OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 14 APRIL 1970[1]

Mr President,
Members of the Court,

The Court has today to decide on a case — I dare not say a dispute — which arises in unusual circumstances. The Commission of the European Communities, acting in accordance with the conditions laid down in Article 169 of the EEC Treaty, has asked you to hold that, in applying a flat-rate transfer price duty at the same rate to home-grown wood and to imported wood calculated on the value of such wood at the time of its declaration of entry for home use, the Kingdom of Belgium has failed to fulfil its obligations under Article 95. Without disputing that allegation, the Belgian Government in its statement of defence relies on the wisdom of the Court; at the oral procedure it maintained that position although indicating briefly the situation of *force majeure* in which it is placed.
Although the last remark calls for certain observations on my part, my opinion can be brief, because the report of the hearing sets out very fully the situation in law and fact which led to the present application.

I

1. The system criticized, which is still in force at the present time, may be summarized in the following manner.
For home-grown wood the flat-rate transference duty is applied at the rate of 14% on the sale of standing trees (Article 31-14 of the General Regulation on Duties assimilated to Stamp Duties); in the case of a public sale, a registration fee of 5%, which excludes liability to transference duty, is levied. But the payment of that duty, like the registration fee, covers the transfer of products derived from wood such as planks, beams, sheets of veneer and packing cases.
Let me add for the sake of completeness that in the three provinces of Liège, Luxembourg and Namur, which account for a little less than 85% of domestic wood production, cut wood is subject in addition to a provincial tax of 2% or 3%.
For imported wood the flat-rate duty is payable, still at the rate of 14%, on goods in the state in which they are brought into the country; as the price of processed wood is clearly higher than that of standing or cut wood, the duty imposed on imported products is necessarily greater than that imposed on corresponding domestic products, which constitutes an infringement of Article 95 of the Treaty.

2. That was the observation made by the Commission in a letter of 9 March 1964 which marked the beginning of a long exchange of memoranda between the parties.
The Belgian Government accepted the existence of inequality between domestic and foreign products from the beginning and stated that it was prepared to eliminate it, but two difficulties arose.
In the first place, although it was in agreement concerning the diversification of the rates of the transference duty to which sales of standing trees and imports of undressed or sawn wood are subject, it intended to take into account, in the calculation of the new rates, the existence of special taxes levied in certain provinces. Such a method was certainly open to criticism because, although these taxes were compensated for on importation, imported wood would be more heavily taxed than certain types of domestic wood grown in the other provinces. On that point the Belgian Government finally deferred to the objections contained in the reasoned opinion of the Commission and informed it by letter of 26 February 1969 that it would no longer take into account the provincial taxes when new rates of transference duty were subsequently fixed.
On the other hand — and this was the

1 — Translated from the French.

second difficulty — it was not sufficient to diversify these rates in order to put an end to all inequality. It was necessary in addition to remove public sales of standing trees from liability to registration fees in order to subject them to tax, and on that point the intervention of Parliament was necessary. That was the object of the draft law which was introduced in June 1967 and lapsed following the dissolution of Parliament, but was then revived by the law of 20 December 1968, and is still pending. During the oral procedure the Agent of the Belgian Government emphasized that it had twice drawn the attention of the Chairman of the Financial Committee of the Chamber of Representatives to this matter and to the importance which it attached to having the draft law passed in the shortest time. The constitutional principle of separation of powers, he added, did not allow more to be done.

II

It was then that the concept of *force majeure* was raised. No doubt it was a reference made in passing; nevertheless, if it is necessary to give it a more exact significance, that would, it appears, be the following: the disregard of Article 95 is accepted but the situation can be redressed only with the agreement of Parliament which is constitutionally separated from the executive and, as the executive had used all the means of action in its power, there cannot be a failure within the meaning of Article 169 or at least there is no reason for the Court to hold that there has been such a failure.

Such reasoning ignores that the subjects of rights — or of obligations — are the Member States of the Community. It is they who under Article 5 must take 'all appropriate measures, whether general or particular' necessary for ensuring the execution of the obligations resulting from the Treaty. The undertaking which they have thus contracted extends to the most diverse spheres and may consequently necessitate on their part very varied legal measures: it may be a matter of instituting, amending or repealing legislation or regulations of general scope, or equally of taking decisions of individual scope intended to ensure the execution of the Treaty and of the provisions implementing it. To know whether in a particular case such execution requires the agreement of only one or of several of the powers which constitute the structure of the State is a question the solution of which depends upon the constitutional system of that State but it cannot modify the extent of the obligations which must apply equally to all and the organs of the Community must not take cognizance of it. No doubt the latter, in accordance with the traditional practices of international relations, are answer able only to the Governments, but it does not follow that only the acts or omissions of the executive and of the departments put under its control amount to failures to fulfil obligations within the meaning of Article 169 of the Treaty. These may arise as soon as the Member State fails to carry out the obligations incumbent upon it, without any need to consider which of its agencies are responsible for the failure complained of.

The necessity to appeal to Parliament, the duties of which are increasing, may, it is true, complicate and delay the redressing of a situation contrary to the Treaty. That is a point to which the Commission is not indifferent, since Article 169 refers to it. Thus in the present case — as in all the others which raise a similar problem — the Commission, when giving a time-limit to the Kingdom of Belgium by which to conform to the reasoned opinion, added that on receipt of a request before the expiration of that period it could be extended 'in so far as is necessary to conform to the parliamentary procedures which are required by the national law in force'. That was on 28 November 1968, and the matter has not progressed since then.

Also, without there being any need to consider who is responsible for that situation, the Commission is correct in its view that persistent prolongation of the situation amounts to a failure on the part of the Kingdom of Belgium to fulfil its obligations under Article 95 of the Treaty.

Might one say lastly that the finding to which you will come will be merely theoretical? One might believe on the contrary that the authority of your judgment will give the various powers concerned a clearer understanding of the extent of their obligations in respect of the Community and will allow the termination of a procedure which is delayed not because of any ill will but because of the slowness of political machinery.

In my opinion it should be declared that the Kingdom of Belgium, by applying the same rate provided for in Article 31-14 of the General Regulation on Duties assimilated to Stamp Duties to home grown-wood transferred standing or felled and to imported wood calculated on its value at the time of the declaration of its entry for home use, fails to fulfil its obligations under Article 95 of the EEC Treaty and that the costs should be paid by the Kingdom of Belgium.