REPORT FOR THE HEARING
delivered in Case 181/85 *

I — Facts and procedure

Article 46 of the EEC Treaty provides that where in a Member State a product is subject to a national market organization or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State, a countervailing charge is to be applied by Member States to imports of that product coming from the Member State where such organization or rules exist, unless that State applies a countervailing charge on export. The Commission is to fix the amount of those charges at the level required to redress the balance.

In September 1984, the Commission, taking the view that the conditions for the application of Article 46 were met in regard to exports from France to other Member States of non-denatured ethyl alcohol of agricultural origin, adopted Regulation No 2541/84, fixing a countervailing charge on imports of that product into the other Member States at a level determined in such a way as to cover the difference between the lowest free-at-frontier price at which representative quantities of non-denatured alcohol from France were sold on the markets of the other Member States and the price of such alcohol which would have been considered the normal price on the Community markets if competition had not been distorted (equilibrium price).

Article 5 (2) of Regulation No 2541/84 provided that the Commission was to adjust the charge in the event of significant changes in the factors used in fixing the charge.

In spring 1985, having found, on the basis of information supplied by the Member States, that the free-at-frontier prices of non-denatured French alcohol had increased only slightly while the equilibrium price had shown a significant rise, the Commission adopted Regulation No 644/85, which increased the amount of the countervailing charge from 0.04 ECU per % volume per hectolitre to 0.075 ECU per % volume per hectolitre.

On 4 June 1985, the Government of the French Republic brought an application for the annulment of Regulation No 644/85 on the ground that it infringed Article 46 of the EEC Treaty as interpreted by the Court of Justice.

By an order of 23 October 1985, the Court granted the United Kingdom leave to intervene in support of the defendant's conclusions.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the French Government and the Commission to furnish it with certain information and statistics by 1 July 1986.

* Language of the Case: French.

II — Conclusions of the parties

The *French Republic* claims that the Court should:

Declare null and void Commission Regulation No 644/85 of 12 March 1985 amending Regulation (EEC) No 2541/84 fixing a countervailing charge on imports into the other Member States of ethyl alcohol of agricultural origin produced in France.

The *Commission* contends that the Court should:

(i) Declare inadmissible the submissions whose real purpose is to call in question the legality of Regulation No 2541/84 as adopted on 4 September 1984;

(ii) Dismiss the application as unfounded;

(iii) Order the applicant to pay the costs.

The *United Kingdom*, intervener, claims that the Court should:

(i) Declare all the submissions in the application admissible;

(ii) Dismiss the application as unfounded;

(iii) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — *Admissibility of certain submissions in the application*

The *Commission* disputes the admissibility of all the submissions put forward by the applicant with the exception of the first on the ground that they are in fact directed against Regulation No 2541/84, any action against which is now time-barred. Those submissions relate to the legality of the criteria for calculating the countervailing charge, which had already been established by Regulation No 2541/84 and were simply repeated in Regulation No 644/85.

It states that a submission directed against a regulation amending a previous regulation which laid down the general criteria for the calculation of a countervailing charge can only be admissible if the amending regulation changes the general criteria contained in the amended regulation or misapplies them. That is clearly not the case here.

Nor can the French Government rely on a Member State's right under Article 184 of the EEC Treaty to raise an objection of illegality against a regulation in proceedings brought against another regulation.

After noting that the French Government did not produce that argument until the reply, and is therefore out of time, the Commission argues that Article 184 creates a remedy for individuals and not for Member States, which by virtue of Article 173 may challenge any regulation without establishing a particular interest. Furthermore, the French Government is all the more unjustified in relying on the provisions of that article in that it was closely involved in the drafting of the general criteria laid down by Regulation No 2541/84, of which it could therefore not be unaware.

The *Government of the French Republic* contends that the Commission is wrong in maintaining that factors which are common to two regulations (in this case Regulations Nos 2541/84 and 644/85) can no longer be challenged in an application directed against the amending regulation if they have not been challenged in proceedings against the original regulation. It states that that argument would have the effect of excluding from the review of the Court of Justice any provision in a regulation incorporating earlier provisions which have not

previously been challenged and would result in the creation of veritable legal 'fossils'; it would enable unlawful provisions to be repeated indefinitely and would prevent the Court of Justice from exercising its full powers of review.

In any event, the French Government means to base its action expressly, in so far as necessary, on the objection of illegality provided for by Article 184 of the EEC Treaty. There is nothing to prevent such an objection from being raised not only by an applicant who would not have had *locus standi* to bring an application to declare the regulation at issue void but also by an applicant such as a Member State which would have been entitled to bring such an action but omitted to do so or failed to do so within the time-limits. That possibility, which is not excluded by the letter of Article 184, was moreover implicitly accepted by the Court of Justice in Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, in which an objection of illegality was dismissed for the sole reason that there was no sufficient legal connection between the regulations challenged by way of objection and the regulation against which the application was directed.

In this case, however, there is such a connection whichever of the three different formulations used by the Court in its judgments in order to define its nature is referred to: there is no doubt that Regulation No 2541/84 forms the legal basis of Regulation No 644/85, that the latter constituted an application of the former, or that there is a direct legal connection between the two regulations.

In the view of the *United Kingdom*, the fact that the preambles to Regulations Nos 2541/84 and 644/85 refer to the same criteria does not prevent the two regulations from being separate enactments. Regulation No 644/85 is based directly on Article 46 of the Treaty and not on Regulation No 2541/84, and the adoption of the same reasoning to justify both regulations does not detract from the fact that they are legally distinct.

It is certainly true that if criteria are laid down generally and in advance in a regulation they cannot be challenged after the expiry of the time-limit applicable to that regulation on each occasion on which they are applied in subsequent regulations. The position is different, however, if criteria are adopted afresh each time the occasion arises for a charge to be applied. In that case each regulation may be challenged within the time-limit applicable to it in respect of both the criteria adopted and the way in which it applies them.

Regulation No 2541/84 did no more than adopt the general criteria in question as the basis for the charge which it laid down, and those criteria were not made obligatory for the future. Indeed, an unsuitable measure might have resulted if a different approach had been taken, in view of the essentially temporary nature of the measures taken under Article 46 of the Treaty.

It cannot be right to treat criteria adopted in successive regulations as if they had been adopted generally and in advance at the outset simply because this might have been so had circumstances led the Commission to proceed differently.

With regard to the objection of illegality provided for in Article 184, the United Kingdom states that the terms of Article 184

should not be construed as being subject to an implied exception of uncertain extent such as would be entailed by the requirement that the Member State should have been 'surprised' by the application of the measure in question. Unlike the situation in proceedings brought by the Commission against a Member State under Article 93 (2) of the Treaty, there is no basis for the exception to Article 184 for which the Commission argues in this case. Furthermore, such a requirement would introduce an element of unpredictability into the exercise of the Court's jurisdiction which would itself be contrary to the principle of legal certainty.

B — *Substance of the case*

First submission

The *French Government* denies that an increase in the rate of the charge was made necessary by the fact that the initial rate of 0.04 ECU per % volume per hectolitre had no effect on French exports. The Commission's decision is based on an error of fact inasmuch as all the statistics show a considerable drop in French exports in the period following September 1984.

The *Commission* states that the French Government is wrong to compare the period from September 1984 to February 1985 with the corresponding period in 1983-84. On the basis of the data supplied by France itself, it may be seen that exports from that country did not diminish in the period immediately following the introduction of the charge, which must be taken as the relevant period for establishing the effects of the charge.

By noting, in the third recital of the preamble to Regulation No 644/85, that the volume of exports from France to other Member States 'has not followed a downward trend', the Commission demonstrated its concern to achieve an equilibrium in trade flows by ensuring not only that the charge should prevent French alcohol from disturbing the markets in the other Member States but also that French exports to those markets should not be significantly reduced solely because of its prohibitive effect.

The *United Kingdom* observes that a comparison of the period from September 1983 to February 1984 with the period from September 1984 to February 1985 is not an appropriate indicator of the effects of the charge introduced in September 1984 because it can be distorted by too many variables. The correct comparison to make is between the figures for September 1984, which are not likely to have been greatly affected by the charge introduced towards the middle of that month, and those for later months. The pattern of French alcohol exports between September 1984 and February 1985 does not in fact show a downward trend.

Second submission

The *French Government* argues that as a result of taking the view, contrary to technical and economic realities, that the alcohol market related to a single or at least a homogeneous product, the Commission was led on the basis of an arbitrary criterion to set the lowest price at which representative quantities of non-denatured alcohol was marketed.

In fact there are at least four grades of alcohol, which are distinguished by the industrial processes used in producing them and by their values in use, have different markets and are sold at different prices.

Prices below FF 300 per hectolitre relate essentially to less sought after grades of alcohol which are not representative of the average value of French exports, nearly all of which, moreover are priced at or above the price arrived at by subtracting the charge from the equilibrium price.

The *Commission* states that in the period taken into account in fixing the amended charge, and with the exception of certain deliveries of neutral alcohol of above-standard quality, the import price of French alcohol has always been below the market price in the Member States.

It was therefore entirely rational not to be guided by those exceptional cases but to adopt as a criterion the lowest offer price provided that representative quantities were sold at that price.

In any event it would be impossible to determine the representative nature of the quantities sold on the market in relation to the various grades of alcohol, the markets for each grade and the different prices ruling in each case. Even the Member States are unable to do so in their own markets, and the Commission is no better placed for the whole of the Community in view of the fact that the price of alcohol depends on its use in certain Member States and on its intrinsic quality in other Member States.

The *United Kingdom* considers that even though it is true that different grades of alcohol command different prices, price relationships exist not only within the same grades but also between the various grades, by virtue of the fact that they constitute different qualities of the same basic product.

The charge fixed by the Commission was designed to quantify the distortive effect of the French national organization of the market at the lower end of the alcohol price range. In view of the price relationships between the various grades, a charge calculated in that way is equally appropriate to offset such effects at different price levels.

The French Government's contention that a number of different charges should be fixed according to the type of alcohol concerned and the Member State of importation, and hence that a system of surcharges and rebates should be introduced in trade in French alcohol between other Member States, is incompatible with the discretion which the Commission must be allowed and with the pressing practical considerations which led it to act as it did.

Furthermore, even if the purposes of Article 46 might be better served by such a system, it does not automatically follow that the adoption of a single charge was unlawful; the Commission was under a duty to have regard to the administrative feasibility of the system it adopted both from its own point of view and from that of the national customs administrations.

Third submission

In the view of the *French Government*, the Commission fixed the equilibrium price on the incorrect basis that the Community constitutes a homogeneous market for non-denatured alcohol which would be

governed by the free play of market forces if competition was not subject to distortions created by a Member State. In fact the market for non-denatured alcohol in the Community displays quite different characteristics from one Member State to another (for example there is a national organization of the market in the Federal Republic of Germany and in Italy, while there is only one producer in the United Kingdom and in the Netherlands). That being the case, it is economically impossible to determine for the common market as a whole a single reference price corresponding to what would be the normal price in the market if competition were not distorted.

A more practical solution would have been to adopt a reference price for each Member State or group of States and to fix different charges for the Member States on that basis.

The *Commission* recognizes that the conditions of alcohol production vary considerably between one Member State and another for a number of reasons having to do with economic, agricultural, or historical or social factors.

Although it might still have been possible for the Commission to base its calculation on the market prices in the other Member States, which were broadly identical, when it first fixed a countervailing charge for French alcohol in 1976, in 1984 that was not possible, in view of the considerable disparities in market prices which had arisen, without adopting a complicated system of charges fixed at a different rate for each importing Member State together with surcharges and rebates in trade in French alcohol between Member States other than France. The Commission therefore preferred, as the only practicable solution, a criterion based on an equilibrium price which would be the normal price on Community markets in free-market conditions.

Fourth submission

The *French Government* accuses the Commission of having determined the equilibrium price in the common market on the basis of an unrepresentative statistical measure, namely the pattern of prices for imported cane molasses in the last quarter of 1984, despite the fact that alcohol of agricultural origin produced in the Community, and particularly in France, is generally derived from beet molasses of Community origin.

Moreover, even if that basis of calculation was appropriate, it would also be necessary to bear in mind that the cif Rotterdam price adopted for that purpose by the Commission is merely a nominal price of a purely indicative nature and that fluctuations in that price in the last quarter of 1984 did not influence the price of alcohol produced in that period. In fact alcohol producers obtain their raw material under annual contracts which, in France, are concluded in the spring.

If the Commission's analysis were correct French alcohol exports would have shown an increase at a constant rate of charge, which was not the case. Finally, disparities in price between Community beet molasses and imported cane molasses are not reflected to a significant extent in the prices of the products processed from those molasses, and hence the fluctuations in the price of cane molasses at Rotterdam did not entitle the Commission to raise the rate of the countervailing charge.

The *Commission* replies:

(a) The quantities of cane molasses used in alcohol production in the Community are greater than the percentages indicated by the French Government;

(b) In the Community there is a fairly constant relationship between the price of domestic beet molasses and imported cane molasses;

(c) The only existing market quotations are those of the Rotterdam market;

(d) Although it is true that producers of alcohol derived from molasses enter into annual contracts, nothing prevents them from obtaining supplies for additional production on the Rotterdam market.

The *United Kingdom* considers that the Commission acted properly. Cane molasses and beet molasses are interchangeable raw materials. Furthermore, beet molasses, which contains nitrogen, is normally up to 15% dearer than cane molasses, which requires the addition of nitrogen. In those circumstances there is an automatic relationship between the price of imported molasses and that of beet molasses. It is that price which will, under normal market conditions, determine the cost of the raw material in alcohol production.

There is no doubt that the cif Rotterdam price is a reliable indicator of both the level and the trend of production costs for molasses alcohol in the Community, and market forces ensure that that price is consistent with both prices for cane molasses outside the Rotterdam market and prices for beet molasses.

The price variations on markets other than the Rotterdam market may well be explained by the influence of factors such as the sugar content or the size of the relevant consignments.

In response to the French Government's argument that fluctuations in the price of molasses between September and December could have no effect on alcohol prices because producers obtain their supplies under annual contracts, the United Kingdom states that that is not the case in the United Kingdom. Furthermore, it would be normal for a producer to increase the price of his products following an increase in the cost of his raw materials. The fact that that is not the practice in France shows that the national organization of the market insulates French producers from the play of market forces.

Fifth submission

The *French Government* considers it odd and illogical that Regulation No 644/75 should exempt from the charge only alcohol 'denatured in accordance with the relevant provisions in France', although exports of French alcohol for denaturing in other Member States cannot disturb the markets in those countries either.

On that point the *Commission* states that it imposed a charge on alcohol of agricultural origin denatured in another Member State after having been exported from France in order to prevent deflection of trade which might occur in breach of Community customs rules.

That view is entirely shared by the *United Kingdom*, which states that, seen as a raw material for the production of denatured alcohol, French alcohol of agricultural origin is in direct competition with alcohol of agricultural origin produced in other Member States and should accordingly bear the charge laid down under Article 46 of the Treaty.

Sixth submission

The *French Government* points out that the charge is applied uniformly to all French alcohol exports, including those priced above the equilibrium price which the Commission regards as representative of the market in the absence of distortions of competition.

It argues that such an indiscriminate application is contrary to Article 46 because it is impossible to see why exports at prices above the market price should disturb the market. Nor is such an application justified by the need to offset the advantages created by the national organization of the market, which are not in fact enjoyed by alcohol of the kind referred to in this submission.

Since the 1982/83 production year, the French Service des alcools has taken into account the quantities produced by each undertaking in such a way that the fixed cost element is spread over total production and not merely the quantities purchased by the Service des alcools.

The *Commission* states that the following considerations justify its refusal to exempt from the charge certain types of alcohol of superior quality and price:

(a) The alcohol in question indirectly benefits from the advantages created by the national organization of the market;

(b) The French market organization for alcohol encourages the export of non-quota alcohol ('alcools libérés') because it would be subject to a national duty (the 'soulte') if it were marketed in France;

(c) The reference to a theoretical price and not the price actually paid by the importer is the only practicable criterion.

The *United Kingdom* refers to the arguments already put forward in favour of a single charge and against the adoption of differentiated charges. The calculation of a flat-rate charge is based on the premise that the specific charge will be imposed on all imports of French alcohol irrespective of the price agreed under a particular contract. The fact that even exports at a price higher than the equilibrium price attract the charge is not of itself sufficient to cast doubt on the validity of the basis on which the charge was calculated and applied.

The French Government has not demonstrated that in imposing a single charge based on the difference between a representative price and a theoretical price the Commission has exceeded the bounds of its discretion. It follows that the imposition of a charge on French alcohol exported at a price above the equilibrium price cannot be called in question.

IV — Replies of the parties to questions put by the Court

By letter dated 26 June 1986, in reply to questions put to it by the Court, the Commission stated that it was not in a position to challenge the correctness of the data furnished by the French Government on trends in exports of non-denatured French alcohol of agricultural origin and on the prices at which alcohol was exported because the only information available to its staff was and continues to be that provided by the importing Member States. Taken as a whole, that information, which is annexed to the Commission's letter, is proof if proof be needed that import prices of French alcohol have always been below market prices in the importing Member States. The Commission also submitted a table showing price movements for imported cane molasses and Community beet molasses.

The Government of the French Republic did not reply to the questions which had been put to it.

G. Bosco
Judge-Rapporteur