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ROYAL COURTS OF JUSTICE  
LONDON, WC2A 2LL

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The Rt. Hon. Michael Jopling, MP,  
Minister of Agriculture, Fisheries and Food,  
Ministry of Agriculture, Fisheries and Food,  
Whitehall Place,  
LONDON, SW1A 2HH

*Re Minister  
Re lawyers want  
to spoil Mr. Jopling's  
5 November 1986  
J.M.  
CDP - 6/Ki*

*Dear Michael:*

FRENCH ACTIONS DISRUPTING UK LAMB TRADE

*at flap  
MB*

Thank you for sending me a copy of your letter of 4th November to Geoffrey Howe.

It is deplorable that the French Government should again be promoting action to disrupt the flow of exports of lamb from this country, the more so in the light of the assurances you had received from Monsieur Bosson. I of course agree that the French must not be allowed to turn on and off their disruptive action at will.

I must make it absolutely clear, however, how dangerous I regard your proposal. The true reason for adopting it would be the desire to retaliate against what you believe (doubtless correctly) to be cheating by the French Government. If your course of action significantly impeded the importation of French apples, this would constitute the imposition of a measure having equivalent effect to a quantitative restriction on imports in breach of Article 30/EEC, and one which you could not justify under the provisions of Article 36: for it would constitute a "means of arbitrary discrimination or a disguised restriction on trade" (see Article 36). The fact that you could plausibly claim that your action was occasioned by concern about the increased proportion of bruised apples landed here will not help you if you find yourself challenged in the European Court or in our own courts. And there would be a real prospect that you would

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be challenged in our courts, at the suit of French apple exporters, for Article 30 takes what is called "direct effect": this means that the English courts must provide a remedy for any proven claim that the UK Government has broken its obligations under Article 30. This in turn means that any such claimant can secure full discovery of documents, including internal memoranda and letters, subject only to public interest immunity (but to claim this you would have to give affidavit evidence disclosing the relevant documents to the Court itself.) In short, either the truth in this case would "out" on discovery or you would have to persuade the Court that it should not "out" - which would be an unpromising exercise. If the Court found that you had knowingly breached our Treaty obligations under Article 30, that would constitute in our law the tort variously known as misfeasance or abuse of administrative powers, and the plaintiffs would be entitled to damages.

We went through all this last year in the French turkeys case - Bourgoin - which you will recall. It was tried on a preliminary issue of law which was whether in respect of a breach of Article 30, with or without misfeasance, damages were payable to anyone who had suffered consequential loss. A ruling to the effect that damages are payable even in the absence of misfeasance would be catastrophic. You will recall that we lost on this point in Bourgoin before Mann, J., and that I only succeeded in reversing him in the Court of Appeal after six days of argument, by a majority of two to one. Thereafter we settled the claim very advantageously, buying off the substantial risk that the House of Lords would settle the law by restoring Mann, J's judgment. I urge you therefore not to risk nullifying our success in the Court of Appeal by giving a cause of action to further French plaintiffs. (We had reason to believe that the French Government were not disinterested in the turkeys case.)

I accept that one may be able to rate action in relation to imports on a scale, at the lowest end of which the action would not conflict with Article 30. But it seems clear to me that Article 30 begins to bite at a very early stage on the scale, with the effect that measures not conflicting with Article 30 would be most unlikely to have any impact on the French Government.

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There seem to me to be other disadvantages in following the course you suggest. Particularly while the UK holds the presidency, but even after December, action against imports would call into question our support for the development of the internal market. Giving up the high ground of legality may adversely affect our interests in the Council. We should also be badly placed to continue to press the Commission to bring pressure to bear on France.

What I would suggest as an alternative is a renewed request in very firm/terms <sup>and public</sup> to the Commission to institute proceedings against the French Government. In the turkeys case the French plaintiffs took that step almost instantly after the introduction of the import ban in September 1981 and got their judgment against us in the European Court the following July.

You could also encourage a lamb exporter to sue the French Government in the French courts, perhaps giving him an indemnity and thus effectively standing behind him. This is not as far fetched as it may seem. In August this year a French judge in Strasbourg ordered the French Government to pay damages to importers of Italian wine for a breach of Article 30, as your officials will know. It would be sufficient, I suggest, to seek the equivalent of an injunction.

With an exporting abattoir in my constituency (not to mention an enormous acreage of apples) I am highly sympathetic to your proposal - and of course on less parochial grounds too. But I am certain I must warn you very strongly against proceeding with it.

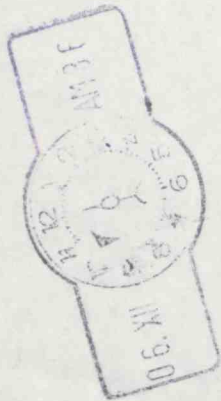
I am sending copies of this letter to the recipients of yours.

*Louisa...*  
*Atkinson*

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