

OPINION OF MR ADVOCATE-GENERAL M. LAGRANGE DELIVERED ON 28 MAY 1963¹

*Mr President,
Members of the Court,*

I am required to give an opinion on the application made by the Government of the Italian Republic against a Decision of the Commission of the EEC of 17 January 1963, authorizing the French Republic, in accordance with Article 226 of the Treaty, to levy a duty on the import of refrigerators from Italy. The amount of this tax, which is additional to the customs duty of 7.5% at present in force, is 12% until 30 April 1963, 9% from 1 May to 30 June, and 6% from 1 to 31 July on which date it is to be removed altogether. It is to be applied unless the Italian Republic prefers to levy an equivalent duty on export, the rates of which have also been determined.

As you know, this Decision was taken on the application of the French Government, made on 19 December 1962, for the determination of protective measures to allow the French refrigerator industry, which, according to that government, was seriously threatened by the huge increase in Italian imports following the abolition of quota restrictions and the reduction in customs duties in conformity with the Treaty, to reorganize itself so that it could adapt itself to the conditions of the Common Market.

This dispute particularly deserves the attention of the Court, for although the Commission has already taken a certain number of decisions under Article 226—most of which incidentally were in favour of Italy—this is the first time that one of these decisions has been the subject of an application to the Court. That is enough to indicate the importance of the judgment which you are called upon

to give. It is also an indication of the importance of Article 226 itself and of the rôle it is required to play in the establishment of the Common Market. It is appropriate, therefore, to take as clear a view as possible on this occasion of the provision in question in the light of the two types of problem raised by its application—on the one hand, those concerning the interpretation of its provisions, particularly with regard to the other provisions of the Treaty and, on the other hand, those relating to the exercise of the jurisdiction of the Court to review the decisions taken by the Commission in such a matter. For these reasons I feel it necessary to make some preliminary observations of a general nature.

Preliminary Observations

The importance of Article 226 and the particular rôle which it is called upon to play (and which in fact it already plays) obviously result from its object and from the opportunity it provides for the adoption of measures by way of derogation from the rules of the Treaty. It is a protection clause in favour of the Member States allowing a temporary departure from the normal application of the rules prescribed for the gradual establishment of the Common Market in cases where certain essential interests are threatened, either in a given sector of the economy or in the economy of a given area.

One cannot refrain from comparing Article 226 with a provision of the same nature contained in Article 37 of the ECSC Treaty, which was interpreted in a judgment of the Court of 13 July 1961 in Joined Cases 2 and 3/60.

¹ — Translated from the French.

In the latter Article there is also a protection clause in favour of the Member States, for cases in which the normal application of the Treaty adversely affects essential national economic interests.

But we must beware of pushing the analogy too far, for there are sharp differences between the provisions of the two Treaties, the principal one being the object of the protection clause.

In the ECSC Treaty, it is a provision of a *permanent nature*, intended to resolve conflicts which may arise between the regular functioning of the Common Market and that part of the general economy of a Member State which does not come under the Treaty: arbitration is then necessary, and a special procedure is set up for this purpose. In the EEC Treaty, on the other hand, Article 226 has the character of a *transitional provision* (it may be made use of only 'during the transitional period'), allowing derogation only as far as is necessary from the rules of the Treaty, so that the least amount of damage is done to the establishment of the Common Market. As everyone knows, the transitional provisions of the Treaty of Rome are not, like those of the Treaty of Paris, the subject of a separate convention providing, during the transitional period, for those exceptions considered as necessary departures from the rules of the Common Market, which was to be operative within a very short time. In the case of the EEC, it is the Treaty itself which supplies all the provisions intended to promote the gradual establishment of the Common Market at the same time as the permanent rules, generally stated in the form of principles, which should govern it, in which are provided the machinery, procedure, time limits—all including numerous derogations—many of which are protection clauses.

In this connexion, Article 226 appears simply as a supplementary protection

clause intended to cope, in the two very precise cases for which it provides, with the possible insufficiency of the normal provisions provided in the Treaty, so that the Common Market should operate under the conditions described in Article 2: 'The Community shall have as its task, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a *harmonious development of economic activities* . . .'; it is clear that this 'harmonious development' must be achieved as early as the transitional period, and the transitional provisions are included precisely to make this possible.

This should allow us already to take up a position, at least in general, with regard to one of the points in dispute in this case, that is, whether Article 226 authorizes a departure from any provision of the Treaty, even one which is fundamental (for example, the principle of non-discrimination set out in Article 7), or whether, on the contrary, certain rules may not be departed from in any circumstances.

I believe that in this respect a distinction should be drawn. Article 226 authorizes 'derogations from the rules of this Treaty, to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1'; therefore any *rule* contained in the Treaty may be the object of a derogation: no exception is provided for, the only criterion being the requirements of the objective to be attained. There is no 'order of merit' in the objectives of the Treaty, such that, in cases of conflict, one should necessarily be sacrificed to the other. On the contrary, it is a matter of reconciling them, and it is only the final objective, the establishment of the Common Market in the best conditions, which should never cease to be pursued. An example of this absence of any order of merit can be seen in the

third paragraph of Article 115 where the working of the Common Market and the establishment of the Common Customs Tariff are put on the same footing.

On the other hand, there is in the Treaty a declaration, or a reminder, of certain *principles*, which it would not be permissible to ignore. Thus it is with non-discrimination, a general principle of law, and of economic law in particular, which goes beyond the mere framework of the establishment of a Common Market: such a principle must be respected. We shall shortly see how, in my opinion, this is to be taken into account in applying Article 226.

A second difference between Article 37 of the ECSC Treaty and Article 226 of the EEC Treaty, which interests us in particular, relates to the nature of the jurisdiction conferred on the Court. Article 37 gives to the Court unlimited jurisdiction involving all the powers necessary to exercise the arbitration provided for in the Article between the 'essential interests of the Community' and the interest of the Member State which is the victim of 'fundamental and persistent disturbances' in its general economy as a result of the Common Market in coal and steel. The grant of such exceptional powers is explained by the fact that one of the elements with which the arbitration is concerned, namely, the general economy of the Member State which is subject to disturbances, is outside the competence of the Community, limited as it is to the market in coal and steel.

In the European Economic Community, as we have seen, it is quite different: it is the gradual realization of the general Common Market which is the task of that Community.

This is doubtless why Article 226 does not give the Court any exceptional powers. The decision taken by the Commission, whether positive or negative, is subject only to the ordinary application for annulment under Article 173,

and the responsibility for the decision belongs entirely to the Commission, which is free to act within the limits of its discretionary power. Of course, the Court's power of review as to legality thereby takes on a special importance, granted the nature of the interests involved, whether they are the interests of the State adversely affected, for which Article 226 is a true protection clause, or the general interests of the Common Market which must be preserved, or even, as in this case, interests of another Member State, brought into conflict, by a positive protective measure, with those of the State adversely affected. The Court's power of review should, therefore, be exercised according to the normal rules for an application for annulment.

Examination of the application

Let us now come to an examination of the application. It invokes, under several headings, insufficiency of grounds and infringement of the Treaty. It also invokes misuse of powers, but only in relation to Article 91.

As regards insufficiency of grounds, there cannot, in my opinion, be any procedural defect in this case, that is to say, an infringement of Article 190 under the terms of which 'regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty'. In fact, the disputed Decision is adequately reasoned and certainly fulfils the requirements of Article 190 with regard to procedure.

What the applicant maintains is that the grounds of the Decision are insufficient or inconsistent in relation to the conclusions which the Decision draws from them; this amounts to claiming that the grounds do not legally justify

that Decision. In French law, such a defect is considered as falling under 'infringement of the law'. But this is of little importance; the essential thing is to see clearly that we are here in the sphere of *review of the legality of the grounds* and not in that of mere defect of procedure. The applicant also disputes on several points the *material accuracy* of the grounds: here too, review must be made by the Court which has the task, when a question of material inaccuracy is raised, of investigating whether, in spite of this inaccuracy, the decision remains any the less legally justified. Such are the principles which hitherto seem to have inspired the Court in its exercise of judicial review of the grounds of a decision taken under a discretionary power.

I shall, therefore, examine together under each heading (as the parties have done) the submissions based on infringement of the Treaty and those based on defects vitiating the reasoning. I shall follow the order adopted by the defendant in the written procedure and which was followed by both parties at the oral procedure. This order has in fact the advantage of conforming most closely to that of Article 226 itself.

I

Of the two situations provided for in Article 226 justifying its possible application, one—that which pertains to the present dispute—envisages 'difficulties... which are serious and liable to persist in any sector of the economy'.

The first point in dispute relates to the question whether the French refrigerator industry constitutes, in itself, a 'sector of the economy'. The applicant Government expresses doubts on this point; according to it, the production of refrigerators forms part of the wider sector of production of electrical appliances for domestic use. Of the fifteen most important French undertakings, seven produce, besides refrigerators,

domestic electrical appliances such as washing machines, etc.

It is often difficult to trace the precise limits of an 'economic sector'; economics is not an exact science and a margin of appraisal almost always exists. The Commission tells us that the French refrigerator industry employed more than 11 000 people in 1961, with a turnover of about 500 million NFrs. It is possible that a new orientation towards the production of domestic electrical appliances might lessen the refrigerator crisis, but that would be part of the adaptation measures to be instituted to resolve that crisis, which without doubt was affecting the refrigerator industry at the date of the French Government's application. Considering this industry as forming part of a 'sector of the economy' within the meaning of Article 226, the Commission appears to me to have kept within the limits of its power of appraisal and to have made neither an error of law nor an error of fact.

A second point, linked to a certain extent to the previous one, concerns the inclusion of *compressor units* among the products subject to the tax, since the export of these appliances to Italy is noticeably higher than the import to France from Italy of the same appliances. The applicant Government first of all invokes this argument in an attempt to show that the French crisis is much less serious than the Commission has admitted and does not reach that degree of seriousness required by Article 226 to justify protective measures.

On this point, one can only reply that it is difficult not to consider the manufacture and separate sale of compressor units as forming part of the 'sector of the economy' relating to refrigerators in France; it is perfectly possible that concentrating the efforts upon this section of production would improve the competitiveness of the industry in question, but, once again, that can only be one of the possible

elements in a programme of re-organization and not of a finding contradicting the real existence of the crisis at the date of the disputed Decision.

As for the inclusion of compressor units among the products subject to the tax, I can, in the circumstances, only accept the explanations of customs technique furnished by the Commission, namely, the risks of diversion of trade, which could result from the separate exportation of the different parts of the refrigerator if compressor units were exempt from tax. It is true that there is in fact disagreement in this respect, as to the greater or lesser ease with which such diversions of trade can take place, for example, as regards the establishment of assembly lines in the importing country. Only an expert's report could throw complete light on this point. You will have to judge the advisability of calling for one. For my part, I tend to think it is not necessary to have recourse to one, as the allegations of the applicant on this point do not appear sufficiently pertinent, *prima facie*, to justify the taking of evidence, which in any event has not been requested.

I now come to the complaints to which the applicant appears to attach most importance and which have regard, on the one hand, to the existence of 'difficulties . . . which are serious and liable to persist' in the sector in question, and, on the other, to the origin of those difficulties which it claims are not due to the increase in Italian imports to France.

A — Proof of the existence of difficulties which are serious and liable to persist

In order to establish the existence, within the refrigerator sector in France, of difficulties which are serious and liable to persist, the disputed Decision is based, as you know, on a whole

series of findings, namely, (1) decrease in production; (2) reduction of exports; (3) increase in imports (threefold between 1961 and 1962 from countries other than Italy, sixfold from the latter)—all accompanied by an increase in national consumption; (4) decrease of about a third in the number of people employed by the producers; (5) cessation of manufacturing activity by five out of fifteen producers; and finally (6) increase in the stocks of finished products, 'mainly at the manufacturers' stocks which 'exceed 190 000 units at the production stage, which represents 20.6% of the national consumption for 1962'.

That such a collection of facts should demonstrate the existence of 'difficulties . . . which are serious and liable to persist' in the industry in question seems difficult to deny, and the applicant Government does not seriously dispute it. On the other hand, it does dispute the *factual accuracy* of certain of the findings, or at least claims that they are not based on sufficiently probative data.

I shall not linger over the criticism of the table appearing in the disputed Decision, to the effect that the periods of comparison in it do not correlate exactly: in fact, on the one hand, it is clear that this table must be read vertically and not horizontally and, if the periods do not entirely coincide, that is because the Commission did not intend to rely on statistics other than those which were in its possession at the time when it took its Decision. On the other hand, we now have, in reply to questions put by the Court, complete annual tables which confirm as a whole the more fragmentary indications in the disputed Decision.

Similarly, I shall not spend time on the question of the closure of factories. The disputed Decision merely says that 'five of the fifteen producers have had to cease their manufacturing activity'; if, as the applicant appears to think, certain

producers had succeeded in directing their production towards other objects without having to close down their factories, that merely confirms, once more, that efforts at re-adaptation are being made, which in no way invalidates the existence and the seriousness of the crisis prevailing in the refrigerator industry, but on the contrary confirms them.

The only point on which there exists a true divergence between the parties concerns the question of stocks.

The Italian Government disagrees that there is a 'large increase' in stocks and, according to certain calculations based on information in its possession, arrives at a figure of increase for the year 1962 of 7 540 units, as against the Commission's figure 48 000. This figure of 7 540 appears in Table I, produced in answer to the questions put by the Court. How can this divergence be explained?

We shall see, first, that if figures are used which appear in Table II, which was also produced by the applicant, we arrive at the figure of increase of stocks in 1962 of 32 540 instead of 7 540; here we are already closer to the 48 000 of the Commission (in Table I, produced by the latter)! The difference results from a different calculation of the *French domestic consumption* for 1962: 950 000 in Table I and 925 000 in Table II, the latter figure given as coming from the French press.

This emphasizes the much more uncertain character of the method of calculation used by the Italian Government in comparison with that of the Commission. In fact, if one compares Table I of the Commission with the two Tables (I and II) of the applicant, one sees that one of the elements upon which the Italian Government relies in calculating the increase in stocks is the consumption figure. But that is only a final element, not directly known, which can give rise only to more or less approximate estimates (as is seen by the

divergence on this point between the two Tables produced by the applicant), estimates which depend in particular on the size of the stocks supposed to be previously known!

On the other hand, Table I of the Commission uses the amount of the stocks as a *datum*, which allows it, with the other data (production, exports, imports), to arrive at a figure of 'apparent consumption'.

The only question therefore is whether the figure put forward by the Commission is based on sufficiently probative data. In this respect I notice that the figure of 190 000 units appears in the memorandum (at p. 2) addressed by the French Government on 19 December 1962 to the Commission requesting the application of Article 226. The final end-of-year figure of 193 000 which is now known fully confirms this estimate. I do not think that the Court has reason to cast doubt on the accuracy of the information supplied to the Commission on this subject by the French Government which clearly has the necessary means available to follow accurately the development of the stocks in an industry such as this one; nor do I think that doubts can be raised in this matter by the Italian Government.

One last remark on this subject: the applicant's calculation (Table II) uses a production figure for 1962 of 800 000 units, whereas the Commission's figure is 825 000, that is, a difference of 25 000 units. We find a corresponding difference between the two parties in estimating the increase of stocks: a figure of 48 000 compared with 32 540 giving a difference of 15 460. The lesser difference for the stocks is thus more than compensated by the lesser difference for production; in other words, if, for the Italian Government, the stocks have *increased less* than for the Commission, on the other hand, for the same Government the production has *declined more* than the Commission admits. It is certain that the element

of 'decrease in production' is as important in the diagnosis of crisis as the element of 'increase of stocks'.

Finally, the applicant in no way establishes that the disputed Decision contains a factual error when it declares that 'the stocks of finished products have greatly increased, mainly at the manufacturers'.

It is to be noted also, in reply to a criticism of the applicant, that the figure of 190 000 units, whose authenticity as we have seen is difficult to dispute, does not serve only to calculate the increase of stocks, but also has an intrinsic value of its own. In fact, the presence at the manufacturers' factories of abnormally large stocks is in general an indication of an industry in difficulty. Thus the fact that the major part of the existing stocks in December 1962 had been accumulated over several years, as the applicant emphasizes, is not an argument against the Commission's thesis, but on the contrary an argument which the Commission was justified in using and is on a par with the increase in these stocks in 1962, a year which saw a sharp reversal of the trend towards reabsorption occurring the previous year (minus 21 000 in 1961, plus 48 000 in 1962).

Thus the inaccuracy of the findings made by the Commission with regard to the stocks is not established and these findings, taken with all the others to serve as a basis for the general estimate, legally justify the disputed Decision on this first point: the existence of difficulties which are serious and liable to persist in the sector in question.

B — Origin of the difficulties

It is not enough to determine the existence of difficulties; it is also necessary to seek their origin in order to justify the choice of the protective measures to be applied.

The applicant Government does not dispute the relevance of the grounds contained in the fifth recital in the preamble to the disputed Decision, that is, that 'these difficulties originate in the considerable increase in imports in 1962 in comparison with the same periods for the previous year; this situation is mainly caused by the huge increase in imports from the Italian Republic, whilst imports from other countries have not shown such a noticeable increase'.

Nor is there any dispute as to the first of the two causes by which the following recital explains this 'swift and massive increase in imports from the Italian Republic', namely, the liberalization of imports; that is a very obvious fact, for it is quite certain that the phenomenon would not have occurred, at least to the same extent, if the imports had remained fixed at a certain quota.

On the other hand, disagreement arises with regard to the second cause referred to, namely, 'the difference between the average price per litre of the Italian refrigerators free-at-frontier and the average price per litre of the same French appliances at the wholesale stage, which is 30% higher than the Italian price free-at-frontier in France, whereas the existing customs protection amounts to only 7.5%'.

It is here that the dispute relating to the price appears.

You know the argument of the Italian Government on this point. The comparison, it says, between the free-at-frontier price of Italian refrigerators and the wholesale price of French refrigerators is irrelevant, for competition only really takes place at the retail price stage. The retail prices of the French appliances and of the Italian appliances of the same type and quality are practically the same. If the free-at-frontier price of Italian refrigerators is 30% less than the average wholesale price of French refrigerators, that is

mainly because in France the organization for distributing Italian products bears much heavier charges than the organization for distributing French products: advertising, after-sales service and especially those mysterious 'extra expenses' of which we have heard at great length during the oral procedure. All these expenses are necessary (the applicant insisted strongly on this point) for an industry which is seeking to establish itself in a foreign country.

I do not think that there is any need to follow the applicant in this matter. Doubtless we shall learn (and it is very interesting, moreover) how Italian exporters have succeeded in setting themselves up in France and in suddenly capturing an appreciable part of the French market. As it is not by a difference in quality at an equal price (the application recognizes this on page 9), it can only be thanks to the efforts made by the commercial distributing department, efforts made possible by the larger profit margins allowed to it by the producers. Clearly that means that the distributors and doubtless also the retailers, are given important advantages in the form of commission or discounts, which encourage them to increase their efforts at advertising and also—how can one fail to be convinced—allow them finally to grant discounts on the catalogue price in order to compete with appliances from other sources. Advertising by itself is not enough and needs to be supplemented by an effort as to prices if it is to divert customers away from brands to which they are accustomed and attract them towards new products coming from abroad. All this is perfectly normal; it is the law of competition.

But what does it prove, except that the Italian producers have been in a position to bear these sacrifices while succeeding in having a wholesale export price (the free-at-frontier price) 30% lower than the wholesale price of their French competitors?

It proves one of two things: either there is dumping, that is to say, that the export prices have been arbitrarily lowered in comparison with the prices on the domestic Italian market so as to conquer the French market—but the Italian Government strongly disputes this and the Commission has taken no stand on this matter—or, and this is the hypothesis we should consider, the conditions of Italian production allowed it in all commercial honesty to apply an export price nearly a third lower than the wholesale price of French appliances, in spite of the weight of charges borne by the distribution services during the establishment of this trade in France.

But then, here we are precisely within the framework of Article 226; the abolition of quotas, together with the lowering of the customs tariff, has caused a serious difference in competitive ability to appear between the two production industries, a difference which the French industry has been unable to overcome. Or else it must be supposed that the French producers have voluntarily accepted this situation by refusing to lower their prices or to bear greater sacrifices in favour of the distributors, when they had the opportunity to do so. The applicant Government, as you know, has not hesitated to put this hypothesis forward. However, it is more than contradicted by the facts: cessation of activity by several undertakings, dismissal of staff, etc. . . ; industrial Malthusianism does have its limits!

Another question is whether the French industry bears part of the responsibility for the situation. Could it not have avoided being taken by surprise? Had it reckoned, as has been suggested, on agreements which, because of the cautious start in applying the anti-trust legislation of the Treaty, might have appeared as not very hazardous but which did not succeed? We do not have to judge that. The facts are there; it is the application of the measures pro-

vided by the Treaty for the gradual establishment of the Common Market which allowed the young and dynamic industry of one of the Member States to endanger the competing industry of another Member State in circumstances such that recourse to Article 226 seemed justified.

And in that very fact there is also justified the remedy adopted by the Commission, namely, a temporary measure intended to reduce for the period necessary the effect of the liberalization measures introduced in accordance with the Treaty. What measure should have been chosen? Restoration of a quota? Import duty, as the French Government requested and the Commission accepted? It was for the latter to decide. As for the *rate* of the duty, that depended on the judgment of the Commission. I would merely note, in answer to an objection in the application, that in its judgment the Commission was legitimately able to take note of the difference of 30% between the Italian price free-at-frontier in France and the French wholesale price, since, as we have seen, it is that difference which crystallized the divergence between the competitive conditions of the two industries.

That said, it rested with the Commission, in the exercise of its discretionary power, to take account of the two objectives, clearly inconsistent with each other, fixed by Article 226 and between which a conciliation must take place; on the one hand, to adopt measures 'in order to rectify the situation and adjust the sector concerned to the economy of the Common Market' and, on the other hand, the choice of measures which 'will least disturb the functioning of the Common Market'. It is only when it is established that one of these objectives has been deliberately or arbitrarily neglected, that is, in a case of misuse of powers, that the Court can criticize the Decision in that respect.

But that is not so here. The difference between the divergence of 30% and the duty chosen (12%), plus the customs duty of 7.5%, leaves a margin allowing the continuation of a level of trade between Italy and France 'without endangering the current reorganization of the French sector of domestic electric refrigerators and its adaptation to the economy of the Common Market', to use the words of the preamble to the disputed Decision. In fact, we know that this reorganization is truly taking place and it is hoped that it will provide the expected results, and we also know from the documents produced by the parties that it has been possible to maintain a considerable level of trade — 36 563 Italian refrigerators were imported into France during the months of January and February 1963 according to Table II of the Italian Government and 50 896 during the first four months of the same year, according to Table II of the Commission.

II

We must now examine the submissions based on infringement of Article 226 in relation to the principle of non-discrimination and the principle of Community preference. That, from the legal point of view, is certainly the most important aspect of the case. It has given rise, in both the written and oral procedures, to very thorough arguments and to noteworthy comments which should make it unnecessary for me to go again over the details of the arguments put forward on both sides. I should merely like to set out as briefly as possible my own view.

A — Principle of non-discrimination

As regards, first, the principle of non-discrimination, the applicant Government maintains, on the one hand, that this principle may not be infringed even by the application of Article 226;

and, secondly, that observance of this principle forbids the creation of a duty which is not equally applicable to imports from all the Member States.

On the first point, I have already explained my view at the beginning. I think that the *principle* of non-discrimination, considered as a general principle of law, should be respected in this case as in any other. But the question is precisely how we should interpret it.

It is well known first that the principle of non-discrimination has a double aspect, both positive and negative; discrimination consists both in treating different situations in the same way and in treating comparable situations in different ways: in the field of prices or in any other field, examples abound in economic affairs.

International case law shows the same attitude, as was recalled by the statement of defence. In an advisory opinion given by the Permanent Court of International Justice on 6 April 1935, that august tribunal decided that 'equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations'.¹

A second observation, which follows from the previous one, is that, still in the domain of economics, the scope of the principle is necessarily narrower when an intervention measure exists than when there is normal trading within the framework of customary rules. This is easily explained since interventionism has the aim of modifying the natural play of economic forces for determined ends: it is thus only within the sphere of the ends pursued that the principle must be respected; it will be infringed only if one treats differently two situations which are similar *with regard to their ends*. Particularly significant in this respect

is the judgment of this Court in Case 8/57 (Rec. 1958, p. 247), cited by the Commission in its statement of defence, a judgment in which the Court considered that the equalization levy on imported scrap was not contrary to the principle of non-discrimination, and particularly to the rule of equal access to the sources of production, in that it imposed heavier rates on certain steel-works, which were heavy consumers of scrap, such as the electric steel-works, which could appear as a real penalization of certain undertakings (those for example manufacturing special steels) technically bound to use scrap as a raw material. The Court stated however that it is not discrimination, because of the very object of the measure; there would have been discrimination only if two undertakings placed in the same situation as to their conditions of manufacture had been treated differently.

This concept of relativity which permeates the principle of non-discrimination is not peculiar to the field of economics; it has a very general character and is found, for example, in the social and revenue spheres: thus the principle of 'equal pay for equal work' is not considered as infringed by the existence of legislation on family allowances; thus again, the principle of equality in respect of the imposition of taxation is adapted to the concept of graduated contributions in the field of personal taxation. Examples could be multiplied.

It is thus that I gladly support the distinction proposed by the honourable representative of the Commission during the oral procedure between what he called discrimination in form and discrimination in substance, a distinction which seems to conform to the ideas which I have just expressed: nothing is more fascinating and at the same time more deceptive than equality, and justice is often based on inequality; all this is well known.

1 — Judgments, Orders and Advisory Opinions of the Permanent Court of International Justice, Series A/B, No. 64, p. 19, *Minority Schools in Albania*.

But the question remains whether, in the case of Article 226, the principle of non-discrimination, even understood in the material sense, allows the imposition of an import duty, the application of which is limited to a single country, in accordance with the settled practice of the Commission—as was shown to us in its statement of defence.

In fact, can we not say that we are dealing with a *customs duty*, provisionally established or re-established, or increased, in favour of a State in order to ensure an adequate protection to that State for a particular product, and that it is *the very essence of such a measure* that it be applied to all the imports of the product in question into the said State? The principle of customs tariff classification is that it should be general except for particular advantages granted contractually by treaty to a particular State in return for other advantages (which, however, the spread of the most-favoured-nation clause is rendering ever more illusory), or again except when the raising of the duty takes on the character of a retaliatory measure based, for example, on dumping practices. If the French refrigerator market really needs special temporary protection, should that not be provided in a uniform manner against all exporting countries, without there being need to seek out which exports are in fact the most threatening? Is this not the only way to avoid creating distortions in international competition?

Such an objection deserves examination, and I confess to having given serious reflection to this subject. However, these reflections have in the end only fully convinced me that the arguments of the Commission are justified.

In fact, it is *not in terms of customs legislation that we should reason here, but in terms of the Common Market.*

The gradual establishment of the Common Market involves in the first place a customs de-restriction carried out in stages, at the same time as an abolition

of quantitative restrictions. It involves the creation, also gradual, of the common external tariff and at the same time the implementing of common policies in all sorts of fields as well as the approximation of laws. All this forms a whole which should be as coherent as possible, without its being possible, however, to unify rigidly and automatically, the measures of all kinds having to combine towards the realization of the final aim; whence the delays (or advances) in particular fields, derogations allowed in certain circumstances, etc.—in sum, arrangements of a considerable flexibility, the handling of which should always remain subject to the pursuit of the objectives of the Treaty and especially the realization of the Common Market.

It is in the light of what, without excessive claims, one may call this philosophy of the Treaty, that Article 226 must be understood and especially the last sentence: 'priority shall be given to such measures as will least disturb the functioning of the Common Market'. When, in order to avoid certain serious disturbances in a Member State, it appears necessary temporarily to suspend in favour of that State the application of some particular rule of the Treaty, not only should the measures to be taken be strictly in conformity with the objective aimed at (which is to allow as soon as possible the regular resumption of progress), but they should also carefully avoid creating new impediments in Community relations where there is no need for them; in other words, the remedy should correspond exactly with the diagnosis.

To return to the present case, this means that once the sudden and massive increase of Italian imports into France, promoted by the first measures introduced in application of the Treaty, have been recognized as the cause of the difficulties of the French market, it is that cause which should be attacked. In extending protective measures to

other countries, whose exports to France had not followed—by a long way—the same rhythm of expansion, one would needlessly have interfered with the rights which those countries derived from the measures of customs de-restriction already carried out; the protection given to the French industry would have been unjustifiably extended.

Elsewhere in the Treaty examples are found of cases in which certain measures taken at the request of one State are limited to the States wherein the cause of the damage is to be found and not extended as of right to all the Member States; this is the position in the case provided for in list F, headings 10.01 and 11.01, note 1, c.

Of course, it was necessary also to ensure that the application of the protective measures against a single country did not favour the imports of other countries improperly and, on the other hand, permitted the maintenance of trade between Italy and France. That is what the Commission has done, in explaining itself in the grounds of its Decision, and, although there is there a question of appraisal deriving from their discretionary power, we know from the tables produced that in fact the expectations of the Commission have been borne out by the facts. A considerable level of trade has been maintained for Italian imports into France and the imports from other countries have been contained within the previous limits, without leading to distortions of competition to the detriment of Italy. Article 226 has been applied legally.

B — Community preference

As regards the alleged infringement of what is called the principle of Community preference, I shall be more brief. In fact, what I have just said regarding Member States applies also to third countries.

There is no doubt that account must also be taken of the rules of GATT. But we have here to take account of them only within the framework of Article 226 of the Treaty of Rome, that is to say, in terms of the Common Market.

Thus the need to respect the rules relating to the establishment of the common external tariff forms part of the whole body of rules concerning the Common Market, without, as I have already said in referring particularly to Article 115, the existence in this respect of any order of preference, a sort of hierarchy of sacrifice.

The Commission had therefore merely to ensure, as it did, that the imports from third countries did not, any more than those from Member States other than Italy, justify an extension to those countries of the measure taken with regard to the Italian imports into France. In fact, the export price into France of refrigerators coming from third countries remains higher than that of Italian refrigerators even with tax. In these circumstances there was no need to interfere with the application of the common external tariff, already applicable to the products in question, by requesting a derogation under GATT. That, by all the evidence, is the meaning which should be given to the penultimate paragraph of the preamble to the disputed Decision.

On the other hand, the Commission cannot be accused of having misapplied the rules of GATT, to the extent that the tax, plus the existing customs duty, exceeds the amount of the bound duties *between France and Italy* at the moment when the Treaty came into force. In fact, the contracting parties to the Treaty of Rome were free to decide not to apply *between themselves* the GATT rules; they were required only to continue to observe them as against third countries. This was expressly recognized by you in the judgment in Case 10/61 of 27 February 1962 (Rec.

1962, pp. 21 and 22) concerning the interpretation of Article 234 of the Treaty.

In conclusion, one word about the submission with regard to misuse of powers. In the written procedure, this submission seems to envisage a misapplication of Article 226 to which the Commission had resorted in order to solve a problem of dumping arising specifically under Article 91. This submission cannot be upheld since, as we have seen, the Commission has never admitted that there was any dumping, and moreover the French Government has never maintained this. There is no dispute on this point and the whole development of the case shows that the Commission has never put forward any argument and never relied upon a single fact relating to differences between the commercial practices in operation within Italy and those regarding export, that is to say, on arguments of dumping.

In the oral procedure, we were told that in reality the Commission was accused of having wanted to grant protection to the manufacturers of refrigerators of third countries in order to permit them

to eliminate their Italian competitors from the French market.

This is a serious aspersion which has in no way been established and which, objectively, we have seen, is not supported by any evidence.

In sum, one can say that the Commission derived from Article 226 a true power to intervene in the functioning of the Common Market, for the exercise of which it was called upon to arbitrate between the three divergent interests of which I spoke at the beginning of my observations: those of France, Italy and the Common Market.

None of the submissions raised establishes that this power was exercised in illegal circumstances.

On the other hand, and although it is outside the jurisdiction of the Court, I should like to add that in my opinion this arbitration seems to have been fair and likely to attain the desired results, namely, to allow the French refrigerator industry to surmount a difficult crisis without seriously compromising the remarkable efforts made by its Italian competitors. If this optimism is confirmed, it is in the end the Common Market which will gain.

I am therefore of the opinion :

- that the application should be dismissed; and
- that the costs should be borne by the Government of the Italian Republic.