from the fact that the common organization has not been fully achieved, in order to enable products covered by the organization to circulate on equal terms without thereby artificially distorting competition between producers in different regions.

2. The incomplete state of the common organization of the market in sheepmeat and goatmeat, which is due in particular to the fact that a particular support measure, in this case the variable slaughter premium, is reserved for producers of a specific region and is liable to improve their competitive position, may call for corrective measures to restore equality between producers in all regions so far as their competitive position is concerned. Such measures, such as charging, on exportation, an amount equivalent to the aforementioned premium (clawback), in so far as they constitute obstacles to the free movement of goods to which any common organization of the market must aspire, are necessarily of an exceptional nature and therefore their scope must be strictly limited to their specific objective in the context of bringing about market conditions which come closest to those of an internal market.

Consequently, Article 9 (3) of Council Regulation No 1837/80, as amended by Council Regulation No 871/84, must be understood as prescribing solely the recovery of the amount of variable slaughter premium for sheep actually paid in respect of an animal when it leaves the region in which the premium was granted. It follows that Commission Regulations Nos 3451/85 and 9/86 must be declared void in so far as they require clawback to be charged, on departure from region 5 (Great Britain), on animals of the ovine species and products thereof for which variable slaughter premium has not been and cannot be paid.

REPORT FOR THE HEARING
delivered in Case 61/86 *

I — Facts

1. Council Regulation No 1837/80 of 27 June 1980 on the common organization of the market in sheepmeat and goatmeat (Official Journal 1980, L 183, p. 1) established a common organization of the markets for sheepmeat and goatmeat, with a price system and a trading system for the products listed in Article 1 of the regulation. Initially, the regulation distinguished five regions, the United Kingdom being region 5, and provided for three types of market support mechanism:

* Language of the Case: English.

(i) an annual premium intended to offset the loss of income suffered by sheepmeat producers in a particular region during a given marketing year;

(ii) intervention measures in the form of aid for private storage and purchases by the intervention agency of certain products;

(iii) a variable slaughter premium for sheepmeat, payable under Article 9, in regions where the intervention measures were not applied. The premium could be paid by the Member States when the prices recorded on the representative markets were below a guide level corresponding to 85% of the basic price. The amount of the premium was to be equal to the difference between the guide level and the market price recorded in the Member States concerned. The necessary measures were to be taken to ensure, in the event of payment of the premium, that an amount equivalent to the premium was charged for the products in question where such products left the territory of the Member State concerned. That amount is generally referred to as 'clawback'.

2. Since region 5 was the only region where the variable slaughter premium was paid, Council Regulation No 871/84 of 31 March 1984 (Official Journal 1984, L 90, p. 35) replaced Article 9 of Regulation No 1837/80 with a new provision allowing the United Kingdom to pay a slaughter premium for sheep in region 5 in so far as it does not apply the provisions concerning intervention measures in the form of purchases by the intervention agencies.

Article 9 (3), as amended, provides that where the premium is paid the Commission is to take the necessary measures to ensure that an amount equivalent to the premium actually granted is charged on all products referred to in Article 1 (a) and (c) of Regulation No 1837/80 (as amended) when they leave the region.

Under Article 9 (4) the Commission, acting in accordance with the procedure laid down in Article 26 of the regulation, is to adopt detailed rules for the application of Article 9. These rules may provide, in particular, for the measures necessary to prevent any disturbance of trade resulting from the application of the premium system.

3. Rules for applying the variable slaughter premium were adopted by Commission Regulation No 2661/80 of 17 October 1980 (Official Journal 1980, L 276, p. 19). That regulation was replaced by Commission Regulation No 1633/84 of 8 June 1984 laying down detailed rules for applying the variable slaughter premium for sheep (Official Journal 1984, L 154, p. 27).

Under Article 1 (2) of the regulation the United Kingdom had the power to determine, subject to the definition given in Article 1 (1), the categories, qualities and weight limits of animals in respect of which the premium was to be payable.

Article 4 (1) of Regulation No 1633/84 provides that for the United Kingdom, the amount to be charged on departure from region 5 of fresh or chilled sheep carcasses (referred to in Article 1 (a) and (c) of Regulation No 1837/80) in respect of which the premium has been paid is to be fixed each week by the Commission at an amount equal to that of the premium fixed for the week during which the departure of the products in question took place.

Article 4 (2) provides for the lodging of security in respect of such products at a level not less than the forecast amount of the premium for the week preceding that during which departure takes place.

Article 4 (3) provides that the amounts applicable to the other products referred to in Article 1 (a) and (c) of Regulation No 1837/80 are to be determined by employing the coefficients referred to in Article 12 (3) and Article 13 (3) of Regulation No 1837/80.

4. By Regulation No 3451/85 of 6 December 1985 amending Regulation No 1633/84 laying down detailed rules for applying the variable slaughter premium for sheep (Official Journal 1985, L 328, p. 23), the Commission amended in particular Article 1 (1) and (2) of Regulation No 1633/84 and added a new paragraph 4 to Article 4 of that regulation.

Article 1 (1), as amended, withdraws the power given to the United Kingdom by Regulation No 1633/84 and itself determines the sheep in respect of which the premium may be paid. Article 1 (2) provides that the premium may not be paid in respect of (a) rams or carcasses of rams or other male sheep or their carcasses having the characteristics of that of a ram, and (b) ewes or their carcasses. Article 1 (2) (a), however, allowed the United Kingdom to grant the premium in respect of rams or other male sheep or their carcasses exported from region 5.

The new Article 4 (4) is worded as follows:

'In the case of carcasses of animals referred to in Article 1 (2) (b) the amounts referred to in paragraphs 1 and 2 shall be calculated on the basis of a coefficient of 0.5. This coefficient shall be applied without prejudice to the coefficients referred to in paragraph 3.

The Commission shall review the said coefficient forthwith if there is any disruption to intra-Community trade.

Furthermore, the said coefficient shall be reviewed every six months in the light of the development of trade between region 5 and the other regions of the Community and the trend in prices. Any decision to adjust the said coefficient shall be taken in accordance with the procedure laid down in Article 26 of Regulation (EEC) No 1837/80.'

5. Commission Regulation (EEC) No 9/86 of 3 January 1986 amending Regulation (EEC) No 1633/84 laying down detailed rules for applying the variable slaughter premium for sheep (Official Journal 1986, L 2, p. 14) deleted Article 1 (2) (a) of Regulation No 1633/84 and replaced Article 4 (4) of that regulation with the following new paragraphs (4) and (5):

'(4) For carcasses of animals other than those which may qualify for the premium, the amounts referred to in paragraphs 1 and 2 shall be determined using the following coefficients:

(i) lambs attaining a carcass weight less than or equal to 14 kg: 0.10;

(ii) animals referred to in Article 1 (2) (a): 0.5;

(iii) animals referred to in Article 1 (2) (b): 0.5;

(iv) other animals: 0.5.

These coefficients shall be applied without prejudice to the coefficents referred to in paragraph 3.

(5) The Commission shall review these coefficients referred to in Article 4, first indent, forthwith if there is any disturbance in intra-Community trade.

Furthermore, the Commission shall review these coefficients every six months in the light of the development of trade between region 5 and the other regions of the Community and the trend in prices. It shall take any decision to adjust these coefficients in accordance with the procedure laid down in Article 26 of Regulation (EEC) No 1837/80.'

6. Since in Great Britain the variable slaughter premium was not generally paid in respect of ewes, from 20 October 1980, the date on which Regulation No 1837/80 came into force with regard to the variable premium, until 9 December 1985, the date on which Regulation No 3451/85 came into force, the United Kingdom operated a system of 'special export certification' (SEC). Under the SEC arrangements a variable premium was paid on the exportation of ewes and ewe carcasses, products covered by Article 1 (a) and (c) of Regulation No 1837/80, thus offsetting the 'clawback'. The United Kingdom based that system on its power under Article 1 (2) of Regulation No 2661/80, and subsequently of Regulation No 1633/84, to determine the categories, qualities and weight limits of animals in respect of which the premium was payable. Regulations Nos 3451/85 and 9/86 put an end to that system, with the effect that rams and ewes and their carcasses were no longer eligible for the variable premium but remained subject to clawback.

II — Written procedure and conclusions of the parties

1. The application of the United Kingdom of Great Britain and Northern Ireland was lodged at the Court Registry on 4 March 1986.

2. By an order of 18 June 1986 the Court gave the French Republic leave to intervene in support of the conclusions of the Commission.

3. 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. It nevertheless requested the Commission to reply in writing to a number of questions; the Commission acceded to that request within the prescribed period.

4. The United Kingdom of Great Britain and Northern Ireland, applicant, claims that the Court should:

(a) Declare that Commission Regulations (EEC) Nos 3451/85 and 9/86 are void in so far as they require 'clawback' to be charged in respect of animals and products for which variable slaughter premium has not been and cannot be granted;

(b) Order the Commission to pay the costs.

5. The Commission, defendant, claims that the Court should:

(a) Dismiss the application as unfounded;

(b) Order the applicant to pay the costs.

6. The French Republic, intervening, claims that the Court should:

(a) Dismiss the application of the United Kingdom;

(b) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

In its application, based on Article 173 of the EEC Treaty, the United Kingdom of Great Britain and Northern Ireland puts forward four main submissions:

A — Lack of competence on the part of the Commission;

B — Misuse of powers;

C — Breach of the fundamental principles of the EEC Treaty with regard to the free movement of goods;

D — Breach of Article 190 of the EEC Treaty.

A — *The Commission's lack of competence*

1. The United Kingdom submits that by adopting Regulations Nos 3451/85 and 9/86 in their present form the Commission went beyond the powers conferred on it by the Council and infringed the last indent of Article 155 of the EEC Treaty.

The United Kingdom states that Article 9 (3) of Council Regulation No 1837/80, as amended by Regulation No 871/84, defines the nature of 'clawback' and imposes a duty on the Commission to implement it within the parameters laid down. It is a charge intended to recover, on export, an amount of money equivalent to any variable premium actually granted on a product in the sector in question. In other words, its purpose is to neutralize so far as possible any premium granted on a product in Great Britain in the event that such a product is exported. Any attempt to justify the imposition of clawback on products in respect of which variable premium has not been granted must fail in view of the wording of Article 9 (3), which speaks of an amount equivalent to the premium 'actually granted'.

The United Kingdom asserts that the Commission's entire thesis in relation to clawback is based on a fundamental misunderstanding of the plain meaning of Council Regulation No 1837/80, as amended.

In stating that the words 'actually granted' merely refer to a general condition of availability of variable premium in Great Britain, the Commission completely ignores the fact that this general condition is already clearly and unequivocally contained in the opening phrase: 'Should the premium referred to in paragraph 1 be paid in region 5 . . .'. The contrast between the first passage 'should the premium . . . be paid in region 5 . . .' and the second passage '. . . an amount equivalent to the premium actually granted . . .' reflects precisely a change from the general to the specific. If those two passages had precisely the same meaning, one of them would be redundant; that would be surprising, especially since the words

'actually granted' were specifically added when Article 9 (3) was amended by Council Regulation No 871/84.

According to the United Kingdom, if the words 'actually granted' do not refer to an 'actual grant' of premium on the product which is to be subjected to clawback, then they have no meaning at all.

The Commission also attributes unwarranted significance to the word 'all' in the phrase '... all products as referred to in Article 1 (a) and (c) ...'. That phrase merely defines the products upon which clawback must be charged provided that the other preconditions are satisfied. One of the preconditions is the exportation of the product in question; another is embodied in the words 'actually granted'.

It is also clear from the wording of Article 9 (3) that the amount to be clawed back is defined by reference to the amount 'actually granted'.

The United Kingdom states that it has made plain its objections to the Commission's interpretation on a number of occasions, and refers in that respect to Annex 7 to its application.

With regard to the Commission's assertions regarding the United Kingdom's attitude during the brief period in 1980 between the adoption of Regulation No 1837/80 and the introduction of the SEC arrangements, the United Kingdom fails to see how they assist the Commission's argument.

With regard to the letters of 13 October 1980 and 25 January 1985 cited by the Commission, there is no indication that the United Kingdom accepted that the Commission's interpretation was correct. The United Kingdom emphasizes that the SEC arrangements were established with the Commission's consent, and the Commission has recognized throughout that the charging of clawback creates a barrier to trade if no corresponding payment of premium has been received.

In the United Kingdom's view, its interpretation is supported by additional factors.

(a) In the second recital in the preamble to Council Regulation No 1837/80 the word 'recovered' is used, which indicates that the regulation is concerned with something which has been paid.

(b) Similarly, Council Regulation No 1311/85 of 23 May 1985 on the granting of a premium for the slaughter of certain adult bovine animals in the United Kingdom (Official Journal 1985, L 137, p. 20), clearly indicates, albeit in slightly different words, that clawback of premium only applies where premium has actually been paid. The complete consistency in that regard between the sheepmeat legislation and the beef and veal legislation certainly corresponds to the view of the Council, as can be seen from the Council's observations in Case 106/81 *Kind* v *EEC*. The purpose of clawback is the same in both cases; the United Kingdom does not, however, suggest that the two sectors are identical markets in all respects.

(c) There is no suggestion in the judgment of 15 September 1982 in Case 106/81 *Kind* v *EEC* [1982] ECR 2885 or in the Opinion

of the Advocate General in that case that clawback could conceivably be charged on animals in respect of which the premium had not and could not have been paid.

The United Kingdom does not deny that both the Advocate General and the Court stated that the purpose of clawback was to offset the effects of the variable premium. That case, however, says the United Kingdom, concerned the charging of clawback on products in respect of which the premium had been paid. In order to attempt to justify the levying of clawback in the present case the Commission is obliged to strain the scope of the word 'effects' used by the Advocate General and the Court in the *Kind* case, but it is faced with two obstacles:

(i) the words of Article 9 (3) requiring clawback of 'an amount equivalent to the premium actually granted', and

(ii) the statement of the Court to the effect that clawback is designed to 'offset exactly the effects of the slaughter premium'.

It is impossible to calculate 'exactly' the effects of a premium upon a product in respect of which it has not been paid. This is purely a matter of speculation. The applicant refers in this regard to the observations of the intervener, which considers that the amount of clawback necessary in order to offset exactly the effects of variable premium on animals in respect of which it has not been paid is 100% of the amount of the premium.

According to the United Kingdom, it is not surprising that in its defence the Commission makes no attempt to justify the rates of clawback with economic or any other kind of evidence, since the rate of 50% was chosen entirely at random.

(d) The United Kingdom goes on to argue that even if Council Regulation No 1837/80, as amended, authorizes clawback in respect of animals on which premium has never been paid, a sliding scale is prohibited by the words of the regulation, which require the clawback to be 'an amount equivalent to the premium actually granted'. The premium is not granted at different rates for different products but only at a flat rate.

The United Kingdom adds that the method chosen results in an internal conflict in the existing version of Commission Regulation No 1633/84 between Article 4 (1), under which the amount to be charged is to be equal to the amount of the premium, and Article 4 (4), which now provides that only a proportion of that sum is to be charged in respect of animals on which premium is not paid.

2. The Commission disputes this submission. It points out first of all that in its analysis of Article 9 (3) of Regulation No 1837/80, as amended by Regulation No 871/84, the United Kingdom lays stress on the words 'actually granted', but completely fails to discuss the requirement that clawback should be charged on all products as referred to in Article 1 (a) and (c). The United Kingdom's argument in fact leads to the conclusion that the word 'all' means 'some'.

According to the Commission, the words 'actually granted' refer not to the amount of the clawback but to conditions which must be fulfilled for the clawback to come into operation. Article 9 (3), it says, provides

that where variable premium is actually granted on any product covered by Regulation No 1837/80, the effects of that premium on all products falling within Article 1 (a) and (c) of Regulation No 1837/80 must be offset by the charging of clawback where such products leave the country where the premium was paid. There is no condition to the effect that clawback should only be charged on products in respect of which premium has been paid.

In the Commission's view, in order correctly to understand the significance of the words 'actually granted' it is necessary to understand the conditions under which the premium is calculated and granted (and under which, accordingly, clawback is charged). In reality the calculation necessary for the Commission to fix the variable premium is made a posteriori by the United Kingdom authorities. At the moment of export from Great Britain the definitive level of the premium for that day is not known, and therefore the definitive level of clawback cannot be charged. The British authorities thus charge a temporary amount of clawback on the day of export and, when the final calculation of the rate of clawback valid for that day has been made, the difference between the definitive amount and the temporary amount will be charged or reimbursed to the exporter as the case may be.

Simply put, the words 'actually granted' ensure that the amount of clawback charged reflects the level of the premium as it is finally calculated for the day of export, so that clawback is not charged on the basis of the provisional rate of premium, which was the only rate known on the actual day of export.

The Commission points out that the United Kingdom has never questioned the validity of clawback on prepared or preserved meat referred to in Article 1 (c) of Regulation No 1837/80, as amended, yet many such products are not composed of meat from animals on which variable premium was granted.

The Commission further states that during the period between the entry into force of Regulation No 1837/80 and the introduction of 'special export certification' (SEC), that is to say a period during which Article 9 (3) covered only products referred to in Article 1 (a), the United Kingdom charged clawback on all products covered by Article 1 (a) of Regulation No 1837/80 when they left Great Britain, regardless of whether or not premium had been paid on them. It also appears from a letter of 13 October 1980 from the Minister for Agriculture of the United Kingdom to the Commission and a letter of 25 January 1985 from the United Kingdom Permanent Representation to the Director-General for Agriculture at the Commission that the United Kingdom accepted that clawback could be charged on products on which premium had not been paid.

The Commission argues that it is precisely because clawback was paid on all products leaving Great Britain whether or not the premium had been paid on them that the United Kingdom established the SEC arrangements in order to ensure that all sheepmeat subject to clawback had previously received premium.

The Commission states that it has never claimed that the United Kingdom approved of the clawback system. It denies having

recognized that the charging of clawback creates a barrier to trade if no corresponding payment of premium has been received.

With regard to the other factors put forward by the United Kingdom in support of its interpretation, the Commission replies as follows:

(a) The use of the word 'recover' in the second recital in the preamble to Regulation No 1837/80 does not necessarily imply that the exporter must previously have been paid the premium; it is sufficient to compare the term 'export refund'. Nor should it be forgotten that the reduced rate of clawback recovers the indirect benefit resulting from the payment of the premium on other products.

(b) The Commission sees no reason why the basic regulation for sheepmeat should be interpreted by reference to the basic regulation on beef. The detailed analysis of the Community sheepmeat market made by the Court and the Advocate General in Case 106/81 (referred to above) shows that it is a highly individualistic market and considerably less uniform. The impact of the two systems is also very different. But the most important difference is the wording of the respective regulations. Article 9 (3) of Regulation No 1837/80, as amended, calls for clawback to be charged 'on all products as referred to in Article 1 (a) and (c)' when they leave Great Britain, whereas Article 3 of Regulation No 1311/85 includes the all-important words 'on which [the premium] has been paid'. That vital difference makes the United Kingdom argument to the effect that the two texts have exactly the same meaning totally untenable.

(c) The Commission considers that its position is supported by the judgment of 15 September 1982 in Case 106/81, referred to above, which upheld the validity of Article 9 of Regulation No 1837/80, and the subsequent amendments made to Article 9 by Regulation No 871/84 have no effect on the points at issue in this case. Both the judgment itself, at paragraph 21, and the Opinion of the Advocate General ([1982] ECR at p. 2928) emphasize in general terms the need to confine the effects of the variable premium system to the region where the variable premium is granted. It is naïve to suggest that a premium paid on a large proportion of the United Kingdom production of sheepmeat (about 85%) has no effect on the price of sheepmeat on which the premium is not paid.

With regard to the obstacles said to stand in the way of its interpretation, the Commission refers to its previous analysis of the phrase 'an amount equivalent to the premium actually granted'. As for the difficulty of finding a way to 'offset exactly the effects of the slaughter premium', the Commission states that it was under a duty to deal with the market disturbances which undoubtedly existed. Faced with the diametrically opposed analyses of France and the United Kingdom, it was obliged to make a decision, and the market has shown that its decision was correct.

(d) According to the Commission, the rate of clawback must reflect exactly the effects of the premium on the various products concerned; it is thus inevitable that the rate of clawback will vary. Clawback is charged at a rate of 100% on all products in respect of which premium is paid; the rate of clawback varies from 50% to 10% only on products in respect of which premium has not been paid.

The Commission denies that there is any internal contradiction in Regulation No 1633/84, as amended, since Article 4 (1) of the regulation ensures that the premium which is used as a reference point for the clawback is that fixed at a later date for the day on which export took place.

3. The French Republic supports, in general, the Commission's arguments, but does not share the latter's opinion regarding the assessment of the effects of the variable premium on the price of animals and meat in respect of which the premium has not been paid. There is a relationship between the price of lambs and that of ewes which merely reflects the difference in quality between the two types of meat and does not affect the price of those products in themselves. The application of clawback at a rate of 100% to all categories of animals exported merely maintains that relationship at its normal level while compensating for the effects of the variable premium.

B — *Misuse of powers*

1. The United Kingdom submits that Article 9 (3) of Regulation No 1837/80, as amended, empowers the Commission to take the necessary measures to ensure that premium granted is recovered on the exportation of the animals in respect of which it is paid. It appears, however, that the Commission has used those powers for a different purpose, that is, to maintain exports of mutton from region 5 (Great Britain) to region 2 (France) at a particular level in relation to the total quantity of sheepmeat products exported from region 5 to region 2. As evidence for that assertion the United Kingdom submits the minutes of meetings of the Management Committee for Sheep and Goats and the first draft of Commission Regulation No 3451/85, and states that that evidence shows that the Commission's purpose in abolishing the SEC arrangements and imposing clawback on animals now excluded from the payment of the premium was at all times to restrict the level of ewe exports from Great Britain to France to a specific level.

At the meeting of the management committee on 4 November 1985 the Commission's representative, in submitting the draft regulation, stated that the regulation included a procedure for revision of the clawback of 50% on exported ewes 'in the event of the percentage of ewe exports to France in relation to the total percentage of exports to that Member State diverging by 22% (bracket 19.5 to 24.5)'.

At the meeting on 11 November 1985 the Commission's representative indicated that no reference should be made in the regulation to the numerical bracket triggering the review procedure, but stated that this was a purely formal modification.

Nothing said or done by the Commission following those meetings indicates that the Commission changed its initial purpose or its principles of review.

The United Kingdom emphasizes that Article 9 (4) simply empowers the Commission to adopt detailed rules; such detailed rules cannot undermine or conflict with Article 9 (3).

The applicant considers that the true nature of the Commission's error is revealed in the passage of its defence where the Commission acknowledges that it uses the clawback mechanism 'in the interests of prudent management of the market'. That is

manifestly a misuse of clawback, regardless of whether or not market management would be appropriate when carried out by legitimate means.

According to the United Kingdom, the maintenance of a quota on the export of ewes and other animals from one Member State to another is not a permissible use of the power to implement clawback given to the Commission by the Council regulation and also infringes the last indent of Article 155 of the EEC Treaty.

2. The Commission replies that the arguments put forward by the United Kingdom show a fundamental misunderstanding of the management committee procedure. The validity of the regulations in question must be judged on the basis of the texts adopted and not by reference to other earlier texts which were rejected by the Commission itself and thus do not form part of a continuous legislative process leading up to the adoption of those regulations. It was only at the meeting of 26 November 1985 that the Commission's staff presented the text which was to become Regulation No 3451/85.

The Commission denies that its intention, in adopting the contested regulations, was to freeze trade between Great Britain and France at particular levels; indeed, at present the level of trade is outside the alleged bracket. Its aim was in fact to avoid disturbances in trade which had arisen as a result of the common organization of the market in sheepmeat.

One of the objectives of the common agricultural policy set out in Article 39 of the Treaty is the stabilization of markets, and Article 9 (4) of Regulation No 1837/80, as amended, makes it clear that the Commission is obliged to take action to prevent any disturbance of trade in livestock, meat or prepared products resulting from the application of the premium system.

The Commission states that in adopting Regulations Nos 3451/85 and 9/86 it complied with its obligations under those two provisions. Furthermore, it undertook to examine the coefficients every six months and also in the event of any disturbances. That again shows that the Commission was not trying to freeze the situation in intra-Community trade.

3. The French Republic considers that the United Kingdom's application contains no evidence capable of supporting its complaint.

C — *Breach of the fundamental principles regarding the free movement of goods*

1. The United Kingdom submits that it is now well established that the Community institutions are bound by the fundamental principles of the Treaty relating to the free movement of goods and in particular those which prohibit customs duties and quantitative restrictions and charges and measures having equivalent effect, and that those principles apply within the context of the common agricultural policy, in particular where there is a common organization of the market.

The United Kingdom contends that in so far as the contested regulations impose clawback upon the export from Great Britain of products which are not eligible for variable premium, such clawback constitutes a charge having equivalent effect

to a customs duty within the meaning of Articles 9, 12, 13 and 16 of the EEC Treaty, and in particular Article 9 (1), and is therefore prohibited. The justification for that prohibition, as the Court of Justice stated in paragraph 14 of its judgment of 1 July 1969 in Joined Cases 2 and 3/69 *Diamantarbeiders* v *Brachfeld* [1969] ECR 211, is based on the fact that any pecuniary charge — however small — imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods.

That point of view, says the United Kingdom, is confirmed by the judgment of 15 September 1982 in Case 106/81, referred to above. In that case the Court held that clawback did not constitute a charge having an effect equivalent to a customs duty but was in reality intended to offset exactly the effects of the slaughter premium, thereby enabling products from the Member States or regions in which the premium was paid to be exported to other Member States without disturbing their markets. That is not the case here, since the contested Commission regulation provides for the 'recovery' of sums which have never been paid.

The United Kingdom goes on to argue that the imposition of clawback on ewes and other sheep not eligible for variable slaughter premium is intended to and does in fact have the effect of a quantitative restriction on exports of such products to other Member States and in particular to France. In fact, as the Commission itself has stated, exports of ewes from Great Britain to France have fallen by 50%, and the United Kingdom's statistics confirm that.

The contested regulations also provide that the Commission is to re-examine the clawback coefficients in order to take account of the development of trade between Great Britain and other regions of the Community. In practice that means that the Commission intends to alter the coefficients if the level of exports of ewes from Great Britain to France goes beyond the specific level which the Commission seeks to maintain.

The United Kingdom is aware, in reference to the judgments of the Court of 22 March 1977 in Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557 and 28 January 1981 in Case 32/80 *Officier van Justitie* v *Kortman* [1981] ECR 251, that normally a single measure does not fall within the scope of both Articles 9 to 16 and Articles 30 to 36 of the EEC Treaty. However, in the circumstances of this case, where a monetary charge on exports is intended to confine within certain limits the level of trade between two regions of the Community, the measure in question may as an exception to the general rule be capable of falling within both Articles 9 to 16 and Articles 30 to 36.

2. According to the Commission the Court held in its judgment of 15 September 1982 in Case 106/81 referred to above, that the clawback provided for in Article 9 (3) of Regulation No 1837/80 is not a charge having equivalent effect to a customs duty since it is in reality intended to offset exactly the effects of the slaughter premium. The Commission regulations comply precisely with the wording of Regulation No 1837/80 by providing for the charging of clawback on sheepmeat leaving Great

Britain at a rate which reflects the exact effect of the premium in each case.

Similarly, the provisions on clawback in Regulations Nos 3451/85 and 9/86 do not constitute a measure having equivalent effect to a quantitative restriction on exports and imports; it is hardly surprising that trade should have fallen back after the necessary corrective measures were taken.

The Commission states that there is no procedure for reviewing the rate of clawback to take account of the development of trade between Great Britain and other regions of the Community. It cannot be concluded, as the United Kingdom asserts, that the contested regulations mean in practice that the Commission intends to alter the rate of clawback if the level of exports of ewes from Great Britain to France goes beyond the specific level which the Commission seeks to maintain. No reference is made to France and no undertaking is given actually to change the rate of clawback. According to the Commission, the provisions on re-examination should rather be seen as an undertaking to keep the whole situation under review in the interests of prudent management of the market.

3. The French Republic argues that the United Kingdom has put forward an incorrect interpretation of the judgment of the Court of 15 September 1982 in Case 106/81 and that the mechanism for offsetting market disturbances cannot be applied in a purely mechanical manner but must take account of the direct and indirect economic effects of the premium, regardless of whether premium has been paid in respect of the products giving rise to disturbance.

D — *Infringement of Article 190 of the EEC Treaty*

1. The United Kingdom submits that the Commission has failed to give any adequate reasons or explanation in support of important propositions set out in the regulations, and has thus infringed Article 190.

Preamble to Regulation No 3451/85

Proposition (a):

A premium granted for the slaughter of lambs automatically has an effect on the prices of other sheep

That proposition cannot be accepted, and even if there is such an effect its extent is wholly speculative. It is not even clear that the price of lamb is invariably affected by payment of variable premium for lambs. The Commission's reference to automatic effects on prices is unacceptable without a statement outlining the economic background envisaged.

According to the United Kingdom, the removal of variable premium would not automatically result in producers seeking to obtain an increased price for mutton or lamb. Its effect on the market for lamb would depend very much on the nature of the support measures and trading arrangements which took the place of the premium. The effect would in any event be difficult to predict with any precision. The possible indirect effects on the market for ewe meat are even more imponderable, particularly since lamb and mutton are not regarded as substitutes by United Kingdom consumers; lamb is considered a luxury

product, while most ewe meat is sold to the pet-food market.

The United Kingdom goes on to argue that the Commission disregards the fact that variable premium is not a cumulative subsidy; it is in the nature of a payment on account of the annual premium paid to producers in all regions of the Community. Removal of the variable premium would therefore automatically increase by a corresponding amount the funds available for distribution to producers as annual premium. The total return to producers would thus remain unchanged. The availability of variable premium in Great Britain does not mean that producers in that region receive a higher level of support; it is only the method of support that differs.

The United Kingdom adds that Article 5 (2) of Regulation No 1837/80, as amended, contains a mechanism to ensure that the market support is in fact restricted to lambs.

According to the United Kingdom's calculations the variable premium represented 22.4% of the total income of sheepmeat producers in 1985, and fell to 12.7% in the first half of 1986. The weighted figures are 21.94% and 16.63% respectively, significantly lower than the figures quoted by the Commission.

In the beef sector, it says, a figure of 10% is more accurate than the 5% figure put forward by the Commission.

Proposition (b):

History shows that an additional reduction in the prices of other sheep in region 5 can cause serious disturbances in trade with the other Community regions and particularly in the traditional trade with region 2

The United Kingdom submits that the Commission's failure to identify the 'serious disturbances' and to explain what is meant by 'traditional trade' represents a fundamental flaw in the reasoning underlying the regulation.

The United Kingdom states that it is not aware of any serious disturbances in trade. As can be seen from Annex 9 to the application, there is no level of trade with France which can legitimately be called 'traditional'. Before the end of 1980 no particular level of trade emerged. It should be emphasized first of all that since 1980 trade in ewes and ewe carcasses between Great Britain and France has been carried on with the grant of a variable premium clawed back at 100%. If that is the 'traditional trade', it is now being distorted by the unwarranted decision to impose clawback where no corresponding payment can be made. Secondly, if the 'serious disturbances' referred to by the Commission relate to the market for lamb in France, that market is not significantly affected by imports of mutton from Great Britain. The market for lamb and the market for mutton in France are two independent markets.

The United Kingdom observes that it is not surprising that sheepmeat exports from Great Britain to France rose after Regulation No 1837/80 came into operation, since until then the marketing in France of

sheepmeat products from Great Britain was unlawfully restricted. However, that increase reached a peak in 1984, and in 1985, when the Commission adopted the contested measures, the exports in question declined in relation to their 1984 level.

With regard to the field studies carried out by the Commission, the United Kingdom considers that the fact that from time to time better quality cuts of ewe meat may be sold alongside French lamb does not prove that one is a substitute for the other. The evidence available to it suggests that the French market for lamb is highly segmented and that segmentation between the lamb and mutton sectors is even more pronounced.

In 1985, on the Rungis market, the wholesale price of good quality lamb was nearly 80% higher than the price of ewe meat, which is quite distinct in colour, texture and meat cover. According to the United Kingdom's enquiries, the markets for mutton and for lamb are entirely different. Almost all ewe meat from Great Britain sold in France is destined for institutional outlets such as schools, hospitals, canteens, old people's homes, etc. while French lamb is sold mainly to restaurants and 'up-market' consumers. Far from being linked, prices of mutton and lamb often move in contrary directions.

According to the United Kingdom, it is therefore most unlikely that mutton from Great Britain has ever been responsible for displacing significant quantities of French lamb. That is confirmed by the fact that in the period January to August 1986 French lamb prices fell, although imports of ewes from Great Britain were reduced by 45% as a result of the imposition of clawback. The French market has continued to weaken since August 1986; the Commission's action has not resolved the problems facing French lamb producers. The United Kingdom considers that a more likely reason for the weakness of French lamb prices towards the end of 1985 was the presence on the French market of an increasing quantity of very cheap Irish lamb. That factor, together with structural weaknesses in the French lamb sector, compounded by two years of drought, has inhibited the competitiveness of French lamb producers.

Finally, the United Kingdom states that the French Government, in its observations, has neither alleged nor shown that imports of ewe meat from Great Britain have caused disturbances on the French market. The only disturbance has been that caused by the unlawful imposition of clawback by the Commission, resulting in a drastic reduction (50%) of exports of ewe meat from Great Britain.

Proposition (c):

Clawback must be charged even in respect of exported products which do not benefit directly from variable premium

In respect of this proposition the United Kingdom refers to its arguments in support of its first submission.

Proposition (d):

Ewes obtain indirect benefit from variable premium and clawback should be charged on them at a rate which takes this into account

The United Kingdom argues that neither in Great Britain nor in France do lamb and mutton constitute a single market; they are in fact quite separate markets. The Commission should therefore have indicated the extent of the alleged benefit and the manner in which it arises.

Proposition (e):

A 50% rate of clawback is appropriate to prevent disturbances through 'artificial trade' between region 5 and the other regions of the Community

According to the United Kingdom, the Commission has not explained why it suddenly became necessary, at the end of 1985, to impose a financial charge on certain exports while at the same time excluding the products in question from entitlement to the corresponding premium. The Commission has given no indication how it arrived at the figure of 50%. Furthermore, the Commission has not indicated what criteria are to be applied in carrying out the review which it considers necessary in order to take account of the development of trade.

Finally, the United Kingdom submits that these remarks in regard to insufficient reasoning apply equally, *mutatis mutandis*, to Regulation No 9/86. In particular, the imposition of differential rates of clawback without adequate explanation is unacceptable.

2. The Commission replies as follows:

(a) The effect of the variable premium granted to lambs on the prices of other sheepmeat products

According to the Commission, in Great Britain producers of ewes and producers of lambs are not two separate and distinct categories, and a producer's income depends on his total production of lambs and ewes. If a substantial part of his production, that is to say lambs, did not receive a subsidy in the form of a premium, the producer would seek to protect his income by increasing his prices. That is clear from the fact that variable premium can account for up to 40% of a producer's total return; in recent marketing years the variable premium has represented 35% to 29% of the market price. It is clear that in order to maintain his income and to avoid an abrupt increase on any one product, a producer will be forced to raise the prices of all his products and not only that of lambs.

The Commission submits that in arguing that the variable premium is no more than a payment on account of the annual premium paid to most Community producers the United Kingdom disregards the advantage which British producers derive from the fact that the variable premium is paid virtually immediately. Furthermore, the United Kingdom is well aware that British producers benefit from two types of market support, variable premium and annual premium, while producers in other regions must be content with the annual premium alone, since intervention buying exists only in theory and is not applied in any Member State.

(b) Disturbances in trade

According to the Commission, after Regulation No 1837/80 had been in operation for about a year exports of sheepmeat from Great Britain to France were increasing and two-thirds of that increase were attributable to an increase in exports of ewes. Ewes,

which represent only 15% of United Kingdom sheepmeat production, were accounting for a much larger percentage of total sheepmeat exports from Great Britain to France, and that percentage was increasing, as may be seen from the figures submitted. Ewes were being disposed of to a large extent not on the domestic market but on the market of another Member State. Even though the level of trade varied according to the relative values of the currencies concerned, the Commission considers that the situation resulting from the increase in British exports to France constituted a disturbance of trade within the meaning of Article 9 (4) of Regulation No 1837/80, as amended.

Field studies undertaken in France by the Commission's staff have shown that consignments of sheepmeat from Great Britain consisted usually of a mixture of lamb meat and ewe meat. Certain of the better quality cuts of ewe meat were put on sale along with equivalent cuts of domestic French lamb. Apart, perhaps, from colour the cuts were strikingly similar, except that British ewe meat was considerably cheaper than French lamb, a fact which proved attractive for French consumers. The effect was thus not on the mutton market in France but on the lamb market, as the French authorities have argued.

In reply to those studies the United Kingdom puts forward only speculation and 'evidence' which is nowhere produced. An enquiry regarding the Rungis market is irrelevant since the high quality meat in question would be imported directly without passing through Rungis. In the Commission's view it was misleading to state that lamb prices fell between January and August 1986. The graph submitted as Annex IV to the rejoinder shows that until approximately July 1986 there was considerable similarity between the 1986 and 1985 prices and that the price variations referred to were no more than the usual seasonal movements. The change which began around July and August 1986 is purely the result of currency fluctuations.

The Commission considers that the volume of imports of Irish sheepmeat was not such as to have the effect on lamb prices complained of by the French Government; it emphasizes that although the figures for 1985 show a decline in British exports to France and an increase in Irish exports, the figures for the first few months of 1986 show that the situation has been reversed.

The Commission does not consider that there is a 'correct' level of trade between France and Great Britain but remains convinced that there was, until the adoption of Regulations Nos 3451/85 and 9/86, a serious disturbance of trade between France and Great Britain, as is again emphasized by France in paragraph 12 of its observations.

The Commission considers that the action taken by it has remedied the problem referred to it by the French authorities, and it is interesting in that regard to consider what has happened since the adoption of the regulations. Contrary to the United Kingdom's forecasts, there has been no

disastrous fall in the domestic price of ewes in the United Kingdom. Prices are firm and have in fact continued to increase. Although the level of exports of ewes from Great Britain to France has of course fallen, that fall has not been disastrous, and the level of exports is about 50% of the previous year's high level.

(c) Clawback on products not having received premium

The Commission refers to its arguments in regard to the first submission.

(d) Benefit from premium derived by ewes

The Commission reiterates that producers in Great Britain in most cases raise both lambs and ewes, and the subsidy which they receive in the form of premiums for lambs influences, in the context of their total income from all their production, the prices which they seek for their ewes. According to the Commission, the availability in France of good quality but cheap ewe meat had had a depressing influence on the domestic lamb market, on which prices were higher.

(e) The 50% rate of clawback

The Commission states that towards the end of 1985 it was increasingly concerned by what it considered to be the serious disturbance of trade between Great Britain and France, and that in such circumstances Article 9 (4) of Regulation No 1837/80, as amended, obliged it to take action. In attempting to resolve the problem the Commission was faced with differing and often conflicting assertions on the state of the sheepmeat market from the Member States mainly concerned, and in particular from the United Kingdom and France.

The Commission is satisfied that subsequent events and the state of the market confirm that it made the correct decision. Even so, it included in its regulations wide review clauses in order to ensure that the figure of 50% would be reviewed and corrected if it proved wrong. In the event trade has stabilized and a review has not been necessary. Faced with a difficult situation in a very complicated market the Commission considers that it acted in exemplary fashion as a prudent manager of the market.

3. The French Republic also considers that the submission must be rejected for the reasons set out above.

IV — Replies to questions put by the Court

1. The Commission was requested to submit to the Court the data on the basis of which it fixed the coefficients laid down in Regulation No 9/86. The Commission explains that at the relevant time it was concerned by the distortions taking place on the market in sheepmeat, the scope of which is indicated by the statistics produced during the written procedure. Since the solutions proposed by the States principally concerned were diametrically opposed, the Commission, after studying the problem on the spot in France, preferred to adopt an intermediate solution and to include wide review clauses in its decision. In the event the Commission's approach was vindicated and no modification has been considered necessary.

2. The Commission was requested to submit to the Court the data which led it to maintain in its defence that the slaughter premium for lambs accounts for 40% of the income of sheep producers and to admit in its rejoinder that it varies between 29 and 35% from year to year. It was also requested to explain how those figures could lead to the same result, namely the fixing of the coefficients laid down in Regulation No 9/86. The Commission replied that a distinction must be drawn between the average figure which could amount to up to 35% and the actual maximum figure which could reach 40%. What is important for producers is not the average figure but the actual figure on sale since most producers specialize in supplying a specific market, for example the spring market, the Easter market or the summer market.

3. The Commission was requested to state whether or not, during the period in question, there were disturbances in trade which led it to adopt the contested regulations. It explains that faced with the problems experienced by the market in sheepmeat at the relevant time it proceeded in two steps; since ewe meat clearly posed the more serious problem, it began by dealing with that before turning to other products. If it had dealt with all products at once the economic realities would have become distorted.

4. The Commission was requested to state in what manner the recitals in the preambles to the contested regulations take account of the points raised in the Court's first, second and third questions. The Commission replied that the fifth recital in the preamble to Regulation No 3451/85 sets out the factors which led the Commission to fix the coefficient for ewe meat. The sixth recital refers to the circumstances in which the coefficients for other products will be fixed. The first two recitals in the preamble to Regulation No 9/86 refer to the procedure followed in fixing the various coefficients.

The second recital in Regulation No 3451/85 refers to the effect of the premium on the price of animals which do not benefit from the premium and to the serious disturbances in trade. Since the aim of Regulation No 9/86 is merely to complete the task begun by Regulation No 3451/85 it is the latter to which reference is made in the second recital in Regulation No 9/86.

F. Schockweiler
Judge-Rapporteur