OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 31 January 1989 *

My Lords,

1. In this action the Commission seeks a declaration under Article 169 of the EEC Treaty that by including in the area of production of 'Caldaro' or 'Lago di Caldaro' DOC wine certain districts in the province of Trento in which wine has not traditionally been marketed under that designation, the Italian Republic has failed to fulfil its obligations under Regulation (EEC) No 823/87 (formerly Regulation No 338/79).

The Community legislation

2. Regulation No 24 of 4 April 1962 on the progressive establishment of a common organization of the market in wine (Official Journal, English Special Edition 1959-62, p. 123) recognized in its preamble that 'it accords with the policy of encouraging quality production that the required characteristics of a quality wine produced in specified regions should be defined'. Accordingly, Article 4(1) provided that before 31 December 1962 the Council should adopt Community rules regarding quality wines produced in specified regions. According to Article 4(2), those rules were to take into account 'traditional conditions of production' and were to be based on the following factors:

'(a) demarcation of the area of production,

(b) vine varieties,

(c) cultivation methods,

(d) wine-making methods,

(e) minimum natural alcoholic strength,

(f) yield per hectare,

(g) analysis and assessment of organoleptic characteristics'.

3. Article 4(3) permitted Member States, in addition to the above factors and taking into account 'fair and traditional customs', to determine 'such other conditions of production and characteristics as shall be obligatory for quality wines produced in specified regions'.

* Original language: English.

4. Comprehensive rules governing quality wines produced in specified regions were in fact first adopted in Council Regulation No 817/70 of 28 April 1970 (Official Journal, English Special Edition 1970 (I), p. 252), which was replaced by Council Regulation (EEC) No 338/79 of 5 February 1979 (Official Journal 1979, L 54, p. 48). Regulation No 338/79 was in its turn replaced by Council Regulation (EEC) No 823/87 of 16 March 1987 (Official Journal 1987, L 84, p. 59).

5. The second paragraph of Article 1 of Regulation No 823/87 provides that '"quality wines produced in specified regions" ... means wines which satisfy the provisions of this regulation and those national rules adopted pursuant thereto'. Article 2(1) lays down the factors which, 'taking into account the traditional conditions of production', must be relied on in determining rules for quality wines produced in specified regions. These factors are the same as those in Article 4(2) of Regulation No 24/62 set out above, except that to factor (e) — minimum natural alcoholic strength — the words 'by volume' are added. Article 2(2) of Regulation No 823/87, again echoing Regulation No 24/62, permits Member States to determine other conditions of production 'taking into account fair and traditional practices'.

6. Article 3(1) of Regulation No 823/87 defines the term 'specified region' as:

'a wine-growing area or combination of wine-growing areas which produces wine possessing special quality characteristics and whose name is used to designate those of its wines which are defined in Article 1'.

7. Article 3(2) requires that 'each specified region shall be precisely demarcated, as far as possible on the basis of the individual vineyard or vineyard plot'. In carrying out the demarcation, Member States are to take into account 'the factors which contribute towards the quality of the wines produced in those regions, such as the nature of the soil and subsoil, the climate and the situation of the individual vineyard or vineyard plot'.

8. Council Regulation No 823/87 replaced Regulation No 338/79 after the Commission had instituted proceedings under Article 169. However, the provisions of Regulation No 823/87 set out above are identical to the corresponding provisions of Regulation No 338/79.

The Italian legislation

9. The Italian enabling Law No 116 of 3 February 1963 (GURI 58, 1.3.1963, p. 1104) provided for the adoption by delegated legislation of rules concerning the use of designations of origin. A decree of the President of the Republic of 12 July 1963 (Supplemento ordinario alla GURI 188, 15.7.1963, p. 3) laid down general rules governing the use of designations of origin, including the designation 'denominazione di origine controllata'. Article 1, second paragraph, of that decree provided that:

'The area of production referred to in the previous paragraph may, in addition to the territory indicated by the designation of origin in question, include neighbouring territories where analogous natural conditions exist there and, on the date of entry into force of the present decree, wines have been produced and marketed there under the same designation for at least 10 years, provided that those wines possess analogous physico-chemical and organoleptic characteristics and have been produced from grapes originating from traditional vine varieties in the area according to the methods generally used in that area.'

10. Article 4 of the decree of 12 July 1963 provides for the recognition of designations of origin and for the approval of rules of production by presidential decree. Under Article 6, the request for recognition is to be submitted by interested parties who must supply documentary evidence concerning *inter alia* local use of the designation, wine varieties and wine-making methods, and the characteristics of the wine produced. The Regional Committee for Agriculture and the National Committee for the Protection of Designations of Origin are required to report, on the request for recognition.

11. A decree of the President of the Republic of 23 March 1970 (GURI 115, 9.5.1970, p. 2872), preceding by one month the adoption of comprehensive Community rules, recognized the designation 'Caldaro' or 'Lago di Caldaro' as a 'denominazione di origine controllata' and adopted and approved rules for the production of the wine. Article 3 of those rules, which are annexed to the decree, provides that the area of production is made up of the area defined in an earlier decree of 23 October 1931 (GURI 290, 17.12.1931), supplemented by neighbouring areas which fulfil the conditions of Article 1, second paragraph, of the decree of 12 July 1963 (set out in paragraph 9 above). The area of production was accordingly defined to include territory in 12 communes in the province of Bolzano and seven in the province of Trento, namely: Rovere della Luna, Faedo, San Michele all'Adige, Lavis, Giovo, Lisignago and Cembra. Under Article 8 of the rules of production, the additional specification 'classico' is reserved for wine produced in the nine Bolzano communes which formed the 'traditional' area of production defined in the decree of 23 October 1931.

12. A further decree of the President of the Republic of 22 September 1981 (GURI 92, 3.4.1982, p. 2607) extended the area of production by the addition of further territory in Lavis and Giovo and by the inclusion of territory in an eighth Trentine commune, Mezzocorona.

13. Following the adoption of the decree of 23 March 1970, a number of traders of the province of Bolzano brought legal proceedings challenging the competence of the State in relation to the recognition of DOC wines and arguing that the inclusion in the area of production of territory in the province of Trento was illegal because it was not traditional to market wine there under the names 'Caldaro' or 'Lago di Caldaro'. By a judgment of 13 February 1973 (No 39) the Italian Council of State dismissed those proceedings on both counts.

The contentions of the parties

14. The Commission does not question the essential conformity with Community legislation of the Italian enabling law of 3 February 1963 and the Presidential decree of 12 July 1963. Nor is there any dispute as to the inclusion in the area of production, by the decree of 23 March 1970, of the 'traditional' production zone bordering the Lake of Caldaro and of other territory in the province of Bolzano. The dispute centres on the inclusion, by the decrees of 23 March 1970 and 22 September 1981, of certain territory in the province of Trento. In the Commission's view, in including that territory Italy failed to comply with Community rules and, indeed, with superior Italian legislation, namely the decree of 12 July 1963. The latter point is relevant because, as indicated above, in order to meet the definition of a quality wine produced in a specified region, a wine must comply not only with the provisions of Regulation No 823/87 but also with the national rules adopted pursuant to that regulation.

15. The Commission argues that it follows from the Community legislation that the 'specified region' is the primary factor which distinguishes and characterizes a quality wine produced in a specified region. For that reason, the demarcation of the region, i. e. of the area of production, must be carried out selectively. When determining the area of production, Member States may go beyond the territory indicated by the designation in question and include neighbouring territory. However, in so doing they must observe two fundamental criteria. The first is that the use of the designation must correspond to tradition; the second is that both the territory and the wine produced there must be homogeneous.

16. According to the Commission, it is not traditional to produce and market wines of the designation 'Caldaro' or 'Lago di Caldaro' in the province of Trento. Moreover, the characteristics of the part of the area of production situated in the province of Trento — as regards the soil and subsoil, the climate and situation of the vineyards — are clearly different from those of the part situated in the province of Bolzano, with the result that the wine produced in Trento also differs from that produced in Bolzano.

17. The Italian Government for its part raises a preliminary issue concerning the scope of supervision by the Commission and of judicial control by the Court. It argues that the Community legislation leaves the Member States the power to demarcate the areas of production, subject only to the requirement that in exercising that power they should take account of the criteria laid down in that legislation. According to the Italian Government, it follows that the only review which may be carried out by the Commission, or, by extension, the Court, is to verify whether or not those criteria have been taken into account.

18. Alternatively, in the event that the Court does not accept its objection on the preliminary issue, the Italian Government argues that the actual demarcation of the

area of production did conform to Community rules and notably the criteria of traditional use and homogeneity referred to above. The Italian Government does not question the Commission's interpretation of the Community legislation or its identification of the relevant issues.

The preliminary issue

19. Essentially, the argument of the Italian Government is that where, in a case such as the present, Community legislation provides a framework for Member State action, laying down certain criteria to govern the exercise of its powers, the supervisory role of the Commission and, by extension, the power of review of the Court, are limited to verifying whether a Member State has taken those criteria into account in its appraisal of the factual situation. It is not, however, for the Commission or the Court to seek to verify whether the appraisal itself, or the outcome of the appraisal, are in compliance with Community requirements, since to do so would involve undertaking a new technical assessment and thus a usurpation of the proper role of the national authorities. Once it is established that the Member State has relied on the correct criteria, the Commission or the Court should only intervene if the outcome is manifestly unfair or illogical.

20. The Italian Government appears to be suggesting that the Court should adopt, in Article 169 proceedings of this nature, a similar view of the scope of judicial control to that which it has assumed in relation to the control, under Article 173 of the Treaty, of the legality of the acts of Community institutions involving complex choices of economic policy. However, while it is appropriate in that context that judicial control should be marginal, such a 'hands off' attitude is not appropriate in the context of the enforcement of compliance by Member States with common, binding rules of Community law.

21. Were the Italian Government's argument to be accepted, the rules of Community law such as those at issue in the present case would rapidly cease to be either common or binding. It would be sufficient for a Member State to establish a purely formal compliance with Community obligations, but actual compliance could not be verified either by the Commission or the Court. A Member State would merely have to show — for instance, by an appropriate reference in the recitals of the national legislation — that at some stage it had taken the Community provisions into consideration, and would then be free, in practice, to set aside or ignore any of those provisions which proved inconvenient or inappropriate.

22. It is the task of the Commission, under Article 155 of the EEC Treaty, to monitor and enforce compliance with the rules of Community law. Equally, it is the task of the Court under Article 164 to ensure that those rules are observed. In both cases, the task can only be properly carried out if the Commission and the Court are able where necessary to evaluate the technical findings and assessment of facts undertaken by a Member State when purportedly applying

these rules. I am therefore of the view that the arguments of the Italian Government on the preliminary issue cannot be accepted.

Review and assessment of evidence

23. According to the established case-law of the Court, recently confirmed in its judgment of 22 September 1988 in Case 272/86 *Commission* v *Greece*, in the context of infringement proceedings under Article 169 of the EEC Treaty, it is for the Commission to establish the existence of the alleged infringement. It is therefore necessary to review and evaluate the evidence presented by the Commission and the responses of the Italian Government in order to determine whether that burden has been discharged.

24. In so doing, it is convenient to adopt the framework used by the Commission, which presents its evidence under three heads:

(1) traditional use of the designation,

(2) homogeneity of the area of production and of the wine,

(3) economic consequences of the extension of the area of production.

The first two heads mentioned above correspond to the two fundamental criteria which, in the Commission's view, must be observed in the demarcation of an area of production.

(1) *Traditional use of the designation*

25. The criterion of traditional use of the designation is not laid down expressly in the Community legislation. Article 2(1) of Regulation No 823/87 lays down that the provisions for quality wines produced in specified regions — including provisions governing the demarcation of the area of production — shall take into account 'the traditional conditions of production'. Article 2(2) of that regulation provides that where Member States lay down additional factors characterizing such wines, they shall take into account 'fair and traditional practices'. The Italian decree of 12 July 1963 gives concrete form to the indefinite Community criterion by laying down that an area of production may include not merely the district indicated by the designation of origin in question but also neighbouring areas, provided *inter alia* that on the date of entry into force of the decree wine had been produced and marketed there under the same designation for at least 10 years.

26. According to the Commission, it is not possible to show a tradition of production of 'Caldaro' or 'Lago di Caldaro' wines in Trento going back at least 10 years, i. e. to 1953. Rather, it points out that the 'Schiava' grapes, traditionally used for the production of 'Caldaro' wines in the original pre-1970 area of production, were not common in Trento before 1960 and that the wine produced in that region was sold under the different name of 'Sorni'.

27. In support of its argument, the Commission points to the fact that when in 1959 the Italian and German Governments reached an agreement on the use of the indication 'Auslese' in relation to 'Caldaro' wines, they decided that the wine had to come exclusively from the localities bordering the lake or from adjacent localities. The Commission also refers to three publications on the subject of Trentine wines, dated 1960, 1961 and 1964 (not produced to the Court) which indicate that at the dates in question wines bearing the designation 'Caldaro' or 'Lago di Caldaro' were not produced and marketed in the province of Trento, but rather that the typical designation for wines produced in that province was 'Sorni'.

28. The Commission further points to the discrepancies between the area of production as determined by the decree of 23 March 1970 and the recommendations made, as part of the pre-legislative process, by the Regional Agricultural Committee for the Trentino-Alto Adige Region (comprising the provinces of Bolzano and Trento) and the National Committee for the Protection of Designations of Origin. The Regional Agricultural Committee, in its report of 20 June 1966, recommended against the inclusion of territory in any of the six Trentine communes put forward by Trentine interests. The National Committee recommended the inclusion of three out of the six. The eventual decree, however, as already mentioned, included territory in seven Trentine communes, including, according to the Commission, one that had not even been requested by Trentine producers and dealers, the commune of Lisignago.

29. The Commission has not produced these reports to the Court, but their substance has not been denied by the Italian Government. The Commission has, however, produced a document entitled 'Report of the Regional Subcommittee for the study of the designation Caldaro'. The task of that subcommittee was to consider the representations and evidence submitted by producers and traders in the provinces of Bolzano and Trento and to report on its findings to the Regional Agricultural Committee referred to above. The report is of considerable interest as being the only documentary evidence submitted to the Court which relates specifically to the crucial period of the preparation of the decree of 23 March 1970, and I shall also refer to it when considering the issue of homogeneity.

30. The subcommittee took the view that under the decree of 12 July 1963, the criterion of traditional use of the designation must attach to the actual area to be determined as the area of production. However, on the basis of the documentary evidence presented to it, the subcommittee found that such traditional use as there was appeared to attach to certain firms and wine cooperatives, which were established both in Trento and Bolzano, rather than to identifiable physical areas in Trento. The crucial passage of the report reads as follows:

'It therefore appears to the subcommittee that a tradition of production and sale of a wine analogous to "Caldaro" in the province of Trento is incontestable in a general way; however, it must be pointed out that that tradition attaches less to

certain areas of production than to certain firms or wine cooperatives in the Trentino-Alto Adige region which obtained and still obtain in Trento a wine which is practically identical to that of the zone of Caldaro.'

In the absence of evidence linking the traditional use to actual areas in Trento, the subcommittee was unable to reach a consensus on the demarcation of the area of production in that province.

31. I agree with the view of the subcommittee that it follows from the wording of the decree of 12 July 1963 that the traditional use of the designation should attach to an identifiable physical area rather than merely to identifiable commercial interests. I am also of the view that that requirement is implicit in the Community legislation, notably Article 2(1) of Regulation No 823/87, which in effect provides that when laying down the provisions governing quality wines produced in specified regions — *inter alia* the rules concerning the demarcation of the area of production — Community and national rules are to take account of traditional conditions of production.

32. For its part, the Italian Government produces a number of documents referring to the sale or export of 'Caldaro' or 'Lago di Caldaro' wines from Trento, namely, five invoices with related customs papers bearing dates between 23 May 1952 and 11 December 1956 issued by the Cooperative of Wine Producers of the Trentine commune of Mezzocorona, and two invoices bearing dates in 1969 issued by the Dorigati firm, which is also based in Mezzocorona. Of those documents, the last two, dated 1969, are of too recent an origin to assist in establishing traditional use. As regards the other five, it is notable that they all originate from a single cooperative, thus adding weight to the conclusion of the Regional Subcommittee, mentioned above, that traditional production in Trento, in so far as it existed, was the province of particular cooperatives or traders. It is also notable that all seven invoices originate from Mezzocorona, which was not added to the area of production until the decree of 22 September 1981. Those documents therefore tell us nothing about the extent of traditional production in the seven Trentine communes first included in the 'Caldaro' area of production by the decree of 23 March 1970.

33. The Italian Government also relies on an undated document entitled 'Report on the Production of "Auslese" wine in the Trentino-Alto Adige Region' (comprising the provinces of Bolzano and Trento) which, *inter alia*, is concerned with the results of quality testing carried out on 'Caldaro' wine in 1964. However, there is nothing in the report to confirm that any of the 'Caldaro' wine in question was produced and marketed in Trento.

34. The Italian Government further argues that the fact that there was no mention of 'Caldaro' or 'Lago di Caldaro' in the three publications on the subject of Trentine wine referred to by the Commission is not conclusive because those publications were concerned with bottled wine whereas the

wine in question was marketed in bulk. It adds that it was common practice for traders in the province of Bolzano to buy wine in bulk from producers in Trento and sell or export it as 'Caldaro' wine. In my view, that explanation assists the Commission by confirming that it was not the usage both to produce and market 'Caldaro' wine as such in Trento in the relevant period, as required by the terms of the decree of 12 July 1963, and by further supporting the view of the subcommittee referred to above that such traditional practice as there was attached primarily to certain commercial interests based both in Bolzano and Trento.

35. To sum up on this issue, I am satisfied that the evidence supplied by the Commission provides sufficient indications that any traditional production and marketing of 'Caldaro' wine in Trento in the 10 years prior to the adoption of the decree of 12 July 1963 was not such as to justify the extension of the area of production into Trento on the scale effected by the decrees of 1970 and 1981. It therefore falls to the Italian Government to refute those indications and this, in my view, it has signally failed to do. Although it repeatedly referred, both in written pleadings and at the hearing, to the 'abundant documentation' which, allegedly, supports it on this issue, and which it says was available to the Italian authorities when making the decree of 23 March 1970 and to the Italian Council of State in reaching its judgment of 13 February 1973, it has failed, despite ample time and opportunity (including a specific written question from the Court), to produce any documentary evidence other than that which I have considered above (paragraphs 32 and 33). I must therefore, on the question of traditional use, and subject to certain reservations to which I will return later, find for the Commission.

(2) *Homogeneity*

36. The Commission argues that Regulation No 823/87, and especially Article 3, requires that the demarcation of an area of production for a wine produced in a specified region must be carried out in the light of factors such as the soil and subsoil, the climate and the situation of the vineyards, all of which ensure a certain homogeneity in the area of production and consequently in the wine produced there. That requirement of homogeneity is duly reflected in the decree of 12 July 1963 which allows an area of production to include not only the area indicated by the designation of origin in question but also neighbouring areas, provided that analogous natural conditions exist there. In the Commission's view, there is a distinct lack of homogeneity as regards those factors between the 'traditional' part of the area of production situated in the vicinity of the Lake of Caldaro in the province of Bolzano and the newer part situated in the province of Trento. The Italian Government, while in general not denying the relevance of the factors referred to by the Commission, rejects the Commission's assessment of those factors.

37. In reviewing the evidence, it is again convenient more or less to follow the order adopted by the Commission, as follows:

(a) soil and subsoil,

(b) climate,

(c) situation of vineyards,

(d) characteristics of the wine.

However, since that evidence is voluminous and detailed, I propose to comment on each head as I go along, reserving an overall assessment for the end.

(a) *Soil and subsoil*

38. The Commission points out that in the Trentine communes of Giovo, Faver and Lavis, the soil is porphyritic in nature whereas in the 'traditional' Caldaro area the land is calcareo-morainic. In answer to written questions from the Court, the Italian Government argues that, on the contrary, the geological conditions of production are practically identical, and that some parts of the area of production in both provinces are situated on dolomitic limestone (five Trentine and four Bolzano communes) and other parts are situated on quartziferous porphyry belonging to the 'Alto Adige porphyritic rock formation' (three Trentine and eight Bolzano communes). It also points out that at no time has territory in the commune of Faver been included in the area of production.

39. As regards this head of evidence, the only statement capable of confirmation is that of the Italian Government concerning the commune of Faver: It does indeed appear from the decrees of 23 March 1970 and 22 September 1981 that the area of production has never included territory in that commune, although the recitals to the later decree reveal that the producers of Faver did seek inclusion. For the rest, both parties rely on assertion rather than reference to independent sources, and neither party seeks to explain the meaning of the technical terms used nor the significance of the alleged differences in the soil and subsoil for wine production. At the hearing, a representative of the Commission explained that the alleged differences in the soil and subsoil had implications for the mineral content of the wine and notably the phosphate content. However, he did not explain why a difference in phosphate content should in itself be regarded as significant. I am therefore of the view that the evidence on this issue does not assist the Court one way or the other.

(b) *Climate*

40. The Commission argues that the two climatological factors of essential significance for wine-growing are rainfall and sunshine. It points out that published figures for average rainfall based on readings taken at two meteorological stations in Trento, namely Trente and San Michele all'Adige, and at Bolzano, show that rainfall is significantly higher in Trento. On the other hand,

figures for average hours of sunshine based on readings taken at San Michele all'Adige and at Bolzano show that the amount of sunshine is significantly higher in Bolzano.

41. Specifically, the Commission points out that the tables of readings produced to the Court show that in the years 1921-70 the average annual rainfall at Bolzano was 704 mm, while at San Michele it was 943 mm. Moreover in the years 1957-70 Bolzano enjoyed an annual average of 1 893.30 hours of sunshine, against 1 731.30 in San Michele in 1950-70. The Commission adds that the readings as regards sunshine in fact give an unduly favourable impression of the situation in Trento, since they were taken at San Michele, which is well exposed, whereas most of the Trentine part of the area of production is situated in the Val di Cembra, whose southern aspect is blocked by high mountains.

42. In answer to written questions from the Court, the Italian Government argues that any climatic differences shown by those figures are insignificant and not capable of affecting the characteristics of the wine produced in each province. It also argues that the figures presented by the Commission are misleading in two respects. In the first place, the readings obtained at the meteorological station at Bolzano are irrelevant because that locality is not in the area of production and in any event enjoys exceptional climatic conditions which are not comparable to those of the 'Caldaro' area of production in general. Secondly, the Commission's rainfall figures, which compare readings at San Michele and at Bolzano, ignore the figures for Caldaro itself, which in 1921-70 had an average annual rainfall of 829 mm: the San Michele reading of 943 mm compares more favourably with that figure than with the Bolzano reading of 744 mm. Moreover, if the readings for Caldaro are compared with those for San Michele, the differences in average rainfall in the crucial period for wine production — April to September — appear negligible. It also states that, contrary to the assertion of the Commission, the Val di Cembra enjoys good exposure to sunshine.

43. The figures presented by the Commission undoubtedly show significant differences in average rainfall and number of hours of sunshine between Bolzano and San Michele in Trento. The differences are narrower in the months of April to September but still appear marked. As regards rainfall, the Italian Government has produced readings for Caldaro itself which show, as against San Michele, a comparable level in August, higher rainfall in Caldaro in June and July, but markedly higher levels in San Michele for the rest of the year. To which should be added that the overall average annual figure of 943 mm for San Michele remains substantially higher than the 829 mm registered for Caldaro. The Italian Government has not sought to rely on any figures comparing the level of sunshine in San Michele with that in Caldaro.

44. The figures produced to the Court do, at first glance, appear to establish the existence of significant climatic differences between the part of the area of production

in Bolzano province and the part in Trento. However, I am reluctant to read too much into figures which, bearing in mind the geographical variety of the region, appear sparse and selective. I am particularly concerned by the lack of any readings from a station or stations in the Val di Cembra, and by the fact that the readings for Bolzano itself were taken at a station located outside the area of production.

45. Quite apart from these doubts as to their representative nature, it appears to me that the Commission has made little effort to place the figures in context. The Court is implicitly invited to accept that differences in rainfall or hours of sunshine of the degree shown must have an impact on the production of the type of wine in question; however, the Commission has not adduced any evidence in this respect. I am therefore forced to the conclusion that the evidence as to climatic differences is inconclusive.

(c) *Situation of the vineyards*

46. The Commission asserts that in the 'traditional' Caldaro area, most of the vineyards are at an altitude of 200 to 400 metres, whereas the Val di Cembra, where most of the Trentine vineyards are found, is situated at an altitude of between 450 and 650 metres. The Italian Government gives no precise answer to those figures, but points out that the decree of 23 March 1970 governing the production of 'Caldaro' wine permits the planting of vines up to an altitude of 600 metres. In response to a request from the Court, the Italian Government has produced maps of the two parts of the area of production showing *inter alia* altitude above sea level.

47. Examination of those maps reveals, according to the contour figures, that the 'traditional' area of production in the vicinity of the Lake of Caldaro is situated at between 212 and 556 metres: the area of production in the Val di Cembra, on the other hand, is situated at between 339 and 654 metres. Those figures give some support to the Commission's argument. However, the maps also appear to indicate that the situation of the Trentine area outside the Val di Cembra is broadly comparable in terms of range of altitude with that of the 'traditional' Caldaro area. Moreover, the maps, while delimiting the area of production, do not indicate the distribution of the vineyards. I am therefore once again forced to the conclusion that the evidence before the Court is inconclusive.

(d) *The characteristics of the wine*

48. In the Commission's view, the lack of homogeneity between the two parts of the area of production explains the differences which it alleges exist between the chemical and organoleptic characteristics of the wine produced in each province, notably as regards acidity and phosphate content. In support of its argument the Commission produces two tables. The first was included in the Application and lists 28 'Caldaro' wines of which the majority, from their names, appear to be of Trentine origin. The Commission points out that the Trentine wines (apparently the bottom two-thirds of

the list) show overall a higher level of acidity and a lower phosphate content than the Bolzano wines. The second table, dated 14 January 1983, was produced in answer to written questions from the Court and shows *inter alia* the total acidity of 44 'Lago di Caldaro Auslese' wines in 1982. Of the 23 Trentine wines on the second list (which to some extent overlaps with the first), 15 have a total acidity of 5 mg or more per litre, whereas only 6 of the 21 Bolzano wines listed reach that level.

49. The Italian Government suggests that the figures are misleading because wine in its raw and unrefined state can possess a high level of acidity which can be adjusted prior to bottling. The Commission, on the contrary, asserts that the acidity level of wine is fixed as soon as it is produced. Neither party produces evidence to support its assertion.

50. The Italian Government further points out that since the majority of wines on both the lists produced by the Commission are Trentine, any general findings based on a comparison with the Bolzano wines may not be reliable. I agree that this casts doubt on the representative nature of the figures. The Commission's evidence on this question is, in my view, also flawed by its failure to explain the significance of the possible differences in terms of acidity or phosphate content, and to indicate why other factors such as sugar content (which on the evidence of the second list appears comparable) are to be left out of account.

51. Also damaging to the Commission's case is the report of the subcommittee referred to above (paragraphs 29 and 30). As already mentioned, this is the only document produced to the Court which dates from the period of the preparation of the decree of 23 March 1970 and which purports to give a technical assessment of the evidence then available. At several places in that report, the subcommittee accepts that the wine produced in Trento was analogous to or nearly identical to that produced in Bolzano. In one passage it even states that the Trentine wine possesses 'the same chemical and organoleptic characteristics' as the wine of Bolzano.

52. I therefore conclude that the Commission has failed to establish that the natural characteristics of the part of the area of production in Trento are different from those of the part in Bolzano, or that the wine produced in Trento is different in type from that produced in Bolzano.

(3) *The economic consequences*

53. The Commission argues that the extension of the area of production into Trento by the decrees of 1970 and 1981 has had serious consequences for the viability of 'Caldaro' wine, contrary to the intention of the Community legislation, which is to protect and promote quality wine production. In 1978, production of 'Caldaro' wine in Trento already exceeded

54 000 hectolitres, climbing to 65 442 hectolitres in 1985. Even before the second extension of the area of production in 1981, Trentine 'Caldaro' commanded a price one-third below that of 'Caldaro' from the 'traditional' production zone of the Alto Adige, causing the price of the latter to drop while other wines from that region held their value. During the last 10 years, the relationship between the price of 'Caldaro' on the one hand and 'Bardolino' and 'Valpolicella' on the other (wines which are comparable as regards type and use) changed from 2:1 to 1:1. In addition, exports of 'Caldaro' wine from the Alto Adige fell from 286 000 hectolitres in 1973 to 170 000 hectolitres in 1985 and 1986.

54. Interesting though those statistics are, I hesitate to read too much into them. The Commission does not point to any independent source for the figures and, as the Italian Government correctly points out, they cannot be said conclusively to indicate that the decline in the price and level of exports of 'Caldaro' wine is specifically due to production of 'inferior' Trentine 'Caldaro'. The figures produced by the Commission are not detailed enough to exclude, for instance, the possibility that the addition to the 'traditional' area of production by the decree of 23 March 1970 of further territory in the province of Bolzano might also have affected price and export levels, or that the changes in the price relationship between 'Caldaro' and other comparable wines might be due to a rise in the prices of those other wines.

The burden of proof

55. Taken as a whole, the evidence as to homogeneity appears inconclusive, and the evidence as to economic consequences inadequate, to support the Commission's application for a declaration. The Commission appears to be aware of this, at any rate as regards the issue of homogeneity, because in its Application to the Court, it makes a number of submissions on the discharge of the burden of proof. It argues that in a case of this kind, where the Commission is required to verify compliance with technical criteria, it is very much dependent on the cooperation of the Member State in question. Such cooperation was not forthcoming in the instant case. In particular, the Italian Government refused to agree to the Commission's proposal to appoint two independent Swiss experts to carry out a technical evaluation of the equivalence or otherwise of the natural conditions affecting production in the two parts of the 'Caldaro' area of production. The Commission argues that in the face of that lack of cooperation, it has furnished solid elements of proof and that it is now for the Italian Government to establish that it has acted in conformity with Community law. Alternatively, it argues that the Court itself, applying Article 49 of the Rules of Procedure, should obtain an expert's opinion on the technical aspects of the case.

56. In my view, neither a reversal of the burden of proof nor the ordering of an expert's opinion is appropriate in this case. As the Court stated in Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791:

'It should be emphasized that in proceedings under Article 169 of the EEC Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled and in so doing the Commission may not rely on any presumption.'

57. In its recent judgment of 22 September 1988 in Case 272/86 *Commission* v *Greece*, the Court allowed a partial reversal of this burden of proof. In that case, the Court found that the Commission had furnished sufficient elements of proof to indicate that an infringement had occurred, and that it was therefore incumbent on the Member State to refute the allegations in a substantial and detailed manner. However, it appears to me that the Court's willingness to allow that reversal was connected to the exceptional circumstances of the case, in which the Member State concerned had shown a marked reluctance to cooperate with the Commission (and, indeed, with the Court) and in which the Commission was almost entirely dependent on that cooperation in order to frame its case.

58. In my view, the present case is not of such an exceptional nature. This is not to say that the Commission's complaints as to lack of cooperation are without substance, but rather that, given a certain lack of cooperation, the Commission has not used all the means at its disposal to present a convincing case to the Court. In particular, the Commission could have done far more to explain and to demonstrate the significance and the relevance of the documentary evidence it has submitted to the Court, evidence which, it appears, was for the most part originally supplied by the Italian Government.

59. As regards the ordering of an expert's report by the Court, even were it not for the Commission's own lack of initiative, I would still be reluctant to recommend such a course which appears to me to be essentially incompatible with the nature of the proceedings under Article 169 of the Treaty, under which it is the Commission which establishes the parameters of the action and under which, as indicated above, it is essentially incumbent upon the Commission to prove its allegations. I would add that in its judgment in *Commission* v *Netherlands*, referred to above, the Court also ruled that failure by a Member State to provide information to enable the Commission to determine whether the Member State has correctly implemented a directive amounts to a breach of the obligation of cooperation under Article 5 of the Treaty and may of itself justify recourse to the procedure under Article 169. The Commission is thus not powerless in the face of a Member State's intransigence.

Conclusion

60. In my view, the Commission has established its case on the question of traditional use and is therefore entitled to a declaration. I reach this conclusion with some reluctance in view of the fact that on the more technical, substantive aspects of the case, the Commission has, in part through its own default, failed to discharge the burden of proof incumbent on it. The Commission's failure on those heads should be reflected in the order for costs. I am also struck by the apparent dilatoriness of the

Commission in bringing these proceedings. Although the Commission mentions in its Application that it received complaints about the demarcation of the area of production as early as 1970, it did not commence formal proceedings under Article 169 until November 1983 and the Application for a declaration was not lodged at the Court until May 1987, some 17 years after the adoption of the decree of 23 March 1970. The very fact of that lapse of time must mean that any damage which may have been done to the reputation of 'Lago di Caldaro' wine, and any consequent economic loss, is now largely beyond repair. Moreover, producers in Trento have — lawfully, as far as they were aware — been producing and marketing 'Lago di Caldaro' since 1970, with the result that the long-term usage which may have been lacking in 1963 has now been established, at any rate in the Trentine communes included in the decree of 23 March 1970.

61. None the less, the Commission is formally entitled to a declaration substantially in the terms sought, and I am therefore of the opinion that the Court should:

(1) declare that, by including in the area of production of 'Caldaro' or 'Lago di Caldaro' wine certain districts in the province of Trento in which wine has not traditionally been marketed under that denomination, in breach of Council Regulation No 823/87 (formerly Council Regulation No 338/79), the Italian Republic has failed to fulfil its obligations under the Treaty;

(2) order the parties to bear their own costs.