the other claim advanced in the application, which is that the defendant be ordered to compensate for the loss of profit arising from the fact that it was virtually impossible, as a consequence of Regulation No 2033/75 of the Commission, for the applicant to perform the contract of 14 May 1975. It must, therefore, be ascertained whether the Commission adopted a provision or behaved in a way which might involve the Community in liability for the damage which the applicant claims to have sustained. In this connexion the legal issues to be considered are naturally the same as those which would have called for consideration in connexion with the principal claim, had that claim been held to be admissible.

It will be recalled that, so far as the substance of the case is concerned, the oral procedure was confined to the preliminary question as to whether the Commission had acted in a way which might render the Community liable for the damage claimed by the applicant. Because of this, certain arguments which were adduced by the parties, especially in the course of the written procedure, remain outside the ambit of this opinion; in particular, I shall not examine whether it would in any case have been possible and convenient for the applicant to effect the importation under the terms of Regulation No 2033/75, or, possibly, to market the product in non-Member countries and I shall not endeavour to establish whether the Romanian corporation was or was not in a position to effect the deliveries provided for under the contract, bearing in mind the change which also occurred in the situation on the market in meat in Romania. In short, I shall make no reference to the question whether there is a causal link between the conduct of the Commission and any damage which may have occurred, or to the question whether there is any damage at all.

I have already referred to the applicant's claim that Regulation No 2033/75 is invalid for breach of the principles of legitimate expectation and of equality of treatment, in that it did not ensure that contracts entered into before 1 June 1975 could be performed. In this context the applicant contends that the modification provided for by Regulation No 1090/75 of the protective arrangements introduced by Regulation No 2668/74 did not make it possible for those concerned to foresee the new restriction which the Commission introduced in Regulation No 2033/75 in respect of a specific type of prepared beef and veal that is to say, prepared or preserved meat coming under the customs subheading to which I have referred. According to the applicant this constitutes a disregard of the legitimate expectations of those concerned; when legislation is being amended, the Commission is said to be under a duty to adopt appropriate transitional measures to protect legitimate expectations and may derogate from that principle only if an overriding matter of public interest so requires. In this case there was no overriding interest which compelled the Commission to interfere with contracts previously concluded in their final form, thus rendering their fulfilment impossible, at least in part. On this point the applicant cites Article 2 of the German Law on foreign trade under which it is provided that restrictions on trade shall not affect contracts already concluded except in so far as this is necessary to prevent attainment of the objective from being seriously jeopardized. In conjunction with this requirement, respect for the principle of proportionality is also said to be involved.

However, there can in my opinion be no question, even allowing for the case-law established by this Court, of the mere existence of a contract conferring on the parties the right to a guarantee on the part of the Community institutions that, until the contract is executed, the legal conditions applicable at the time of its conclusion shall remain unchanged and that, accordingly, in the case of legislative amendments which make the conditions for importing or exporting particular products more difficult, the new arrangements should not apply to operations relating to the performance of previously concluded contracts. Only if the transaction in question had been the subject of a specific authorization by the Community authorities or by the national authorities delegated by them would it be possible to recognize the applicant's claim to some form of guarantee. This applies with particular force to the case of a person who has paid a deposit as a guarantee of a

specific transaction in consideration of the advance fixing of the amount to be paid in respect of that transaction provided that it is effected under the preordained conditions and terms.

When, however, the anticipated import or export transaction has been the subject of no Community or national administrative measure before fresh legislation comes into force, the mere fact of the pre-existence of a private contractual relationship cannot restrict the freedom of the Community authority to introduce new rules which apply equally to a legal relationship contracted for but not yet executed. Obviously, it would cause enormous complication for the Community authorities and would open the door to the possibility of abuse on the part of individuals if the fact that a contractual relationship formed under the previous system was outstanding were to attract guarantees such as those which can be recognized as the consideration for obligations imposed on undertakings. If the continuance of legislation which is advantageous for certain categories of contract actually creates expectations these cannot in any event be comparable in importance with those individually protected rights which, as I have stated, may attach to Community measures authorizing transactions guaranteed by the lodging of security. In the present case, Regulation No 2033/75 did in fact provide for its entry into force after a period of time sufficiently long, in normal circumstances, to enable contracts previously concluded to be performed. There is more than one reason, therefore, why I do not think it can be said that the general requirement regarding the protection of the legitimate expectations of persons concerned has been infringed.

Invoking once more the principle that legitimate expectations must be safeguarded, the applicant contends that the period allowed between the publication and the entry into force of Regulation No 2033/75 was too short, especially in relation to cases like that under consideration, where importation was delayed by reasons of *force majeure*.

It is at this juncture important to avoid the mistake of confusing any requirements arising from a general principle relating to *force majeure* (which I will deal with in a moment) with the question of the protection of the expectations of those concerned in the event of legislative amendments which adversely affect the execution of existing contracts. This last question has a bearing on the effect of all outstanding contracts and must therefore be answered in the light of normal circumstances, whereas *force majeure* comes into play only in cases which are affected by it and this occurs in one or two exceptional situations. Accordingly, the assessment of the adequacy of the time-limit fixed by Regulation No 2033/75 for its entry into force, as a provision capable of protecting the expectations of the parties to outstanding contracts, must not be complicated by factors connected with the different question of the effect of exceptional situations described as cases of *force majeure*.

In the present case the applicant has not denied that, had it not been for the exceptional events which delayed the delivery of the goods by his supplier, he would, before the entry into force of Regulation No 2033/75, have been able to import into Germany the entire consignment of goods in respect of which he is now seeking compensation for damage.

The real cause of the damage complained of is therefore not the inadequacy of the period of time which, under Regulation No 2033/75, was to run between publication of the latter and its entry into force. The real cause can consist solely of the fact that the Commission did not take account of the circumstances of *force majeure* relied upon by the applicant.

This also disposes of the other ground of illegality invoked by IFG relating to the alleged breach of the principle of equality of treatment. It is claimed that this breach arose from the fact that the period of time which elapsed between the publication and the entry into force of Regulation No 2033/75 enabled traders to enter into fresh contracts for the importation of prepared beef and veal by providing for delivery between 5 August and 1 September 1975, and thus to import the goods in total freedom, whereas the applicant, which had concluded its contract before 5 August, was unable to import all the goods covered by the contract before 1 September owing to the unusual situation with which its supplier was faced. In fact this argument merely demonstrates that, given normal circumstances, the period in question enabled contracts already concluded or indeed yet to be concluded to be performed. The difference in the circumstances encountered by the existing contract between IFG and the Romanian corporation was not the result of any inequality of treatment but of the difference, indeed the absolute uniqueness, of the factual situation, which is typical of the exceptional occurrences known as cases of *force majeure*.

5. In the reply the applicant for the first time contended for the illegality of Article 1 (4) of Regulation No 2033/75, that is to say, the provision which made importation of the product in question subject to the EXIM system defined in Regulation No 1090/75. The applicant claims that there was no authority for this measure in Article 21 (2) of Regulation No 805/68 on which, as we have seen, the Commission's power to adopt protective measures is founded.

Since this is a fresh issue, for the belated introduction of which there is no excuse, it must be treated as inadmissible by virtue of Article 42 of the Rules of Procedure.

In any event, the criticism is also without foundation. The applicant raises the issue to condemn highly discretionary assessments by the Commission concerning the gravity of the situation in respect of which it adopted the contested measure without, moreover, succeeding in demonstrating either the non-existence of the danger claimed by the Commission in its statement of reasons for Regulation No 2033/75 or the existence of a manifest disproportion between the restrictive measures adopted and the gravity of the situation.

The applicant relies in particular on an alleged infringement of Article 110 of the Treaty (referred to in Article 31 of Regulation No 805/68) under which 'Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers'. In support of its argument, IFG submits critical comments on the Community intervention system which it regards as a total failure in so far as market policy is concerned.

Criticism of this kind may be of interest in terms of political and economic argument but it does not appear to constitute proof of the intrinsic illegality of a specific measure implementing Community agricultural policy.

6. At this juncture the issue becomes one of determining whether the Commission acted illegally or at least was responsible for an act or omission capable of making the Community liable for the alleged damage when it refused to exempt the applicant from the application of Regulation No 2033/75 in respect of the imports which the undertaking had contracted to carry out before 1 September 1975 but did not succeed in carrying out owing to the exceptional events which took place in Romania in the summer of 1975.

According to the applicant, the Commission ought in the first place to have applied by analogy the provisions of Article 20 of Regulation (EEC) No 193/75 of the Commission of 17 January 1975 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products. That article lays down that where as a result of *force majeure* importation or exportation cannot be effected during the period of validity of the licence or certificate, the competent agency of the issuing Member State shall decide, at the request of the titular holder, that the obligation to import or export be cancelled, the security being released, or that the period of validity of the licence or certificate be extended for such period as may be considered necessary in view of the circumstances invoked.

However, in contrast with the situation to which that provision refers, in the present case the applicant was under no obligation to import, nor had any security been paid to guarantee the execution of a transaction provided for and authorized within a specified period. The basic situations are very different and this prevents the application by analogy of the said provision.

Support for this conclusion is forthcoming from the preliminary ruling given by this Court on 24 June 1970 in Case 73/69, *Oehlmann* v *Hauptzollamt Münster* [1970] ECR 467, especially at pages 475 to 476. The national court had asked whether certain provisions of Community agricultural law which, in connexion with the collection of the levy fixed in advance, recognize cases of *force majeure* as excusing delay in importation, were applicable by analogy even in cases where no provision was made for the possibility of fixing the levy in advance. The Court replied in the negative on the ground that the provisions allowing for exceptional treatment in cases of delay in importation presuppose the existence of a certificate fixing the levy in advance, including a counter-obligation to carry out the importation on a given date and the deposit of security as a guarantee of prompt performance. The said provisions could not therefore be applied by analogy to a completely different situation merely because in that situation importation took place at a date other than that originally intended (paragraph 15 of the decision). However, the application by analogy of a provision recognizing *force majeure* as excusing delay in the case of failure to observe a time-limit provided for in a licence for importation, subject to advance fixing of the levy, from third countries was held to be possible in cases of importation from other Member States when, as happened during the transitional period, the levy had been fixed in advance. Cases of this kind contain all the essential conditions by which the Community rules recognize 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 within a predetermined time-limit (see the judgment of 20 February 1975 in Case 64/74, *Reich* v *Hauptzollamt Landau* [1975] ECR 261).

In the circumstances which gave rise to the present proceedings those essential conditions do not, as I have stated, obtain. This means that Article 20 of Regulation No 193/75 cannot be applied by analogy.

7. The applicant further claims that the Commission ought to have extended the application of Article 2 of Regulation No 2033/75 so as to allow for cases of *force majeure*. It is not clear whether this criticism refers to the wording of the article or merely to its application. If the applicant intended to attack the wording of the provision

(because the Commission did not draft it so as to enable the application of the regulation to be deferred in the event of *force majeure* preventing the execution, by 1 September, of contracts previously entered into) this would invite the comment that the Commission is not bound to include a clause relating to *force majeure* in each and every one of its regulations. If there were a general principle recognizing that *force majeure* had legal effect, there would be no need to confirm it in every regulation. On the other hand, in the absence of a general principle to that effect, the Community authority would, in the exercise of its legislative functions, be free to attach or not to attach importance to *force majeure.*

However, it seems to me to be more likely that the applicant's contention is to be interpreted literally and that its criticism of the Commission is that, in actually applying Article 2, it failed to make allowance for *force majeure.* If this is correct, the argument is tenable only on proof that there exists a general principle of law recognizing the effect of *force majeure* and obliging the Community institutions to take account of it.

The first comment I have to make on this is that no evidence has been supplied to this effect and it is difficult to believe that it could be. Reference to the national legal systems reveals that *force majeure* has certain effects in criminal law, others in public law and others again in private law; they are for the most part governed by specific rules. The fact that there is no uniform view regarding *force majeure* has also been recognized by this Court in terms of Community law. In its judgment of 1 July 1968 in Case 4/68, *Schwarzwaldmilch* v *Einfuhr- und Vorratsstelle Fette* [1968] ECR 377, especially at p. 385, the Court held that the concept of *force majeure* is not identical in the different branches of law and the various fields of application and that its significance must be determined on the basis of the legal framework within which it is intended to take effect. According to the judgment in that case, 'the interpretation of the concept of *force majeure* used in the regulation in question must take into account the particular nature of the relationships in public law between the importers and the national administration, as well as the objectives of that regulation'. (For a judgment to the same effect see that of 30 January 1974 in Case 158/73, *Kampffmeyer* v *Einfuhr- und Vorratsstelle Getreide* [1974] ECR 101 especially at p. 110.)

It must be emphasized that those judgments related to cases in which *force majeure* was expressly referred to in a provision of a Community regulation. I referred earlier to a case of this kind when I cited Article 20 of Regulation No 193/75 of the Commission of 17 January 1975 and stated that its application by analogy was out of the question. I think I must make it clear that it is equally out of the question that the general principle relied upon by the applicant can be deduced from that provision (or from its alleged objective). According to the applicant, there is no valid reason for restricting the scope of *force majeure* to importations subject to the import licence procedure, to the exclusion of those for which there is no provision for the issue of licences. The applicant appears to regard it as inconsistent that a more liberal system such as the second one should, in a case of *force majeure,* be of less advantage to undertakings than a less liberal system such as that under which, in order to export, it is necessary to obtain an advance fixing certificate, to accept the obligation to carry out the transaction within a certain period and to lodge a deposit, to be forfeit in the event of the undertaking not being fulfilled. But in fact there is no inconsistency. Under the more restrictive and onerous import system the importer receives as

consideration a guarantee from the Community that he will be able to effect the importation on the conditions agreed in advance. If therefore a case of *force majeure* prevents him from fulfilling his obligation by the prescribed time it is reasonable and fair that *force majeure* should be recognized as an excuse for the delay and that an individual extension of the period should be allowed in order to avoid the loss of the security lodged. On the other hand, those considerations of reasonableness and fairness do not apply when the trader has not made any commitment to the Community authorities in respect of the importation provided for and no corresponding guarantee, express or implied, has been given by those authorities.

Nevertheless, it is worth looking more closely at the possibility of the existence of a general principle of Community law relating to *force majeure*. What ought such a principle to consist of?

Under national legal systems *force majeure* is, of course, generally recognized as a factor which may exonerate an individual from the effects of non-observance of a positive obligation or of a prohibition by which he is bound or in consequence of a general rule, as in the particular case of criminal law, or under a public or private measure which gives rise to a particular relationship between the individual and the public administration or, again, between individuals *inter se*. But in the present case *force majeure* is being relied upon not so much to justify the non-fulfilment of an obligation as to show that the Commission ought to accord to the party concerned treatment which derogates from general provisions which are detrimental to its interests. In other words, the alleged general principle should take the form of an obligation on the part of the Community authorities to exempt from the application of new and less advantageous legislation and continue to treat as subject to the previous legislation any undertaking whose commercial affairs have suffered the adverse effects of a case of *force majeure*. All this seems to me to be very far from the general concept of *force majeure* and too specific to constitue a 'general principle'.

Finally, it may serve some purpose to make a further brief comment on the features and objectives of the legislation involved in the present case. As we have seen, Regulation No 2033/75 provides for the extension of certain protective measures to the products in question in order to meet a situation in which there was a marked increase in imports which might compromise the proper functioning of the common organization of the market and imperil the attainment of the objectives of Article 39 of the Treaty. In short, as in the case of all provisions introducing protective measures, the nature and purpose of the regulation were that of a provision rendered necessary by an exceptional situation. Even if, therefore, there were some conceivable justification for so wide a concept of *force majeure* as to make it capable of derogating from subsequent and less advantageous legislation, it would not appear to be consistent with the declared objectives of Regulation No 2033/75 to conceive of derogations from the full and uniform application of its provisions for the protection of the national market.

In the light of the foregoing there can, in my opinion, be no question of an alleged obligation on the part of the Commission to take account of the grounds of *force majeure* relied upon by the applicant and in consequence no blame can be said to attach to it for its refusal to do so.

8. For the reasons which I have explained, I recommend that the Court should dismiss as inadmissible the first head of the application relating to the so-called 'reparation in kind', declare to be unfounded that part of the application for loss of profit and order the applicant to pay the costs.