In deciding whether it is appropriate to withdraw a product, the Commission must take account of all trade between Spain and the Community of Ten, not merely trade between Spain and an individual Member State.

Moreover, the supplementary trade mechanism is not related to the protocols concluded with certain non-member countries in order to ensure that those countries, notwithstanding the accession, maintain their traditional patterns of exports to the Community by means of the dismantling of tariffs, in such a manner that a product may be withdrawn from that mechanism only after appropriate measures have been adopted to monitor imports of that product from the non-member countries concerned.

# REPORT FOR THE HEARING
## in Case C-46/89 *

## I — Facts and procedure

1. *Legal background*

*The supplementary mechanism applicable to trade — Act of Accession*

Article 81 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (Official Journal 1985 L 302, p. 23, hereinafter referred to as the 'Act of Accession') introduced a 'supplementary mechanism applicable to trade' ('STM') between the Community as constituted on 31 December 1985 ('the Community of Ten') and Spain. That mechanism applies to imports into the Community of Ten of products in the wine sector and new potatoes, and also (as from 1 January 1990) imports of fruit and vegetables.

In the Act of Accession, the STM is presented as a supervisory system intended to prevent excessive imports which might upset the markets. Its purpose is to ensure 'a harmonious and gradual opening up of the market' with a view to 'the full realization of free movement within the Community' at the end of the transitional period (Article 83(2)).

For each of the products subject to the STM, a 'forward estimate' is drawn up at the start of each marketing year, in accordance with the procedure provided for in Article 83(1), on the basis of production and consumption estimates. An 'indicative ceiling' for imports is fixed on that basis, which must reflect an annual rate of

* Language of the case: French.

progress ensuring gradual opening up of the market (Article 83(2)).

Where developments in trade show that a significant increase in imports has taken place or is forecast and if that situation should result in the indicative ceiling for the current marketing year being reached or exceeded, special protective measures may be taken in accordance with Article 85(3).

Pursuant to Article 85(4), the application of the STM may in no event lead to products coming from Spain or from the Community as at present constituted being treated in a less favourable manner than those coming from non-member countries benefiting from the most-favoured-nation clause, which are sold in the regions concerned.

Article 81(3) lays down the conditions for withdrawal of a product from the list of products subject to the STM. It provides *inter alia*:

'In accordance with the procedures set out in Article 82 a decision may be made to withdraw from the list of products subject to the STM:

(a) Products from the wine sector, new potatoes and milk in powder or granules intended for human consumption at the start of the second year following accession and at the start of each of the following years;

(b) . . .

With regard to those products, account will be taken in particular of the situation at the level of the production and marketing structure of the products in question.'

Under Article 82, the Commission may adopt a withdrawal decision where the latter is in conformity with the opinion of an ad hoc committee composed of representatives of the Member States and presided over by a representative of the Commission.

*The general rules on the application of the STM — Regulations (EEC) Nos 569/86 and 2297/86*

Council Regulation (EEC) No 569/86 of 25 February 1986 (Official Journal 1986 L 55, p. 106) lays down general rules for the application of the STM. Referring, in the first recital in the preamble thereto, to the purpose of the STM, namely 'to monitor the development of trade', and, in the second recital, to 'additional guidelines agreed on at the conference', the Council established, by means of that regulation, a system of certificates or licences and securities. The main features of that system are as follows.

Article 1(1) of the regulation provides that products subject to the STM may be released for consumption only on presentation of an 'STM certificate or licence'. Pursuant to Article 1(3), the issue of an STM certificate or licence is to be subject to the provision of a security 'guaranteeing compliance with the undertaking to release for consumption during the period of validity of the STM certificate or licence, which shall be wholly or partially forfeit if the transaction is not completed within that time or is only partially completed'.

In order to monitor the development of imports from non-member countries into the Community in the same way as Community imports, Article 3 provides that: 'Where products from third countries enter into free circulation in the Member State in which the STM applies, release for free circulation may be carried out only on presentation of an STM import licence. STM import licences shall be valid only in the Member State in which the STM applies'.

Furthermore, the issuing of STM certificates and STM import licences may be limited to certain products in a sector and spread over the year, and a time-limit may be set for the issuing of certificates (Article 4). Where the situation on the market calls for limitation or suspension of imports on the market of the Member State concerned, the issuing of STM certificates or licences may be limited or suspended. (Article 5(1)).

In order to assess the market situation of a Member State subject to the STM, account is taken in particular of:

(i) the trend in domestic prices in the Member State concerned,

(ii) the trend in domestic demand in the Member State concerned,

(iii) the quantities of products forming the subject of trade without further processing or after processing between the Member State concerned and the other Member States and third countries (Article 6).

With respect to new potatoes imported from non-member countries, the Council, by Regulation (EEC) No 2297/86 of 21 July 1986 (Official Journal 1986 L 201, p. 3), supplemented Regulation No 569/86 by inserting Article 6a. Article 6a(2) provides *inter alia* that if, in the Community, the market in new potatoes suffers or is liable to suffer, because of imports, serious disturbances that may jeopardize achievement of the objectives set out in Article 39 of the Treaty, appropriate action may be taken with regard to trade with non-member countries until the disturbance or threat thereof has been dispelled.

*Indicative ceilings for new potatoes in 1986 and 1987*

The Commission laid down detailed rules for applying Regulation No 569/86 in Regulation (EEC) No 624/86 of 28 February 1986 (Official Journal 1986 L 60, p. 1) and Regulation (EEC) No 435/87 of 12 February 1987 (Official Journal L 43, p. 19). In fixing the indicative ceilings for new potatoes for 1986 and 1987 as 80 000 and 88 000 tonnes respectively, the Commission applied a rate of progression of 10%.

*Additional protocols to the cooperation and association agreements between the Community and certain non-member countries — Dismantlement of tariff barriers*

Under the agreements between the Community and certain Mediterranean non-member countries, imports of new potatoes into the Community of Ten are subject to a lower rate of customs duty than that provided for in the normal tariff. That applies in particular in relation to the agreements with the non-member countries which are the main exporters of new potatoes to the Community of Ten, namely

Egypt, Morocco and Cyprus (see Article 17(1) of the Cooperation Agreement between the European Economic Community and the Arab Republic of Egypt annexed to Council Regulation (EEC) No 2213/78 of 26 September 1978 concerning the conclusion thereof (Official Journal 1978 L 266, p. 1); Article 15 of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco annexed to Council Regulation (EEC) No 2211/78 of 26 September 1978 concerning the conclusion thereof (Official Journal 1978 L 264, p. 1); and Article 3(1) of the Agreement establishing an Association between the European Economic Community and the Republic of Cyprus annexed to Council Regulation (EEC) No 1246/73 of 14 May 1973 concerning the conclusion thereof (Official Journal 1973 L 133, p. 1).

Under those agreements, the Commission conducted negotiations with the non-member countries concerned with a view to the accession of Spain and Portugal to the EEC, pursuant to a mandate from the Council of 25 November 1985 (Bull. EC 11-1985, paragraph 2.3.16), amended on 21/22 October 1986 (Bull. EC 10-1986, paragraph 2.2.18). The results of the negotiations were confirmed in a number of additional protocols (see Additional Protocol to the Cooperation Agreement between the European Economic Community and the Arab Republic of Egypt (Official Journal 1987 L 297, p. 11); the Additional Protocol to the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco (Official Journal 1988 L 224, p. 18); and the Protocol laying down the conditions and procedures for the implementation of the second stage of the Agreement establishing an Association between the European Economic Community and the Republic of Cyprus and adapting certain provisions of the Agreement (Official Journal 1987 L 393, p. 2)).

Those protocols provide, for products originating in Egypt and Morocco, that the customs duties applicable to imports into the Community are to be phased out over the same period and at the same rates as provided in the Act of Accession for the same products imported from Spain and Portugal into the Community of Ten (Article 1 of the Additional Protocol concerning Egypt; Article 1 of the Additional Protocol concerning Morocco). The phasing out is to take place for new potatoes within the limits of a tariff quota (Article 1(3) of the Additional Protocol concerning Egypt; Article 1(4) of the Additional Protocol concerning Morocco). It will not commence until the level of the duty on the same product from Spain and Portugal has fallen below that of the duty applied to new potatoes from the non-member country concerned (Article 1(2) of the Additional Protocol concerning Egypt; Article 1(2) of the Additional Protocol concerning Morocco).

For new potatoes imported from Cyprus into the Community of Ten, the tariff quota is raised from 60 000 to 110 000 tonnes in 10 equal annual steps of 5 000 tonnes each (Article 18 of the Protocol laying down the conditions and procedures for the implementation of the second stage of the Agreement establishing an Association between the European Economic Community and the Republic of Cyprus). Within that quota, the customs duty is to be progressively abolished over a period of 10 years (Article 16 of the same Protocol).

*Regulations adopted under the Additional Protocols*

Community tariff quotas for new potatoes from Egypt and Morocco were opened for Egypt by Council Regulation (EEC) No

4223/88 of 19 December 1988 (Official Journal 1988 L 371, p. 19) and for Morocco by Council Regulation (EEC) No 4244/88 of 21 December 1988 (Official Journal 1988 L 373, p. 29).

Council Regulation (EEC) No 451/89 and Regulation (EEC) No 452/89 of 20 February 1989 (Official Journal 1989 L 52, p. 7 and p. 15) established procedures for Community review of certain products originating in various non-member countries for which reference quantities are set (Article 1 of Regulation (EEC) No 452/89).

*The withdrawal of new potatoes from the STM list*

New potatoes were withdrawn from the list of products subject to the STM by Commission Regulation (EEC) No 530/88 of 26 February 1988 (Official Journal 1988 L 53, p. 71). According to the third recital in the preamble thereto, the application of the STM over the previous two years had shown trade in new potatoes to have followed a normal pattern. The fourth recital states that the measures provided for in the regulation are in accordance with the opinion of the ad hoc committee. New potatoes were withdrawn as from 1 January 1988 (Article 2).

2. *Procedure*

On 17 May 1988, the French Government brought an action before the Court for the annulment of Regulation No 530/88. The application was dismissed by judgment of the Court in Case C-136/88 *France* v *Commission* [1989] ECR 4163).

SICA and Sipefel, which are agricultural cooperatives with the status of producers' associations, brought the present action.

Their application was received at the Court Registry on 21 February 1989.

By order of 21 June 1989, the Court gave leave to the Kingdom of Spain to intervene in support of the Commission's conclusions.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By decision of 10 May 1990, the Court assigned the case to the Fourth Chamber.

3. *Conclusions of the parties*

The *applicants* claim that the Court should:

(i) declare that Regulation No 530/88 is unlawful and that the Commission has thereby incurred liability;

(ii) in the alternative, declare that, by failing to adopt, upon the entry into force of Regulation No 530/88, a specific mechanism for the surveillance of trade with non-member countries, the Commission has committed a wrongful act and has thereby incurred liability;

(iii) order the Commission to pay them the following sums by way of damages, and interest thereon at the legally prescribed rate:

to SICA:

seven million one hundred and eighty-two thousand one hundred French francs (FF 7 182 100);

to Sipefel:

six million two hundred and seventy thousand eight hundred French francs (FF 6 270 800);

(iv) order the Commission to pay the costs.

The *Commission* and the *Spanish Government* contend that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicants to pay the costs.

**II — Submissions and arguments of the parties**

The *applicants* claim that Regulation No 530/88 was adopted illegally and that the Commission has thereby incurred liability for the damage suffered by them through their obtaining lower prices for their own production of new potatoes in 1988. They put forward two arguments.

1. *Infringement of Regulation No 569/86*

The *applicants* maintain that, by adopting Regulation No 530/88, the Commission did not comply with Article 6 of Regulation No 569/86. Moreover, Regulation No 530/88 was based on manifestly incorrect findings of fact.

According to the applicants, Article 6 concerns all cases where 'the market situation of a Member State subject to the STM' must be assessed. Such a situation arises in particular when it is intended to withdraw a product from the STM system. Account should be taken in particular of the trend in domestic prices in that Member State, the trend in domestic demand in that Member State and the quantities of products forming the subject of trade between that Member State and the other Member States and non-member countries.

The applicants reject the view that the pattern of trade in new potatoes in 1986 and 1987 was normal (third recital, Regulation No 530/88). The trend in new-potato exports from Spain to the Community of Ten was subject to considerable irregularities: the 1986 exports, amounting to 62 794 tonnes, represented 78.5% of the indicative ceiling whilst the 1987 exports, on the other hand, amounting to 94 676 tonnes, corresponded to 107.6% of the indicative ceiling. Moreover, the level of Spanish new-potato exports to France in 1987, which is high by comparison with the figures for the previous 10 years, shows that

the pattern of trade in new potatoes was not normal.

In addition, the Commission failed to take account of the pattern of demand and the trend in new-potato prices within the Community of Ten. As regards demand, the applicants state that per capita consumption in the Community of Ten has not changed since 1982/88. Prices were extremely low in 1986. The Commission itself described the 1986/87 marketing year as 'somewhat abnormal by comparison with other years' (Commission report on the situation of agriculture for 1987, Table T/164). The fact that prices rose in 1987 could not have justified the withdrawal from the STM list effected by Regulation No 530/88.

Moreover, the abundant 1987 harvest gave rise to the creation of stocks of ware potatoes in the Community of Ten. The Commission failed to take account of the well-known influence of such stocks on the market for new potatoes. The applicants refer in that connection to the judgment of the Court in Case 114/83 *SICA and Sipefel* v *Commission* [1984] ECR 2589, paragraph 13).

The Commission likewise failed to take account in its decision of the pattern of Community trade with non-member countries, that being another factor which might lead to removal from the STM list under Article 6. Imports of new potatoes from non-member countries into the five main importing countries of the Community of Ten in 1986 and 1987 were of a very high level compared with 1982/83 and the following years. The tariff quotas provided for in the Protocols had been exceeded by a large margin and it was therefore essential to maintain the STM.

The applicants state that the purpose of the STM, namely to prevent disturbance of the markets, coincides with the aim of stabilizing the markets mentioned in Article 39(1)(c) of the EEC Treaty. By failing to comply with Article 6 of Regulation No 569/86 the Commission therefore infringed Article 39 of the Treaty, which embodies a superior rule of law for the protection of the individual.

The *Commission* and the *Spanish Government* contend that Article 6 of Regulation No 569/86 does not relate to withdrawal from the STM list. Articles 5 and 6 of that regulation lay down detailed rules for the application of Article 85(3)(b) of the Act of Accession. The criteria laid down in Article 6 relate only to a market situation in which protective measures are called for, such as the limitation or suspension of imports referred to in Article 5. Article 6 thus envisages a situation diametrically opposed to one which might give rise to a withdrawal from the STM list. In fact, decisions to make withdrawals from the STM list are inspired by liberalization of trade, whilst Articles 5 and 6 empower the Commission to restrict imports, thus allowing a temporary derogation from the abovementioned principle.

The extensive interpretation of Article 6 adopted by the applicants also runs counter

to the very purpose of Regulation No 569/86, which deals only with the conditions for bringing the STM scheme into operation, certainly not with abolition of the STM scheme as such.

The Commission, by contrast, considers that the conditions for abolition of the STM scheme derive directly from the Act of Accession. It is necessary to establish whether the factors which led to the application of the STM to new potatoes in accordance with Article 85 of the Act of Accession are still present. A withdrawal decision thus calls for an examination of the pattern of trade in new potatoes between Spain and the Community of Ten since accession. For that purpose it is inappropriate to analyse trade in new potatoes between Spain and an individual Member State, as contended by the applicants; only the total trade in new potatoes between Spain and the Community of Ten must be taken into account.

The Commission observes that the pattern of trade cannot provide the basis for a withdrawal from the STM list: such trade merely contributes to the process of arriving at a decision whereby import restrictions are imposed under Articles 5, 6 and 6a. That avoids the imposition of such a restriction on Spanish and Portuguese imports in circumstances in which the disturbance of the market of the Community of Ten is in fact the result of imports from non-member countries.

On the other hand, the Commission assessed the trade between Spain and the Community of Ten by reference to the pattern of such trade during the years prior to accession. It also took account of the expansion in ware potato production in the Community of Ten. It drew up a table of statistics for the 1982/83 to 1987/88 marketing years for new potatoes. That table shows that the market in new potatoes is closely linked with the ware potato market, in so far as a copious harvest of ware potatoes in the Community of Ten leads to a decrease in Spanish exports of new potatoes to the Community. A shortage of ware potatoes in the Community of Ten, conversely, leads to an increase in such exports. In view of that link, the pattern of trade in new potatoes between Spain and the Community of Ten has not shown, since accession, any significant variation by comparison with the pattern of such trade since 1982/83. Moreover, the pattern follows a foreseeable cycle determined by the said link with the production of ware potatoes. That foreseeability was confirmed by the changes in indicative ceilings by comparison with the changes in the annual volume of Spanish exports since 1982/83. With a rate of progression of 10% being applied, the trend resulted in an indicative ceiling of 96 500 tonnes for 1988. That figure exceeded, as a whole, the annual level of Spanish exports of new potatoes to the Community of Ten since 1983.

The Commission's finding that the pattern of trade in new potatoes between Spain and the Community of Ten had been normal since accession was therefore correct.

The Commission then gives its views on the submissions concerning demand, prices and trends in trade with non-member countries.

With respect to consumption in the Community, the Commission refers to a slight increase since 1982/83. The price of new potatoes is also strongly influenced by stocks of ware potatoes, as was confirmed by the Court in its judgment in Case 114/83, *supra*. Account being taken of that influence, no significant variation was found regarding price trends for those two types of potatoes. Moreover, the Commission's report quoted by the applicants bears no relation to Spanish exports. It concerns only a fall in prices occasioned by the supply of Greek and Italian new potatoes as from May 1987.

The Commission rejects the conclusions drawn by the applicants from the figures for imports of new potatoes from non-member countries into the Community of Ten since 1982/83, in particular the figures for 1986 and 1987. In order properly to assess the pattern of such trade, it is necessary to exclude the figures for Spanish imports into the Community of Ten since accession. Whilst it is true that imports from a particular non-member country into a particular Member State increased, the pattern in total imports from non-member countries into the Community of Ten has shown no significant variation since accession. The pattern in such trade is thus not relevant to the withdrawal at issue.

2. *Non-compliance with the Council's mandate of 25 November 1985 and the Additional Protocols*

In their reply, the *applicants* state that the Council's mandate of 25 November 1985 and the Additional Protocols to the agreements with the Arab Republic of Egypt, the Kingdom of Morocco and the Republic of Cyprus preclude the introduction of a system for the surveillance of imports from non-member countries into the Community since the entry into force of those Protocols. They add that the tariff system provided for in the Protocols logically relates to the enlargement of the Community following the accession of Spain and Portugal. That relationship implies that the application of the STM to imports from non-member countries is not accounted for solely by the requirement of Community preference imposed by Article 85(4) of the Act of Accession but also by the principle of tariff preference set out in the Protocols. Although the Protocols entered into force on 1 January 1988, a surveillance system under the Protocols was not applied before 1 January 1989 (Regulations Nos 451/89 and 452/89). When the withdrawal from the STM list was made (1 January 1988), imports of new potatoes from non-member countries into the Community in 1988 therefore evolved in the absence of a surveillance system. The Commission thus neglected its obligation to continue to apply the STM system or to replace it by another surveillance system for imports from non-member countries. It is therefore liable for the damage suffered by the applicants as a result of the disturbance of the market following the contested withdrawal.

According to the *Commission* and the *Spanish Government*, the STM system must

be distinguished from the surveillance system set up under the Protocols (Regulation No 452/89). The two systems derive from specific contexts and aims. The STM system for imports from non-member countries is concerned with surveillance to ensure Community preference, in accordance with Article 85(4) of the Act of Accession, whilst the system set up by the Council under the Protocols is concerned only with statistical surveillance of the development of imports from non-member countries with a view to the dismantling of tariffs. In the absence of any relationship between the two systems, the applicants' argument that the Commission is obliged, under the Protocols, to continue to apply the STM system or to replace it by another system of surveillance is unfounded.

Moreover, the introduction of a surveillance system under the Protocols is compulsory only since the entry into force of the Protocols. The progressive reduction of customs duties on imports of new potatoes from Morocco and Egypt became effective only as from the time at which the duties charged on Spanish new potatoes fell below the level of those charged on new potatoes from the non-member countries concerned (Article 1(2) of the Additional Protocol concerning Morocco; Article 1(2) of the Additional Protocol concerning Egypt). The tariff quotas, in particular for Morocco and Egypt, were not opened until 1 January 1989 (Regulations Nos 4244/88 and 4223/88, cited above). It was only with effect from that date that a surveillance system was applied. Regulations Nos 451/89 and 452/89 comply with that timing requirement.

The Commission also points out that the introduction of a surveillance system under the Protocols and also the decisions to conclude and give effect to them are matters exclusively within the purview of the Council.

3. *Damage: causal link*

The *applicants* claim that the withdrawal of the STM led to an excessive supply of new potatoes in the Community. Producing statistics for the new potatoes in 1988, the applicants claim, in the first place, that imports of new potatoes from Morocco and France caused prices to fall. They then allege that the excessive supply of new potatoes from Egypt and Cyprus on the United Kingdom market led to a collapse of prices in June 1988. In that connection, the court found in its judgment in Case 144/83, *supra*, that the French and United Kingdom new-potato markets were closely linked. Because of those events, French traders had to sell their production at prices lower than those of the previous years. Since that result could have been avoided if a surveillance mechanism and protective measures had been in force, the Community is under an obligation to pay compensation for the damage suffered.

According to the *Commission*, the application should be dismissed because of the lack of any causal link between the withdrawal of the STM and the alleged damage. It also denies that any damage was actually suffered.

It states that the trend in prices in 1986/87 and 1987/88 was not influenced by the withdrawal decision but by the production of ware potatoes in the Community. That production was very great in autumn 1987, so that the high price level of 1986/87, when there was a shortage, fell, thus affecting the prices of new potatoes.

P. J. G. Kapteyn
Judge-Rapporteur