obligations under Articles 1 and 2 of Decision No 66/532/EEC of the Council of 26 July 1966;

3. Orders the defendant to pay the costs.

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 18 February 1970.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 10 DECEMBER 1969[1]

Mr President,

Members of the Court,

In the application which the Commission of the European Communities has made to you under Article 169 of the Treaty it requests you to state that the customs duties which the Italian Government has applied since 1 January 1968 on imports of unwrought lead (tariff heading No 78.01 A), unwrought zinc (heading No 79.01 A) and, in certain cases, on imports of lead waste and scrap (heading No 78.01 B) and zinc waste (heading No 79.01 B) constitute a failure to fulfil its obligations both under the Acceleration Decision of the Council of 26 July 1966 and Article 23(1)(c) of the Treaty.

There is no disagreement about the duties actually applied during the period in question — I shall deal with this matter in detail later. However, for reasons developed in its defence and during the oral procedure, the Italian Republic has always contested strongly that it was bound by any obligation by virtue of this decision of the Council. Therefore, before considering the respective arguments put forward by the parties, it is necessary to review the provisions which have been applied in this matter and which form the basis of the dispute.

I

1. Lead and zinc, which are products of acute concern for the Italian Republic and which hold an important place in the economy of the least developed areas of Sardinia, appear in List G annexed to the Treaty of Rome. For this reason the duties applicable to them in the Common Customs Tariff were to be determined by negotiations between the Member States; they were in fact so determined by an agreement of 2 March 1960. At the same time, however,

1 — Translated from the French.

Protocol No XV concerning these two products contained provisions intended to meet the differing interests of the Member States. First, on the application of the States concerned the Commission authorized the Federal Republic of Germany, Belgium and Holland to introduce a certain number of zero-duty tariff quotas as from the first stage of the introduction of the Common Customs Tariff. Secondly, the Member States expressed 'support' for the application of Article 226 of the Treaty entailing the isolation for a period of six years from the signing of the Protocol — that is, until 2 March 1966 — of the Italian market in lead and zinc, both as regards other Member States and third countries.

To deal with the second aspect of this problem, the decisions of the Commission of 27 July 1961 and 28 February 1962 respectively authorized the Italian Republic to maintain until 7 August 1962 the specific minimum duties in force on 2 March 1960 on, first, unwrought lead and zinc and, secondly, the waste and scrap of these two products. These decisions were successively renewed and amended by other decisions which took into account the programme of rationalization and reorganization of the mining and metallurgical industry undertaken in this sector by the Italian Government.

Thus, it was a decision of the Commission of 6 July 1966, as amended by the decisions of 22 March and 1 August 1967, which finally authorized the Italian Republic to impose duties on imports from Member States and third countries in excess of those which would have been in force had the provisions of the Treaty and of the acceleration decisions already been applied. This decision was valid until 31 December 1967. However, it only accepted in part the Italian Government's request for, first, the maintenance until 30 June 1968 af the protective measures authorized by the decision of 20 December 1963 and, secondly, the fixing of the time-tables and detailed rules for the gradual reduction of intra-Community customs duties and the full application of the Common Customs Tariff for the period after 30 June 1968.

Subsequently, on 7 December 1967 the Italian Government sought the introduction of a further protective measure involving the maintenance until 30 June 1968 of the duties authorized by the decision of 6 July 1966 and the application of reduced duties until 31 December 1969, at which date the end of the transitional period prevented further recourse to Article 226. Its application was rejected by the Commission on 20 March 1968. A further application, submitted on 24 June 1969, was rejected on 24 July 1969.

2. In the meantime, however, the Council took its decision of 26 July 1966 (OJ No 165 of 21.9.1966, p. 2971/66) from which the whole dispute stems. As it considered that economic development within the Community rendered possible the total abolition of customs duties on imports as between Member States and the application of the Common Customs Tariff in its entirety sooner than anticipated, the Council adopted the following measures for all products except the agricultural products listed in Annex II to the Treaty:

— as regards intra-Community customs duties: reduction of the duty to 15 per cent of the basic duty on 1 July 1967 and abolition of the duty on 1 July 1968;

— as regards the Common Customs Tariff on imports from third countries: application of that tariff as from 1 July 1968.

3. The Commission's argument is therefore as follows:

(a) As Italy no longer benefited from any protective measure after 31 December 1967, it should as from 1 January 1968 have given effect to the Acceleration Decision of 26 July 1966 *in intra-Community trade.*

As on 1 January 1957 the basic duties were 35 lire per kilo for lead and 25 lire per kilo for zinc, it should have levied 5.25 lire and 3.75 lire per kilo respectively until 30 June 1968 and abolished all charges after that date. It is not disputed that during the first half of 1968 it applied duties of 17.5 lire for lead and 12.5 lire for zinc, which it reduced as from 1 July 1968 to 7 and 5 lire per kilo respectively.

In other words, from 1 January to 30 June 1968 it reduced the basic duty by 50 per cent instead of by 85 per cent as laid down in the Acceleration Decision; as from 1 July 1968 it limited the reduction of the duty to 80 per cent instead of abolishing it altogether.
As regards waste and scrap, its policy has been somewhat different.
During the first half of 1968, it should have applied an *ad valorem* duty of 1.5 per cent on lead waste and scrap and 1.65 per cent on zinc waste and scrap.
It applied instead duties of 5 per cent and 5.5 per cent respectively. As from 1 July 1968 it was no longer entitled to impose any duty and although in fact no duty was applied to zinc waste and scrap it retained duties of between 3.8 lire and 6.9 lire per kilo for lead waste and scrap according to the quality of those by-products.

(b) The Commission has criticized the defendant for similar breaches regarding *imports from third countries.*
For the period from 1 January to 30 June 1968, the obligations imposed on the Italian Republic did not arise out of the Acceleration Decision, but directly out of Article 23(1)(c) of the Treaty. In accordance with the provisions of this article, as Italy was no longer covered by any protective measure it should have applied the second reduction of 30 per cent of the difference between the rate applied in practice on 1 January 1957 and that laid down in the Common Customs Tariff. Furthermore, by virtue of the Acceleration Decision it should have applied the Common Customs Tariff in its entirety as from 1 July 1968.
It is not disputed — and on this point I need merely refer to the figures appearing in the report of the hearing — that during the first half of 1968 the Italian Republic imposed duties which exceeded those which would have resulted from the application of Article 23(1)(c) of the Treaty, both as regards lead and zinc and the waste and scrap of those two products. It is also established that as from 1 July 1968 it applied the Common Customs Tariff only to waste and scrap and continued to charge duties in excess of that tariff on imports of lead and zinc.
It is on the basis of these findings that, in a letter dated 13 September 1968, the Commission requested the Italian Republic to submit its observations. As it did not consider these to be satisfactory the Commission on 2 April 1969 delivered a reasoned opinion on the failures of the Italian Republic to fulfil its obligations under both Article 23(1)(c) of the Treaty and the decision of the Council of 26 July 1966; it is on the basis of these two provisions that it has brought the matter before you.

II

The whole question turns upon the scope of the Council's decision of 26 July 1966. During the meeting at which it was adopted the Italian Republic made a statement to the effect that, in its opinion, the Acceleration Decision could not result in its abandoning the protective measures for lead and zinc.
It considers today that this statement, which was accepted without objection by the other Member States, must be interpreted as a refusal to comply with the decision to accelerate the entry into force of the customs union in respect of these two products. It has been maintained during the oral procedure that in both international and Community law, where the high contracting parties open negotiations in order to reach a certain agreement, the statements made by the parties and attached to the agreement have the same value as the agreement itself. This argument calls for two observations:

1. The first is that, as we are aware, the parties do not agree on the terms of the statement made during the meeting by the Italian Government. The file shows the various positions which were successively adopted by this country's delegation during the preliminary discussions between the Permanent Representatives; at times it merely reserves the question, at others it draws attention to the problem raised by Protocol No XV, as the delegation did not wish the Acceleration Decision to constitute a factor which would prevent the possible application of Article 226 of the Treaty. These provisions give rise to no argument.

This does not apply, however, to the meeting of the Council; you have before you two different versions of the proceedings, one of which appears in the *draft minutes* of the 191st meeting of the Council in July 1966, which is dated 7 May 1968. In this document the Council signifies its agreement with a certain number of statements:

— the first recognizes that, as regards the implementation of the Council's decision, both the safeguard clauses and the other provisions of the Treaty are applicable;

— in the second the Italian delegation draws attention to the problem posed by Protocol No XV and the possible application of Article 226 in terms very similar to those which I have just used. The Commission's representative states that the Council's decision does not prejudge the criteria for the application of the protective measures necessary to remedy difficulties which are serious and likely to persist in any sector of the economy, or which could bring about serious deterioration in the economic situation of a given area within the meaning of Article 226.

This document is, however, only a draft of the minutes which has apparently never been approved or made the subject of a request for correction. However, during the oral procedure, the Agent of the Italian Government refused to regard it as an exact expression of the thinking of his government; the correct text, as he read it to you, should be the following: 'The Italian delegation draws attention to the problem raised by Protocol No XV concerning lead and zinc attached to the agreement relating to List C. This delegation desires that the Acceleration Decision should not constitute an obstacle if it becomes necessary to prolong the customs support measures for the lead and zinc industry, even by means of Article 226 of the Treaty'.

In fact, in my opinion this new wording is not very different in scope from that of the draft minutes. It deals with a possible application of Article 226; it is a desire expressed by the Italian delegation but it does not imply on the part of the Council the recognition of an unconditional right for the Italian Republic to benefit from new protective measures under Article 226, especially if the statement in question is compared with that made by the Commission. As the Commission says, Italy wished to obtain confirmation — which was not necessary — that until 31 December 1969 Article 226 might be applied if necessary; it has never been said that it should be applied automatically.

2. In addition — and this is the second observation called for by the argument put forward by the Italian Government — in order to ascertain the scope of the decision in dispute and whether it may be reconciled with reservations which would reduce its scope, one must examine the legal nature of this decision and its place in the system established by the Treaty.

On this point, there can be no doubt. It is a decision taken under Article 235 of the Treaty, which, once made, has all the effects attributed to a decision by Article 189.

There is no need to recall that under Article 235 if action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community and the Treaty has not provided the necessary powers the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the 'appropriate measures'.

This occurred in this instance. If reference is made to the reasons for the decision in dispute, it can be seen that one of the objectives of the Community is to realize the establishment of the Common Market within the shortest possible period, that action by the Community is necessary for this purpose and that as the Treaty has not provided the necessary powers in specific provisions it is necessary to resort to Article 235 of the Treaty. It refers to the Commission's proposal and to the opinion of the Assembly. It was on this basis that the Council adopted its decision, Article 4 of which states that it is addressed to the Member States.

The form taken by the Council's action

under Article 235 may of course vary according to the circumstances, since this article refers to 'appropriate measures'. It may be a regulation (cf. for example Regulation No 167/64/EEC of the Council of 30 October 1964 on the levy applicable to certain blends of milk products and certain preparations containing butter, Official Journal No 173 of 31 December 1964, p. 2752/64). It may also be, as in this instance, a decision within the meaning of Article 189 and therefore 'binding in its entirety upon those to whom it is addressed'. Such decisions are, of course, subject to special procedures and require the unanimous consent of the Council, but once these conditions have been fulfilled — and they are in the present case — it falls within the scope of the ordinary law set out in Article 189. Consequently, I am unable to share the opinion expressed at the hearing by the Agent of the Italian Republic when he referred to 'this agreement which is called a decision, but which is in fact an international agreement'. To do so would lead you on to the shifting ground of decisions taken by the representatives of the governments of the Member States in Council, such as the two previous Acceleration Decisions of 12 May 1960 and 15 May 1962. However, contrary to what happened on that occasion, we are here dealing with a measure adopted by a wholly and exclusively Community institution, which, once it has been adopted, is binding upon those to whom it is addressed, that is, upon the Member States. Such an act cannot give rise to any refusal to implement it or to any reservations on the part of those Member States, and the only remedy open to them is that provided under Article 173.

If any additional proof was sought that the measure adopted by the Council is really a decision within the precise meaning of Article 189 it would be sufficient to refer to the terms used in the various language versions of this provision. This measure is called an '*Entscheidung*' in German and '*Beschikking*' in Dutch, which are the terms used in Article 189, whereas, for example, the wider and less precise terms '*Beschluss*' and '*Besluit*' have been used for the acceleration decisions taken by the representatives of the governments of the Member States in Council.

However that may be, the wording of the decision in dispute is perfectly clear. Apart from the agricultural products listed in Annex II, it applies to all commodities covered by the customs tariff; it provides for no exception, restriction, qualification or period of grace for any product whatsoever, in particular for lead and zinc. In accordance with your established principles it is unnecessary to refer to the preliminary discussions; it is sufficient to apply the provision as it stands.

III

In addition, the criticism made by the Italian Republic, as I have set it out, is directed solely against the Council's decision of 26 July 1966. Even if, as it is asking, it were not required to implement that decision, in respect of imports from third countries it would still be bound by Article 23(1)(c) of the Treaty which required it to carry out a second reduction of 30 per cent of the difference between the rate applied in practice on 1 January 1957 and the duty in the Common Customs Tariff. The Italian Republic does not refer to this text. It cannot, however, dismiss it implicitly except on the ground of some right to benefit from protective measure for the lead and zinc industry.

But it is difficult to see on what basis such a right might be recognized.

It cannot at all events be based on Protocol No XV. It is true that when this was signed the Member States had expressed 'support' for the application of Article 226 for a period of six years. In a similar case, involving Protocol No VIII on silk, you considered that such an expression of support constituted a guideline which the Commission had to take into account without, however, being bound by any specific legal obligation, as it retained full discretion (Case 32/64, *Italian Republic* v *Commission of the EEC*, 17 June 1965, [1965] E.C.R. 365). This is all the more so if, as in the present case, the period of six years provided for by the Protocol has expired.

Of course, when the last protective measure

ceased to have effect on 31 December 1967, the Italian Republic was still entitled to request its renewal, as it in fact did. It was, however, for the Commission to decide whether or not it was necessary to accede to these requests. Its refusals to do so could justify an appeal to the Court by the Italian Republic under the conditions laid down in Article 173, but not a refusal to fulfil its obligations under the Council's decision of 26 July 1966 and Article 23(1)(c) of the Treaty. Contrary to the view apparently held by the Italian Republic, it is not a contradiction for the Commission to maintain at the same time that the alleged failures of the Italian Republic to fulfil its obligations concern an infringement of the Council's decision and of Article 23 of the Treaty and that it should have contested the rejection of its applications for protective measures. Only in this way could it have usefully put forward the considerations which it has developed at length regarding the special position of the lead and zinc mining industry in Sardinia and which, however interesting they may be, are irrelevant to a consideration of the present case.

In the light of these observations I am of the opinion that:

1. During the first half of 1968 the Italian Republic applied to imports from other Member States of unwrought lead, unwrought zinc and the waste and scrap of those products customs duties which exceeded by 15 per cent those applied on 1 January 1957. In so doing, it failed to fulfil its obligations under Article 1 of the Council's decision of 26 July 1966.

During the same period, it applied to imports of the same products from third countries customs dutise in excess of those applied in practice on 1 January 1957, as reduced by the difference between these latter duties and those in the Common Customs Tariff. In so doing, it failed to observe the provisions of Article 23 (1) (c) of the Treaty.

2. On 1 July 1968 it failed to abolish customs duties on imports from other Member States of unwrought lead, unwrought zinc and lead waste and scrap; on the same date it failed to apply the duties in the Common Customs Tariff to unwrought lead and unwrought zinc imported from third countries. In so doing it failed to fulfil its obligations under Articles 1 and 2 of the decision of the Council.

Finally, I consider that the Italian Republic should be ordered to pay the costs.