On those grounds,

THE COURT,

as an interlocutory decision, hereby orders as follows:

(1) There are no grounds for ordering the interim measures requested by the Commission.

(2) The costs are reserved.

Luxembourg, 28 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 25 MARCH 1980 [1]

Mr President,
Members of the Court,

1. The application for the adoption of interim measures, with which this opinion is concerned, was made by the Commission on 12 March of this year against the French Republic in Cases 24/80 and 97/80. Both those cases, which have now been joined, seek a declaration that France has failed to comply with the judgment of the Court of Justice dated 25 September 1979 (Case 232/78), which in the first paragraph of the operative part declared that "by continuing after 1 January 1978 to apply its restrictive national system to the importation of mutton and lamb from the United Kingdom the French Republic has failed to fulfil its obligations under Articles 12 and 30 of the EEC Treaty".

I do not think it is necessary to repeat the facts leading up to the judgment of

1 — Translated from the Italian.

25 September 1979. It is worth, however, briefly recalling that the Commission in bringing the proceedings registered under Case 24/80 on 14 January last regretted that France had not amended its scheme for the import of mutton and lamb from the United Kingdom in spite of the efforts made by the Commission through direct contacts with the Government of that country and in the Council to find a solution likely to guarantee the living standard of the French producers in the sector in question. Therefore the application in Case 24/80 concluded by asking the Court to declare that the French Republic, by continuing after 25 September 1979 to apply its restrictive national system to the importation of mutton and lamb from the United Kingdom, "has failed to fulfil its obligations under Article 171 of the EEC Treaty".

The second of the above-mentioned applications (which has received the number 97/80) is concerned with the fact that from 7 January 1980 the French Government, in order to maintain its restrictive national system, has to a certain extent changed the nature of the obstacles to the free movement of mutton and lamb inasmuch as it required importers thereof from the United Kingdom to possess a licence and imposed tax on them. The Commission points out that the judgment of 25 September 1979 has already found that France is in breach of Article 12 of the EEC Treaty and states that since the levy of a tax on imports is contrary to that rule it is also contrary to the said judgment. Having regard to that it is stated that "possible political solutions have failed" and the application in Case 97/80 concludes by asking the Court to declare that France by imposing a tax on imports of mutton and lamb from the United Kingdom "has failed to fulfil its obligations under Article 171 of the EEC Treaty".

The application for interim measures made under Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure is based on the claim that French conduct incurs the risk of serious damage which may be difficult to make good (for the British economy from the material point of view but also for the whole Community from the moral point of view), that this situation calls for urgent remedy and that there is in the case much more than a *fumus boni juris* since the Commission bases its claim on the judgment of 25 September 1979 which has not yet been complied with. Therefore the applicant is asking the Court for an injunction that the French Republic shall immediately cease to apply those restrictions and/or taxes on imports in relation to mutton or lamb from the United Kingdom.

2. The French attitude to the Commission's complaints at the origin of Case 24/80 is threefold. In the first place it is not denied that the judgment of 25 September 1979 "must be complied with in its entirety" and the French Government "intends to comply with it" fully (pp. 1 and 5 of the defence). In the second place it is maintained that Article 171 does not preclude compliance with a judgment of the Court being spread over "a reasonable period" especially when "hasty" compliance would have "the most serious political and economic consequences". It is therefore suggested that a period is required for fully

complying with the above-mentioned judgment but no particulars are given of how long such period should be. In the third place mention is made of a first measure in compliance with the judgment which the French Government took on 22 October 1979 (temporary scheme for the weekly importation tax-free of 200 tonnes of mutton and lamb from the United Kingdom) and stress is laid on the other steps taken by the Government following the judgment, that is to say the abolition of the quantitative restrictions (which was however accompanied by the introduction of the tax referred to on the imported goods) and the contacts initiated with the Commission and negotiations within the Council with a view to establishing a common organization of the market.

In its written and oral observations in answer to the application for the adoption of interim measures the French Government has not only repeated the arguments summarized above, insisting in particular on the necessity for a "reasonable period", but has also discussed at length the specific question of whether the legal conditions for granting interim measures are satisfied. In this respect the French Government has put forward the following objections:

(a) in substance the Commission is asking the Court by way of interim measures to order France to comply with the judgment of 25 September 1979. This is contrary to the protective and temporary nature of the interim measures provided for in Article 186 of the EEC Treaty; further it would be incompatible with Articles 171 and 187 of the Treaty according to which it is for the Member States to adopt measures to comply with the judgments of the Court affecting them which are not enforceable *per se;*

(b) France does not deny the binding nature of the aforementioned judgment but confines itself to saying that compliance still requires a certain time; there is therefore no infringement of Article 171 and no presumption that the main claim is well-founded;

(c) the alleged damage suffered by British producers and exporters of mutton and lamb are only theoretical, since the British production satisfies only half the demand within that country and export is possible only because of the large purchases by British traders in non-member countries;

(d) the damage which the interim measure sought would cause France would be serious and irreversible;

(e) if the Court were to order the interim measures in question it would by implication reject the French case that there should be a "reasonable period" for complying with the judgment of 25 September last and would thus be ruling on the merits of the action which is still pending.

3. In my opinion in considering the arguments put forward by the parties it is necessary to begin by considering the nature and function of the "interim measures" which the Court may order under the aforementioned Article 186 of the EEC Treaty. In this respect there are three factors which are worth stressing: the close link between each interim measure and the substance of the action, the temporary nature characteristic of the measures in question and the requirement that they should not prejudice the main decision.

As regards the first of these factors it is sufficient to draw attention to the wording of Article 186 of the EEC Treaty and Article 83 (1) of the Rules of Procedure. The first provides that the Court may "in any cases before it" prescribe any necessary interim measures. The second paragraph of the other provides that an application for the adoption of interim measures as referred to in Article 86 "shall be admissible only if it is made by a party to a case before the Court *and relates to that case*". But I should like to point out that the link between the main action and the application for interim measures is not simply a formal condition for such an application; it means in fact that the interim measure is within the scope of a particular action and is intended to prevent the effectiveness of the decision from being jeopardized by a situation which is incompatible with the realization of the rights of one party. The Court by implication recognized this in the order of 12 December 1968 in Case 27/68 R *Renckens* [1969] ECR at p. 276 when it rejected an application for a temporary suspension of a measure adopted by the Commission and stated that such suspension was not necessary "to ensure that, when delivered, the judgment will be fully effective".

As regards the temporary nature of the measures in question it is worth citing, apart of course from Article 186, Article 86 (3) of the Rules of Procedure which provides: "Unless the order fixes the date on which the interim measure is to lapse, the measure shall lapse when final judgment is delivered". That confirms what I have just said, namely that the interim measures remain within the context of the main action: when the latter is concluded the measure has spent its force and it is the judgment which definitively determines the rights and obligations of the parties with an authority and effectiveness which are logically greater than that of the interim measure. Of course, the temporary character of this kind of measure implies that by its nature it may be varied or cancelled, as Article 87 of the Rules of Procedure provides, and does not give rise to an irreversible situation. In this respect the case-law of the Court gives important guidelines in the orders of 28 May 1975 in Case 44/75 R *Könecke* [1975] ECR 637 and of 23 July 1976 in Case 26/76 R *Metro* [1976] ECR 1353: the first states *inter alia* that it is not possible to order a particular measure "which, far from being of a provisional character, would in reality be irrevocable and would confront the judges responsible for the substantive decision with an irreversible situation" (paragraph 4 of the decision) and the second refused to suspend the operation of a decision of the Commission because such a suspension, by affecting the relations between the defendant company and third parties, "would be outside the scope of an urgent interim measure *intended to safeguard temporarily the interests of the applicant*" (paragraph 2 of the decision).

Finally, the requirement that the ultimate decision on the substance of the case

shall not be prejudiced in any way by the interim measure is expressed clearly and precisely both in the last paragraph of Article 36 of the Statute of the Court (EEC) and in Article 86 (4) of the Rules of Procedure. The requirement in question is justified moreover on at least three grounds: first of all the relationship between the interim measure and the judgment, characterized as I have said by the ancillary nature of the first, would be reversed if the judgment were influenced or anticipated by the interim measure; secondly the summary nature of the proceedings in an application for interim measures would not make it possible to reach a decision capable of affecting the substance of the case without seriously affecting the rights of the parties; thirdly, resumption of the normal course of the proceedings in the main action after their interruption by the interim measure would lose all purpose if the main problem for decision had already been decided by way of the order for interim measures. In this respect the case-law of the Court is unequivocal: let me cite the orders of 15 October 1974 in Joined Cases 71/74R and RR *Fruit- en Groentenimporthandel* [1974] ECR 1031, of 28 May 1975 in Case 44/75 R *Könecke*, which has already been cited, of 15 October 1976 in Case 91/76 R *De Lacroix* [1976] ECR 1563 and of 13 January 1978 in Case 4/78 R *Salerno* [1978] ECR 1. All those decisions agree that the urgent interim measure cannot affect the judgment in the main action and cannot therefore be allowed to attain the results sought by the main action; otherwise the latter would be without purpose.

4. It is necessary to consider the nature of the application for the adoption of interim measures made by the Commission against the French Government in the light of what has just been said. It is true that the application is joined to a main action: as has been seen, it is made in relation to Joined Cases 24 and 97/80. But is it possible to say that it remains within the scope of those cases? From the point of view of the aim the answer must be in the affirmative: the aim is practically the same as that of the aforesaid cases. More precisely the two Cases 24 and 97/80 seek a declaration from the Court that the French Republic has infringed Article 171 of the EEC Treaty by not complying with the judgment of the Court of 25 September 1979 and has continued to disregard the obligations imposed by Articles 12 and 30 of the EEC Treaty; the application for interim measures seeks an order from the Court that the French Republic should cease to apply any restrictive system of imports of mutton and lamb, that is to say put an end to the infringement of the said Articles 12 and 30. From the point of view of the aim pursued however, the application in question seems to exceed the scope of the aforesaid cases. The Commission has admitted that it is seeking to obtain compliance with the judgment of 25 September 1979, but an order to comply with that judgment must be final and not interim. In other words the independent nature and binding force of the judgment which has already been given by the Court accords ill with the proposition that the Court itself may

order enforcement thereof until the date of the new judgment; such limitation in time is however inherent in the nature of interim measures.

It may be objected that the Commission is persuaded that by bringing Joined Cases 24 and 97/80 it will obtain from the Court a judgment recognizing the infringement by France of Article 171 of the EEC Treaty and requiring it once again to dismantle its national organization of the market in mutton and lamb. But while we must recognize the necessity for a second judgment based on Article 171 where a Member State has not complied with an earlier judgment of the Court — for as is known the Community institutions have no means of enforcement — it is not logically possible on the other hand to justify the interposition between the two judgments, both of which are final, of an order for the same purpose but of a temporary nature.

A second kind of difficulty arises in the present case in connexion with the relationship between the application for the adoption of interim measures and the decision on the main application. I have said that the issue, having regard to the positions adopted by the parties, concerns not the obligation to comply with the judgment of 25 September 1979, which the French Republic recognizes, but the time aspect of that obligation: that is, whether it is possible to accept that that Member State has a certain period of time (and if so what) to comply with the said judgment. Now it is clear that the order for interim measures sought by the Commission would resolve that problem immediately: the French case in the main application would be by implication rejected by an order to adopt "sans délai" all domestic measures in accordance with the judgment whilst according to the defendant, Article 171 allows a "délai raisonnable" for taking such measures. However, the principle that an interim measure cannot prejudice the definitive decision in the action seems to me to prevent in the present case acceding to the application of the Commission.

It is not possible to answer that the judgment of 25 September 1979 has already rejected the French claim to maintain the national organization of the market in mutton and lamb so long as no common organization of the market has been set up in that sector (second sentence of paragraph 8 of the decision). In fact this finding by the Court is one of the fundamental premises on which it relied in declaring the infringement by France of Articles 12 and 30 of the EEC Treaty as from 1 January 1978; but I do not think that the same finding also resolved the question of the time for complying with the judgment. That question, as the parties have in the meantime recognized, has aspects of a general interest and in any event could be resolved in this case on the basis of criteria other than either automatic and immediate compliance with the judgment or postponement of compliance until the establishment of a common organization of the market. I observe in this respect that during the oral procedure the Commission did not deny that it was necessary for Member States to have a certain period in which to comply with

judgments which require them to adopt domestic measures; it preferred to state that the six months which have passed since the judgment have given sufficient time for compliance. The Commission has also asked the Court to resolve the question of "délai raisonnable" and stated in its application for the adoption of interim measures (foot of page 8) that it was "very much in the interest of the Commission to ask the Court to bring this uncertainty to an end by defining more clearly the point which it left open in its judgment in Case 232/78". It seems clear to me in any event that such a clearer definition can be given by the Court only in the main judgment and the claim to resolve this central issue in the dispute by means of the procdure for urgent interim measures is in clear contrast to the nature of those measures as I have previously explained.

Finally it is worth noting that the Commission's application which seeks an order to *stop* applying any restrictions on imports of mutton and lamb, would give rise, if granted, to a situation which could scarcely be reversed (both for economic and social reasons) and would not be merely temporary. It is true that the final dismantling of the organization of the market in question would be quite consistent with the said judgment in Case 232/78 and would be capable of putting an end to the issue between the Commission and the French Republic, but for that very reason it is not possible for the judicial means sought to achieve such result to be the instrument of the *interim* measure. I do not need to stress the point: it is clear that the inconveniences that I have so far pointed out are the related and cumulative aspects of a single phenomenon which I would describe as the improper use of the procedural instrument of interim measures.

5. The Commission and the French Government referred in their respective pleadings to the precedents constituted by the orders of 21 May 1977 in Cases 31/77 R and 53/77 R *Commission* v *United Kingdom* [1977] ECR 921 and the order of 13 July 1977 in Case 61/77 R *Commission* v *Ireland* [1977] ECR 1411. In particular the Commission has drawn attention to the first of those two orders and above all to paragraph 20 thereof in which the Court states: "Disregard of the provisions of the final sentence of Article 93, which is the means of safeguarding the machinery for review laid down by that article, interferes with the proper operation of that machinery to such an extent as to be capable by itself of giving rise to the application of Article 186". The Commission's reasoning at the hearing was in substance as follows: if the Court has recognized that Article 186 applies in a case in which a Member State has infringed the obligation not to apply certain measures of aid before a final decision of the Commission (last sentence of Article 93), *a fortiori* Article 186 must apply in a case in which the obligation infringed is that of Article 171 and thus failure to comply with a judgment of the Court.

That argument neglects to consider a very important fact distinguishing the situation with which the order of 21 May 1977 was concerned and the situation which we are considering. I refer to the fact that the interim measure sought in the dispute between the Commission and the United Kingdom took the form of

the maintenance of the *status quo ante*, whereas the present application seeks a significant change in a situation which has been in existence for a long time. That means that in Cases 31 and 53/77 the United Kingdom was in substance ordered to suspend the application of a domestic measure which could have been re-introduced even with retroactive effect whereas now measures are sought against France which would be practically irreversible. Paragraph 23 of the order of 21 May 1977 states: "Moreover the provisional measure sought will not necessarily have irreversible consequences as, if the decision of the Commission were to be annulled, the United Kingdom would still be in a position to provide the aid in dispute retroactively". That passage shows the care which the Court took in taking into account the temporary nature of interim measures before granting the measures sought in Cases 31 and 53/77 R. To that it may be added that the Court's order neither anticipated the ultimate judgment on the United Kingdom's case nor prejudiced it.

As for the interim measure adopted in the order of 13 July 1977 against Ireland its nature as a purely suspensory order is apparent from the words used ("Ireland shall suspend . . ."). The Court preferred to confirm clearly and expressly the rule to the effect that the measure should lapse upon pronouncement of the judgment (the suspension was worded "until judgment has been given in the main action"). In that case too it was a question of temporarily suspending national measures which had recently been introduced and again in that case it was without prejudice to the final decision. Further, in the previous order of 22 May 1977 in which the Court had in substance allowed the parties a period in which to agree upon a possible alternative solution, it was recognized that the appropriateness of the Irish measure (apart from its efficacy) could be definitively assessed only in the ultimate decision (paragraphs 30 to 35 of the order).

6. The conviction which I have expressed and sought to justify concerning the inadmissibility of an application for interim measures in this case makes it unnecessary to inquire whether or not the basic conditions for granting interim measures obtain (*prima facie* valid claim, serious damage and urgency). Nevertheless in the event of the Court's deciding to consider those aspects of the problem I think it useful to make certain brief observations on the requirement of damage for which the interim measure aims to give temporary relief.

The Court has repeatedly insisted on the necessity that the applicant should be exposed to serious, in the sense of "irreparable", damage; let me cite in particular the orders of 28 May 1964 in Case 17/64 R *Suss* [1964] ECR 617, 17 September 1974 in Case 62/74 R *Vellozzi* [1974] ECR 895, 13 January 1978 in Case 4/78 R *Salerno* which has already been cited, 28 August 1978 in

Case 166/78 R *Italian Republic* v *Council* [1978] ECR 1745 and 6 April 1979 in Case 48/79 R *Ooms* [1979] ECR 1703. This irreparable nature may be understood in two senses: in the sense that the nature of the damage rules out any possibility of compensation or in the sense, which in my opinion is more precise, that the damage would be such as to make the ultimate judgment pointless, so that in the absence of interim measures there would be no purpose in the ultimate judgment (see for example in this sense the order of 12 May 1959 in Case 19/59 R *Geitling Ruhrkohlen* [1960] ECR 34. In addition in the present case the Commission, or rather the Community which it represents, would suffer, so it is said, "moral" damage from the continued failure to comply with a judgment of the Court; but that does not seem to me the kind of damage of a nature to justify interim measures. If it were thought otherwise it would be necessary to go as far as maintaining that any action brought by the Commission for infringement of Article 171 would automatically justify interim measures against the defendant State. This however, in my view, would distort the system of the Treaty both as regards the objective of interim measures and the position of Member States in default as against the Community.

Apart from the alleged "moral damage" it is necessary to consider the financial damage of the British sheep breeders or of the British exporters of mutton and lamb. Without going into the substance of the objections put forward by France concerning the theoretical nature of such damage, it seems to me that in so far as it is existing and quantifiable it is not at all irreparable. It is conceivable that those who on exporting mutton and lamb to France have had to pay the relevant tax may bring an action before the French courts for infringement by the French Government of Articles 12 and 30 of the EEC Treaty which are in the nature of directly applicable rules.

Finally if the view is taken that damage is "irreparable" only if it robs the ultimate judgment of any practical utility, it seems to me that in this case the significance and scope of the ultimate judgment will not be affected if, *in the meantime*, the French organization of the market in mutton and lamb continues. In other words the ultimate judgment in the case pending will have the same effect whether or not it is preceded by an order based on Article 186; the effect will probably be even greater if no interim measure has been ordered.

In my opinion therefore, the conditions for the existence of irreparable damage are not shown in the situation now before us. The same may be said regarding the requirement of urgency which, on the other hand, tends to overlap with the one I have just considered. In fact the Commission did not think it necessary to put in its application any particular observation on this issue; at the hearing it spoke of the urgency "on principle" of complying with the judgment of the Court. It seems to me that there are no circumstances preventing the Commission from awaiting the outcome of the pending actions to obtain a declaration from the

Court on performance of the obligations resulting from the judgment of 25 September 1979. Confirmation of those obligations by way of interim measures far from being a matter of urgency is in short superfluous.

Of course, what I have said does not mean that prolonged non-compliance with a judgment of the court by a Member State may be regarded as a harmless phenomenon and that the Government concerned may therefore wait to comply with such a judgment for as long as it considers appropriate to its own interests. On the contrary the Community suffers increasing harm as time passes without Community law's being respected promptly and in good faith. Therefore it is in the permanent interests of every Member State not to contribute to exhausting the value of rules which have been introduced in the interests of all. But precisely in order to safeguard all the balances in the Community legal system I think it is necessary also to avoid any improper use of procedural measures and to be as strict in seeing that the prescribed conditions with regard thereto are respected as in requiring Member States to observe the rules of substantive law governing their conduct as part of the Community.

7. Other matters adumbrated by the parties during these proceedings concern the substance of the action and I shall therefore not discuss them at the present stage. That is so in particular of consideration of the conduct respectively of the Commission and the French Government after the judgment of September last; such consideration may serve *inter alia* to decide in detail the question of non-compliance with that judgment and the importance to be attributed to the "neglect" by the Council to establish a common organization of the market in mutton and lamb.

I therefore conclude by proposing that the Court should, for the procedural reasons which I have so far indicated, reject the application for the adoption of interim measures made by the Commission against the French Republic in Joined Cases 24 and 97/80.