REPORT FOR THE HEARING, BY JUDGE-RAPPORTEUR PESCATORE, READ AT THE HEARING ON 5 OCTOBER 1969[1]

I — Statement of facts

1. On 29 September 1969 the Government of the Federal Republic of Germany, with the particular object of containing an influx of speculative capital, required the Federal Bank to suspend *ad interim* any intervention intended to ensure observance of the maximum and minimum rates previously fixed for the Deutsche Mark.

2. Because the prices of products subject to a common organization of agricultural markets are fixed in units of account, and because appreciable differences were being recorded in the daily spot rate between the actual rate of exchange and the official parity for the Deutsche Mark in relation to the dollar and thus to the unit of account, agricultural products were being imported into the Federal Republic at less than the intervention price.

3. On 29 September the Government of the Federal Republic therefore decided to charge on imports of certain agricultural products compensatory amounts calculated on the basis of the arithmetical mean of fluctuations in the spot market rate of the Deutsche Mark against the dollar in the week during which the import was effected.

4. On 30 September 1969 the Federal Republic applied to the Commission under Article 226 of the EEC Treaty for authorization to charge compensatory amounts on imports and to grant subsidies on exports of certain agricultural products.

5. By a decision of 1 October 1969 the Commission authorized the Federal Republic to suspend all imports of certain agricultural products from Member States and third countries, 'subject to adherence to Community rules in force'.

6. By an application lodged with the Court on 3 October 1969 the Federal Republic applied to have this decision declared void, 'to the extent in which [it] authorizes more extensive interventions in the Common Market than were indicated in Germany's application of 30 September and prohibits the implementation of the measures requested in that application'.

7. The Federal Republic lodged an application on the same day for suspension of the operation of the contested provisions of the said decision.

8. On 4 October the Commission lodged written observations.

9. By an order of 3 October 1969 the President of the Court of Justice decided to refer the application to the Court in accordance with Article 85 of the Rules of Procedure.

10. By an order of the same date the parties were requested to submit their oral observations at the hearing on 5 October 1969.

II — Conclusions of the parties

1. *The Government of the Federal Republic* claims in accordance with Article 185 of the EEC Treaty that the Court should suspend the operation of the decision of the Commission of 1 October 1969 authorizing the Federal Republic of Germany to take protective measures with regard to agriculture, to the extent to which that decision prohibits all other

1 — Translated from the French.

measures derogating from Community rules in force, until judgment is given on the substance of the proceedings.

2. *The Commission* contends that the application for suspension of the execution of the contested decision should be rejected, and that the applicant should be ordered to pay the costs.

III — Summary of the submissions and arguments of the parties

(1) (a) The *applicant* is of the opinion that the protective measures taken in the order of 29 September 1969 on the charging of compensatory amounts are justified under Articles 109 and 115 of the EEC Treaty. The Commission however wishes to have this decision declared void or at least to deprive it of its basis in Community law. The Federal Republic has thus a legitimate interest in these proceedings.

(b) It is moreover a matter of urgency to establish at the level of Community law whether provisions which do not amount to a complete suspension of imports may continue to apply as an interim measure, as the German courts may otherwise refuse to apply the order in dispute.

(c) Suspension of the operation of the decision is necessary: from the legal point of view, the implementation of the decision of the Commission would create an irreversible situation, even if the decision were later declared void in the main action. In fact, in the absence of a system of compensatory amounts there is a risk of serious disturbance on the agricultural market. Suspension of imports of all important agricultural products, by a State with as much foreign trade as the Federal Republic, would have incalculable effects on the Common Market and on world trade as a whole.

(d) Finally, suspension of the operation of the decision would not prejudge the substance of the case. It would merely maintain the existing situation.

2. The *defendant* first of all outlines the economic and monetary situation in which the German Government made its application of 30 September and the Commission itself took its decision of 1 October 1969; it then sets out its important points as follows:

(a) The real object of the application for suspension is to obtain approval in terms of Community law for the order already issued by the Government of the Federal Republic, or more precisely, since the Commission had already expressly withheld the desired authorization, to obtain approval from the Court of Justice under Article 226 of the EEC Treaty for this unilateral measure. The German Government wishes thereby to have the Commission's decision replaced by that of the Court. In accordance with the principles set out in the case-law of the Court, this application must be rejected.

Protective measures taken pursuant to Article 226 are permissible only within the limits and under the conditions laid down by the Commission. Even in the absence of provisions in the contested decision excluding any derogation from Community rules in force, the protective measures proposed by the German Government could have been permissible only on the basis of a positive authorization on the part of the Commission. Its application for suspension cannot therefore achieve its object.

(b) The German Government's reference to Articles 109 and 115 is irrelevant in view of the Commission's decision taken in respect of the application, which was based on Article 226 alone. Any other solution would be incompatible with the separation of powers laid down in the Treaty and with the general system of protective clauses.

(c) The German Government has failed to prove the threat of serious or irrepar-

able damage, which is an essential precondition for the grant of a suspension. That such damage is inevitable has not been proved, and if it were to occur the suspension of imports, authorized by the Commission, would be a suitable method of counteracting it. Moreover, the Federal Republic is not bound to undertake a long-term suspension of all imports.

(d) Finally, suspension of operation can be granted only when there is a strong presumption that the application originating the main action is well-founded. This is not so in the present proceedings:

— The contested decision does not infringe Article 226(3), since the Commission did not exceed its discretion under that provision in judging that a temporary suspension of imports which could be limited to specific products might be considered the lesser evil.

— Protective measures have not been refused.

— The fact that the statement of reasons for the decision mentions, in justification of the application of Article 226 of the EEC Treaty, the difficulties arising in the agricultural sector from the floating rate of exchange does not lead to the conclusion that the Commission used its powers for a purpose other than that for which they were conferred.

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 5 OCTOBER 1969[1]

Mr President,
Members of the Court,

1. The comprehensiveness of the written observations submitted by the parties, which have been supplemented before the Court, makes it possible for me to be fairly brief in the opinion which I shall deliver on the application before the Court today. Needless to say, I shall take pains to comment not only objectively but with the calmness required of a judge. On the other hand, at the risk of appearing rather unimaginative I shall restrict myself entirely to the question with which we are concerned today. At the present stage in the proceedings the Court has not in fact to give a ruling on the legality of the decision taken on 1 October 1969 by the Commission of the European Communities; the annulment of this decision forms the subject of a separate action brought by the Federal Republic of Germany, the investigation of which is only in its initial stages and in the course of which the parties will be required to give further explanations. The Court is simply asked to order suspension of the operation of this decision to an extent which I shall define.

This application accompanying the action is based on the rule set out in Article 185 of the EEC Treaty, which reads as follows:

> 'Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.'

In accordance with the normal view of public law and administrative law this provision treats suspension as a derogation. The continuity of administrative activity in fact requires that decisions of the public authorities shall be imple-

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