THE COURT

hereby:

1. **Dismisses as inadmissible the application to suspend the operation of the Decision, contained in Application 32/64;**
2. **Dismisses Application 32/64 as unfounded;**
3. **Order the applicant to pay the costs.**

Hammes Donner Lecourt

Delvaux Trabucchi Strauß Monaco

Delivered in open court in Luxembourg on 17 June 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 6 MAY 1965[1]

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Mr President,
Members of the Court,

At the time of the establishment of the Common Customs Tariff for the products in list G in Annex I of the EEC Treaty (Agreement of 2 March 1960, Official Journal 1960, p. 1825), the Member States of the Community agreed in Protocol No VIII concerning silk (raw, tariff heading 50.02) annexed to the Agreement to express their support

1 — Translated from the German.

for 'the application of Article 226 of the Treaty entailing the isolation, for a period of six years from the signing of the present Protocol, of the Italian market in those products appearing in Chapter 50 of the Common Customs Tariff for which such isolation appears necessary, both as regards other Member States and third countries'.

Accordingly during the years which followed, the Italian Government regularly submitted requests to the Commission of the EEC and there followed Decisions of 28 February 1962 (Official Journal 1962, p. 1092), 20 March 1963 (Official Journal 1963, p. 1085) and 22 May 1964 (Official Journal 1964, p. 1373) whereby it was authorized each time to take protective measures for a period of one year or thereabouts for certain products appearing in Chapter 50 of the Common Customs Tariff. In the first place these protective measures maintained the rates of customs duty in force on 2 March 1960 in relation to other Member States on woven silk fabrics and only reduced them to 10.5% on certain other fabrics. By virtue of the second authorization the Italian Government was able to apply the rates of customs duty in force on 2 March 1960 on woven silk fabrics and to impose duties (varying between 7% and 9.6%) on other clearly-defined fabrics. Finally, for the various fabrics appearing under tariff heading 50.09 of the Italian customs tariff, the third Decision of the Commission authorized the Italian Government to apply in relation to other Member States rates of duty varying between 5.6% and 9.5%, that is tc say, rates lower than those of the previous year.

It is this Decision which is the subject of the present application for annulment. According to the Italian Government it must be annulled because the protective measures in question are insufficient, that is, they fall short of what is sought in its last request: the extension of validity of the protective measures granted for 1963-1964.

Concurrently with the application and in the same document the Italian Government requested that operation of the contested Decision be provisionally suspended in order to avoid irreparable damage to Italian silk production.

Legal consideration

I — The application for suspension

Before making a legal assessment of the facts I must say a few words on the application for suspension on which no ruling has as yet been given.

The following considerations arise:

(I) We see that this application was not lodged in a separate document as is required by the Rules of Procedure (Article 83 (3)). In my opinion this formal requirement is not of purely secondary importance. On the contrary it is intended to establish a sufficiently clear distinction between the procedure used in applications for interim measures and that in the main action, because for suspension proceedings not only are there special rules as to jurisdiction but also special requirements as to substance not appropriate to a main application (a statement of the circumstances establishing the urgency of the suspension as well as submissions of fact and law justifying the need for the measure asked for). In my opinion it follows that a request for suspension merely inserted in a main application must be dismissed as inadmissible for failure to observe the compulsory procedural requirements.

(2) Moreover, it would appear that the application must also be dismissed for failure to comply with the requirement in Article 83 (3) of the Rules of Procedure that clear reasons be given. The application, like the reply, simply states that implementation of the contested Decision will have serious consequences

and result in irreparable damage to the Italian silk industry. They do not sufficiently specify the circumstances establishing the urgency of the request nor the submissions of fact and law justifying the grant of the interim measure.

(3) The application for suspension must therefore be dismissed without its being necessary to consider whether it is still possible at this time, that is, after 28 February 1964, the limit of validity of the Decision, to admit the existence of an interest in the suspensions, whether the purpose of this application—the grant of wider customs protection—can be realized at all by this means or whether, conversely, suspension of operation of the contested Decision would result in an obligation to apply the *general provisions of the Treaty* concerning the reduction of customs duties since the earlier decisions of the Commission authorizing the introduction of higher customs duties ceased to be applicable after expiry of their period of validity.

II—The substance of the case

(1) As to the substance it seems advisable first of all to show how the Commission assessed the extent of the necessary protective measures. In my opinion this will facilitate consideration of the legal position which it has adopted and at the same time will lead to a better understanding of the arguments of the applicant.

The Commission relies upon the fact that the producer price of raw silk from Italy (that is, untreated silk, not thrown) is higher than the world market price and in particular higher than the Japanese producer price by reason of the particular circumstances applying to Italian sericulture and the hand unwinding practised in that country. In order to give effective protection to the production of Italian silk corresponding customs duties must be imposed upon imports of woven fabrics and other silk-based products. The multiplicity of the products derived from silk rendered impracticable calculation of the necessary customs protection on the basis of the difference in price between the various silk-based products in Italy and abroad. For this reason the Commission proceeded in the following manner: it ascertained the average price delivered to the manufacturer for certain *types* of fabrics manufactured from silk of Japanese origin in one or other Member State and, by comparison with the corresponding Italian product, calculated the effect on the manufacturing price of processing raw silk from Italy. Having taken into account the part played by the raw material in the cost of production it then calculated the necessary customs duty in the form of an *ad valorem* duty on the finished product, whilst in calculating the costs of throwing and spinning and the overheads of both Italian and foreign products it worked on the basis of identical information supplied by the Italian Government. For 1964, the year referred to in the contested Decision, it fixed a lower customs duty than for 1963 because of the smaller difference, as compared to the previous year, between the prices of Italian and Japanese silk (owing to a greater increase in Japanese prices).

(2) The applicant maintains that this method is inadequate for two basic reasons.

(a) According to the applicant, in the comparative calculation of manufacturing costs there is no justification for the adoption of the same figure to represent overheads regardless of whether Italian or Japanese silk is being processed. On the contrary, the overheads must be calculated on the basis of 15% of the cost of manufacturing the finished product which, in the case of the processing of raw silk from Italy the cost price of which is higher, requires the

adoption of a higher figure in respect of overheads.

(b) Furthermore, the customs protection granted by the Commission is incomplete because it does not provide for any supplementary rate intended to protect the processing industry.

(c) A third point, which appears for the first time in the reply and then only in the form of a note, cannot be considered as an additional submission in its own right. This note merely states that the reference by the Commission to the difference between Italian prices and international prices for raw silk, calculated upon the basis of the average *over only one year, is extremely debatable.* It would have been more correct to calculate the average over *the three years* from 1961 to 1963. The Commission has clearly shown that such arguments (apart from possible objections as to their admissibility—cf. Article 42 of the Rules of Procedure) could not be relevant. Disregard of the fact that the prices of raw silk from Japan increased considerably in 1963 would without any doubt lead to the establishment of an unjustifiably high customs protection for the production of Italian silk for the period referred to in the Decision of the Commission. For this reason I consider it unnecessary to pursue discussion of this groundless complaint.

Let us rather consider whether the two main grounds for the appeal already cited have any prospects of success.

For this purpose it appears useful to recall the legal basis of the Decision of the Commission, since the submissions presented during the proceedings give the impression that the applicant sometimes loses sight of this essential point. The Decision of the Commission authorizing the measures is essentially based upon Article 226 of the EEC Treaty, that is, upon the safeguard clause which we have already met in several actions and which in fact forms the *only* legal basis for the measures introduced. In particular, it would be a mistake to see in Protocol No VIII to the Agreement of 2 March 1960 concerning the Common Customs Tariff a measure giving additional and wider powers of authorization. As I have already said, the Protocol only specifies that 'the Member States support the application of Article 226 of the Treaty etc. . . .' which in my opinion merely acknowledges the need to take protective measures for the benefit of the Italian economy for certain products appearing in Chapter 50 of the Common Customs Tariff. Thus, the determining factors are in any event the limits in point of time and substance and the requirements and aims of Article 226. As the Commission rightly emphasizes, the Court has, in its case-law, established that Article 226 only authorizes those measures which are absolutely necessary to achieve the purpose of the Article: that is, adjustment to the economy of the Common Market and rectification of a particular and difficult situation. Moreover, these measures must disturb the functioning of the Common Market as little as possible. This requirement can only be met if the *causes* of the crisis are known with certainty and the protective measures are adapted to it accordingly (Case 13/63, Rec. 1963, p. 361; Joined Cases 73 and 74/63, Rec. 1964, pp. 26 and 27).

The present action does not appear to present any difficulties as regards this last point. The support for the introduction of protective measures for the benefit of the Italian silk industry arose solely out of the particular economic conditions appertaining to the production of Italian *raw silk.* Its costs are above the level on the world market and the aim is to render it gradually able to withstand competition on an international level, by a process of reorganization and rationalization. This is shown clearly by Protocol No VIII to the Agreement of 2 March 1960 which refers expressly to the prices of Italian

raw silk by the exchange of letters between the Italian Government and the EEC Commission regarding the implementation of measures of reorganization in favour of the Italian raw silk industry and by the implementing measures introduced prior to the contested Decision.

Consequently, when calculating the rate of the necessary protective duty, we need only ask ourselves whether, by reason of the higher cost price of raw silk from Italy, it is really necessary to adopt a higher figure to represent the overheads, that is, a figure representing 15% of the manufacturing costs of the finished product, with the result that duty should be levied at approximately 11.11%, rather than at the 9.5% authorized by the Commission, on imports of unbleached cloth into Italy (to quote only one of the facts provided by the applicant at p. 7 of the reply—French version).

On this point I should like to make two observations.

In the first place I do not think that it has been proved that higher prices for raw materials necessarily give rise to a corresponding increase of overheads in manufacturing costs. As the Commission rightly emphasizes, the overheads include many elements which are totally independent of the price level of the raw materials, such as the salaries of administrative staff, general operating costs, depreciation, rent, shipping charges, advertising expenses, etc. At the most it is only *one section* of the overheads which varies according to the price level of the raw materials: this includes taxes, insurance, commissions, etc. Consequently, in calculating the production costs of fabrics woven from Italian silk, it cannot possibly be right to accept as a general principle that overheads represent 15% of the manufacturing costs.

A second observation on these facts could well be still more important. Bearing in mind that we are dealing with measures taken in the context of Article 226, which must always be limited to what is strictly necessary, the only decisive question is whether the protection granted by the Commission is in fact adequate. The criteria necessary to give a negative answer are lacking in this particular case. When the figures submitted to us for Italian imports and exports of woven fabrics of silk are examined there is proof that the Commission, which during previous years always calculated the overheads in the same manner, has fixed too low a level for the protection of the Italian silk industry. The figures for imports are particularly significant in this respect, as we are dealing with a protective customs measure. It is shown by tables prepared by the applicant that from 1960 to 1964 the total imports of woven fabrics of silk into Italy, like imports from other Member States of the EEC, diminished constantly and significantly from the point of view of both quantity and value. Conversely, exports for the years 1960 to 1964 show a general tendency to increase in both quantity and value: only exports to Member States of the EEC (equivalent to approximately one third of the total exports) show a slight decrease in quantity, while for 1964, a year characterized by a certain number of short-term national measures to damp down the economy and a fall in production of 30%, their value always remained above that for 1960. Consequently, this information—and we have no other figures by which to assess the position of Italian silk production—gives the impression that the protective measures granted by the Commission were always generous and, until the last financial year the figures for which are known, offered the Italian silk industry opportunities for expansion.

Basically this observation also deals with the applicant's second complaint: that the Commission neglected to provide for an additional customs duty of 2.6%

on unbleached cloth and correspondingly on other silk-based products *in order to protect the Italian processing industry*. The available statistical data do not show that the Italian silk processing industry's need for protection was not met. On this point I refer to the figures concerning temporary imports of raw silk (notably from Japan) which represents approximately three-quarters of the production of raw silk from Italy (cf. Protocol No VIII in conjunction with Table A drawn up by the applicant): since 1960 these figures have remained virtually static. Similarly, I refer to the observation by the Commission that more than half the silk manufactured in Italy is exported, which proves that when it uses raw materials at world market prices the Italian processing industry is quite capable of withstanding competition and consequently only merits protection by reason of the higher prices of raw silk from Italy.

In fact, as regards the second point, the applicant does not invoke an alleged crisis within the Italian processing industry resulting from higher processing costs. Rather, it puts forward general considerations regarding the necessary structure of customs tariff systems justifying the general application of additional customs duties for the benefit of the processing industry. It is for this reason that on 1 January 1957 a duty of 13% was imposed in Italy on raw silk while in order to protect the processing industry duties varying between 16% and 18% were imposed on imports of woven silk fabrics. For the same reasons other countries which are not producers of raw materials would, the applicant argues, impose customs duties on the import of finished products. The Decision of the Council of 4 April 1962 based on Article 235 of the Treaty which provided for the imposition of a countervailing charge on certain goods resulting from the processing of agricultural products and the Commission's consequential proposal which was intended to replace this regulation took into account the idea of additional customs protection for the benefit of the industry. Finally, the applicant claims that the practical result of the refusal to grant specific additional protection for the Italian processing industry will be that this particular element of the customs duty will cease to be applicable in Italy before the expiry of the transitional period, although other Member States are bound to continue the gradual abolition until the end of this period. If it is desired to maintain a preference in favour of the national industry for Italy as well, then only a *gradual* reduction of the specific customs protection applying to processing can be insisted on.

It is easy to see that this view is based upon an incorrect interpretation of Protocol No VIII to the Agreement of 2 March 1960. As I have already said, it seems impossible to deduce from this Protocol a guarantee allowing the Italian silk industry to offer goods in the Common Market under the same conditions as the corresponding industries of other Member States. The fact that Protocol No VIII quotes Article 226 of the Treaty as well as the circumstances and manner in which the measures are to be put into effect is decisive. Therefore, in the case of 'difficulties . . . which are serious and liable to persist in any sector of the economy' protective measures may only be taken 'in order to rectify the situation and adjust the sector concerned to the economy of the Common Market'; for this reason, as the Commission rightly emphasizes, it is necessary to seek the exact causes of these difficulties and adjust the protective measures accordingly. It is precisely in this sense that we must interpret the fact that Protocol No VIII restricts the 'isolation of the Italian market in relation to other Member States' to a period of six years, that is, it only provides for *temporary* emerg-

ency regulations which must, in theory, disappear before the end of the transitional period.

For this reason, that is, having regard to the special nature of Article 226, it is inappropriate to rely upon the *general* regulations concerning the import of processed agricultural products for the purposes of interpretation, since it is based upon Article 235 of the Treaty and follows other rules. It seems likewise mistaken to refer to the normal structure of customs systems. In this connexion the Commission also observes that it is possible to prove that specific and additional customs protection existed everywhere for the benefit of processing industries. It goes so far as to provide figures for the customs tariff applied in Italy on 1 January 1957 and for the rates fixed in the Agreement of 2 March 1960 concerning silk. Finally, let me say in passing that not only is the applicant's argument, which breaks down the customs duties into their different elements, extremely problematic and impossible to achieve in practice, but it also contradicts the fundamental concept of the Treaty which considers the customs duties actually applied on 1 January 1957 in their entirety and goes on to provide for the gradual abolition of customs protection. In any case I do not see how this idea could be reliably applied within the framework of Protocol No VIII to the portion of the duty imposed to protect the Italian processing industry.

In the light of the above I must say first that from the information available it cannot be proved that the Commission misused its powers by applying Article 226 for the benefit of the Italian silk industry, that is, by regulating the position of Italian producers which owes its special nature to the fact that the prices of raw materials are higher in Italy. This information, together with the fact that in calculating the various rates of customs duty the Commission rounded its figures up, that it neglected to take account of the transport costs of woven silk fabrics produced outside Italy, that it always based its calculations on products manufactured from up to 100% silk and consequently applied the customs duty so calculated to composite fabrics and finally the fact, stated in the oral proceedings, that in 1963 the difference between the prices of raw silk from Italy and from Japan was in reality smaller than that adopted by the Commission in its Decision, enable me to find that the Commission showed a large measure of generosity in fixing the measures intended to protect the Italian silk industry.

III — Summary and conclusions

For these reasons I am of the opinion that the application of the Italian Government for the annulment of the Decision of the Commission of 22 May 1964 should be dismissed as unfounded. Likewise the application to suspend the operation of the contested Decision should be dismissed. The applicant must bear the costs.