On those grounds,

THE COURT,

in answer to the question referred to it by the Hessisches Finanzgericht by order of 24 March 1980, hereby rules:

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Commission Regulations Nos 687/79, 797/79 and 1152/79.

Mertens de Wilmars Mackenzie Stuart Koopmans O'Keeffe Bosco

Touffait Due Everling Chloros

Delivered in open court in Luxembourg on 5 May 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 24 FEBRUARY 1981 [1]

Mr President,
Members of the Court,

Article 29 (1) of Regulation No 1035/72 of the Council on the common organization of the market in fruit and vegetables (Official Journal, English Special Edition 1972 (II), p. 437) as amended by Regulation No 2454/72 of the Council (Official Journal, English Special Edition 1972 (November), p. 60) provides:

"(1) Appropriate measures may be applied in trade with third countries if:

— By reason of imports or exports, the Community market in one or more of the products referred to in Article 1" (including dessert apples coming under tariff subheading 08.06 A II) "experiences or is threatened

1 — Translated from the German.

with serious disturbances which may endanger the objectives set out in Article 39 of the Treaty, or

— For the products listed in Annex III a, the withdrawal or buying-in operations effected pursuant to Articles 18 and 19 concern significant quantities.

Such measures may be applied only until, depending on the case, either the disturbance or threatened disturbance disappears or the quantities withdrawn or bought-in have decreased substantially."

By Article 29 (2) the Commission is to lay down provisions for the application of that paragraph. Article 29 (2) further provides that if the situation mentioned in paragraph (1) arises the Commission is to decide upon the necessary measures and the measures are to be communicated to the Member States and are to be immediately applicable.

The conditions for the application of protective measures in the fruit and vegetable sector were laid down in Regulation No 2707/72 of the Council (Official Journal, English Special Edition 1972 (28-30 December), p. 3). Article 1 thereof provides:

"In order to determine whether the situation referred to in the first indent of Article 29 (1) of Regulation (EEC) No 1035/72 exists, account shall be taken in particular of:

(a) the actual or probable volume of imports or exports,

(b) the availability of products on the Community market,

(c) the prices of domestic products recorded on the Community market, or the probable trend of those prices, and in particular their tendency to fall or rise excessively in relation to basic prices or, with regard to products which do not have basic prices, in relation to the prices of preceding years,

(d) if the situation referred to in the first part exists by reason of imports:

— The prices on the Community market of products exported from third countries and in particular their tendency to fall excessively,

— Quantities for which withdrawals are or may be effected."

Article 3 states:

"(1) The measures which may be taken pursuant to Article 29 (2) and (3) of Regulation (EEC) No 1035/72 are:

— When the situation covered by the first indent of paragraph (1) of that article exists, the suspension of imports or exports or the levying of export taxes;

— When the situation referred to in the second indent of paragraph (1) of that article exists, the suspension of imports or the levying of an additional amount equal to 50% of the difference between the basic price and the price referred to in the first indent of Article 18 (1) (a) of Regulation (EEC) No 1035/72. This additional amount shall be added to the customs duties and to the countervailing charges, if any, which may have been introduced pursuant to Article 25 of Regulation (EEC) No 1035/72.

...

(2) Such measures may only be taken in so far, and for as long, as they are strictly necessary.

(3) The measures provided for in paragraph (1) shall take account of the special position of products in transit to the Community. They shall apply only to products exported from, or intended for, third countries. They may be limited to products exported from, originating in, or intended for certain countries, or to certain qualities, size grades or groups.

As regards the measures provided for in the first indent of paragraph (1), they may be limited to imports intended for certain areas of the Community or to exports from such areas."

In the spring of 1979 the Commission came to the conclusion that it should use those provisions once it had determined that the production of apples in the current marketing year had considerably exceeded that of the previous year, that the stocks still available were substantially higher than those at the same period in the two previous years, that producer prices in several Member States were at a particularly low level in relation to the basic price and that the quantities available for export in the then current marketing year in the countries of the southern hemisphere seemed to be considerably larger than in previous years. However, at the beginning of March it first tried through negotiations with the most important supplier countries to achieve a reduction of the probable exports of 380 000 tonnes, of which 75 000 tonnes were to come from Chile, to 310 000 tonnes. It was able to reach an agreement with South Africa, Argentina, Australia and New Zealand. Chile on the other hand insisted on being able to export at least 55 000 tonnes to the Community because export contracts had already been concluded for that quantity. On the assumption that the Community market could not, without creating a disturbance, absorb more than 310 000 tonnes, of which 42 000 tonnes were to be allocated to Chile after a proportionate reduction of the probable exports, the Commission therefore set out to achieve that object with regard to Chile by the use of unilateral protective measures.

With that aim in view, and because from information available to it on goods already in the course of transit or recently loaded on board ship it was to be expected that the amount in question would be reached on 25 April, the Commission, on 5 April 1979, adopted Regulation No 687/79 (Official Journal L 86 of 6 April 1979, p. 18). Article 1 thereof provided that the placing in free circulation of apples falling under subheading 08.06 A II of the Common Customs Tariff originating in Chile was to be suspended during the period 25 April to 15 August 1979. At the same time by a *note verbale* of 6 April 1979 the Commission notified the Chilean Government that it was prepared to reconsider the measure adopted if imports had not reached the stated amount (42 000 tonnes) on 25 April.

The Commission was informed by an *aide-mémoire* from the Chilean Embassy of 17 April 1979 that three ships with a cargo of 6 400 tonnes which had been taken into account in the earlier estimates would not arrive in the Community before 25 April and on 23 April 1979 it adopted Regulation No 797/79 (Official Journal L 101 of 24 April 1979, p. 7) in order to make those imports possible but also to ensure that there were no further imports. Article 1

thereof added the following provision to Article 1 of Regulation No 687/79:

"However, in respect of the apples referred to in the paragraph above which left Chile not later than 12 April 1979 in vessels bound for a Community port, placing in free circulation in the Community shall be suspended only as from 5 May 1979.

..."

On 5 May 1979 it became clear that certain quantities of Chilean apples previously taken into account were not destined for the Community market and that only 38 600 tonnes of the quantity allocated to Chile had been imported. As it was known that two ships with a cargo of 3 800 tonnes had reached the Community between 5 and 19 May — the goods having been put in a customs warehouse — on 12 June 1979 the Commission adopted another regulation, No 1152/79 (Official Journal L 144 of 13 June 1979, p. 13) which replaced the second paragraph of Article 1 of Regulation No 687/79 with the following paragraph:

"However, in respect of the apples referred to in the preceding paragraph transported in ships which reached a Community port before 19 May 1979, placing in free circulation in the Community shall be suspended only as from 17 June 1979."

Thus apparently a total of 42 400 tonnes of Chilean apples was allowed to be imported into the Community in 1978/79.

Firma Dürbeck, an importer and wholesaler of fruit and vegetables and the plaintiff in the main action, had made contracts for the import from Chile of 300 000 boxes of apples of which only 180 000 boxes had been imported when Regulation No 687/79 was adopted. The remainder was to be loaded so as to enable the ship to leave port in Chile between 18 and 20 April 1979. In view of the measures adopted by the Commission and because the Commission had not granted an application made to it in telex messages of 10 and 12 April 1979 to make an exemption in the case of 2 000 tonnes, Dürbeck cancelled its purchase and affreightment contract.

In order to be able to test the legality of the measures adopted by the Commission and perhaps also in order to prepare the way for an action for damages which was subsequently brought against the Commission (see Case 11/81) on 25 July 1979 Dürbeck imported by air two cartons of Chilean apples weighing 45 kilograms. The Hauptzollamt Frankfurt am Main-Flughafen refused to allow them to be released into free circulation on the ground of Commission Regulation No 687/79.

Dürbeck brought the matter before the Hessisches Finanzgericht on the ground that the regulations adopted by the Commission, which I have already mentioned, were invalid. It alleged that the Commission had not made a diligent inquiry into and assessment of the facts as required by the Community provisions referred to. Moreover the Commission regulations offend against the principle of the protection of legitimate expectation and the prohibition of discrimination. Finally the measures adopted should be treated as inadmissible because they infringe Article 110 of the EEC Treaty in conjunction with the provisions of GATT and the provisions of international commercial law.

In view of those arguments, by an order dated 24 March 1980 the Hessisches Finanzgericht stayed the proceedings and submitted the following question for a preliminary ruling under Article 177 of the EEC Treaty:

"Is Commission Regulation (EEC) No 687/79 of 5 April 1979 (Official Journal L 86, p. 18), in conjunction with amending Regulations (EEC) No 797/79 of 23 April 1979 (Official Journal L 101, p. 7) and No 1152/79 of 12 June 1979 (Official Journal L 144, p. 13), valid?"

Before dealing with this question I would point out that in view of the measures which had been adopted the Chilean Government sought consultations in accordance with Article XXIII (2) of GATT and as a result a working group met on 24 March 1980 and 18 June 1980. The Commission's representative informed us in the oral procedure about the results of those investigations.

Moreover the Commission measures in issue here have been contested in three further sets of proceedings (Cases 201, 202 and 253/80) which have been brought directly before the Court under the second paragraph of Article 215 of the EEC Treaty by other undertakings. In so far as additional arguments about the legality of the measures which were adopted have been advanced in those proceedings I will of course deal with them here, too. For, even if it is not obliged to do so when considering a matter of validity under Article 177 of the EEC Treaty, the Court of Justice should in my view nevertheless still include in its examination actions concerning the same issue.

1. I must preface my opinion with a brief remark on the matter of admissibility. Although it is not expressly questioned by the Commission it does however indicate in its written submissions that it regards the method of importation at issue in the main action, the importation by air of a small quantity of Chilean apples, as wholly out of the ordinary.

I should like here to repeat the plaintiff's point that we cannot refuse to resolve the issue of Community law now before us on the ground that there is no legitimate interest in the proceedings because they have been deliberately engineered. The court seised of the main proceedings has to decide whether there is such an interest and it obviously did not see any reason for doubt. Nor can it be argued that the plaintiff could protect its rights in some other way. In fact the possibility of directly challenging the protective measures adopted by the Commission under Article 173 of the EEC Treaty on the ground that they are legislative in nature does not arise. However, an action to establish public liability, which the plaintiff has in the meantime also decided upon, rests on quite special conditions. Consequently one can scarcely object if, first, the validity of the allegedly damaging act is examined, in an alternative way which is available; for this, under German law, as import licences are not required, it is essential for an actual importation to be effected.

2. It is clear from the legal grounds on which the Commission measures were based and which I described at the beginning of my opinion that investigations of an economic nature — into the situation on the Community market and the effect of imports thereon — are of great importance in answering

the question which has been raised. Before I go into them I should like to start with some purely or mainly legal considerations to which the submissions in these proceedings and in the actions for damages give rise.

(a) In Case 201/80 the plaintiffs have stressed that Article 29 of Regulation No 1035/72 has to be interpreted restrictively and that therefore measures based on that article must be subjected to a very critical examination. They have pointed out that a freeze on imports represents a derogation from Article 22 of Regulation No 1035/72 whereby the application to imports from non-member countries of any quantitative restrictions or measures having equivalent effect is prohibited. Moreover the function of the system embodied in Article 23 et seq. of Regulation No 1035/72, consisting in the fixing of reference and import prices and the levying of countervailing charges on imports, is in principle to avoid disturbances which might arise from the price level of products offered by non-member countries.

In principle it will not be possible to deny the validity of that argument. On the other hand, however, it must not be overlooked that the task with which the Commission is charged of determining whether there are serious disturbances, or a threat of them, and of determining their effects requires a wide margin of discretion since that task involves making economic forecasts of a necessarily complicated character and complicated economic measures are at issue. That was emphatically stated in the judgment of 7 February 1973 in Case 40/72 *I. Schroeder KG* v *Federal Republic of Germany* [1973] ECR 125, especially in paragraph 14, which concerned a similar set of facts involving protective measures against the importation of products processed from tomatoes.

(b) The plaintiff in the main action alleges that the Commission regulations complained of made no reference to Regulation No 2707/72 which, as I have already said, determines the matters which must be taken into account in the determination of the question whether the situation referred to in Article 29 of Regulation No 1035/72 exists. The plaintiff regards that as a defect of form which must necessarily mean that the Commission regulations are invalid since there must be some doubt whether the Commission had regard to the provisions of Regulation No 2707/72. At any rate, in this way, it is claimed, information which those concerned needed for the protection of their rights was withheld from them.

I should like to say in reply to that point that Regulation No 1035/72, to which the recitals in the preamble to the Commission regulations make express reference, is to be regarded as their prime legal basis. Furthermore the economic considerations mentioned in the preambles to the regulations are not the only indication that the Commission had due regard to Regulation No 2707/72; further information on this matter was also provided in the proceedings so that the assumption that the plaintiff was handicapped in the protection of its rights, which seems improbable even according to the plaintiff's own written submissions, can undoubtedly be ruled out.

Therefore there is really no ground for describing the deficiency referred to as a major formal defect necessarily making the measures adopted invalid.

(c) The plaintiffs in Case 201/80 have made the further criticism that the preambles to the Commission regulations say nothing about the prices of products from non-member countries and a downward trend in prices although that aspect is mentioned in Regulation No 2707/72 as a factor to be taken into account. They have further objected that the preamble to Regulation No 687/79 mentions only the impending risk of extensive withdrawals and that imports from non-member countries might theoretically increase the quantities to be withdrawn from the market. They agree that that does seem sufficient for the purposes of Regulation No 2707/72, Article 1 (d) of which refers to "quantities for which withdrawals are or may be effected". However, under Article 29 of Regulation No 1035/72 measures against non-member countries in connexion with withdrawals from the market are only possible if withdrawal or buying-in operations have actually taken place and concern significant quantities. On that basis, therefore, it is claimed, the assumption must be — if the compatibility of Regulation No 2707/72 with Regulation No 1035/72 is not to be in doubt — that the criterion mentioned from Regulation No 2707/72 must be understood as requiring at least a present possibility that withdrawals may be effected and not only a future risk which the preamble to the Community regulation refers to.

It should be remembered that under the system of Regulation No 1035/72 (see Article 23 et seq.) the Commission is to be kept constantly informed about prices recorded in non-member countries. There can therefore be no question that it did not take note of those factors and their trends. If they were not referred to in the preamble to the regulation however, the explanation is that imports from non-member countries and their trend in the spring of 1979 together with the price level in the Community, which was already very low anyway, were a problem less of prices than of quantities for the Commission; it was afraid of disturbances on the market not so much in the form of a further decline in domestic prices as in the form of a drop in sales and the concomitant extension of intervention measures. This case is therefore reminiscent of Joined Cases 41 to 44/70 *NV International Fruit Company and Others* v *Commission* [1971] ECR 411, judgment of 13 May 1971, in which it was not so much the prices of the imported products which counted in the assessment of the measures to protect the apple market; rather it was considered sufficient that increased imports, which were bound to attract demand, created the risk of increased intervention.

Secondly, there can in my view be no question of a failure to observe the second indent of Article 29 (1) of Regulation No 1035/72 or of a wrong application of the second indent of Article 1 (d) of Regulation No 2707/72. Article 29 of Regulation No 1035/72 envisages two cases in which appropriate measures may be applied in trade with non-member countries. The first occurs if by reason of imports or exports the Community market in one or more of the products referred to in Article 1 experiences or is threatened with serious disturbances; the second case exists if the withdrawal or buying-in operations effected pursuant to Articles 18 and 19 in relation to the products listed in Annex III a concern significant quantities —

and there is obviously no need here to prove that imports are actually the cause of the disturbance. However, in the first case, with which we are concerned here, it is also specified in a Council regulation, that is in a measure of equal status, that in order to determine whether such a situation exists account is to be taken of the quantities for which withdrawals are or *may* be effected. So it is clear, without there being any question of a break in the logic of the system or any incompatibility of Regulation No 2707/72 with Regulation No 1035/72, that the *fear* that intervention measures might be adopted is sufficient in this regard, not just in the form of a present possibility but also of a future risk.

Moreover it should not be forgotten that very considerable withdrawals from the market had in fact already taken place in March 1979. That must be the decisive factor rather than the fact that it was not mentioned in the preamble to the regulation but only brought up during the proceedings, for surely it is scarcely possible to require a detailed and comprehensive survey of the economic situation to be given in the preamble to a regulation in order to escape the charge of a deficiency in the statement of reasons.

3. I now come to the heart of the proceedings, namely the question whether the Commission correctly assumed in the spring of 1979 that serious disturbances were to be expected on the Community market in dessert apples owing to imports. We must determine in particular, as Regulation No 2707/72 requires, which findings the Commission arrived at and was properly entitled to arrive at with respect to the volume of probable imports, the quantities available on the common market, the prices of domestic produce on the common market and the quantities for which withdrawals were or might be effected; then we must consider whether the supension of imports from Chile appears justified.

(a) In view of what we have learned in the proceedings it can hardly be denied that the common market in dessert apples was in a really difficult situation in spring 1979.

As proof of that, the figures on the size of the harvest in the marketing year 1978/79 (6 676 000 tonnes) and the comparison with previous harvests (1975/76: 7 551 000 tonnes; 1976/77: 6 497 000 tonnes; 1977/78: 5 122 000 tonnes) are certainly not sufficient. For, as the plaintiff has correctly pointed out, only marketable goods, that is to say goods meeting the quality standards of the common organization of the market, are relevant to the market and in its appraisal. However, the Commission could not adduce any figures, just as the plaintiff's argument that only less than one-third of the 1978/79 harvest met the quality standards was not proved.

Other facts, however, are of crucial importance.

For example, the figures for the *quantities in storage* are impressive, especially when compared to the harvest figures. Whilst 1 499 000 tonnes and 1 152 000 tonnes were in storage in

March 1979 and April 1979 respectively, the figures for the same periods in 1977 were 1 264 000 tonnes and 872 000 tonnes and in 1978, after a particularly small harvest, 1 072 000 tonnes and 750 000 tonnes. Nor can the conclusion to be drawn about the situation on the market in this case be affected by any of the various arguments put forward by the plaintiff. That applies above all as regards its observation that 55 to 60 % of imports from Chile were destined for the Federal Republic of Germany where the quantities of apples in storage were smaller. For, in the case of a protective measure applying throughout the Community, the situation in the entire Community is naturally important, just as it will not do to take only Chilean exports into account here. The plaintiff could not adduce any evidence for its contention that at the end of the harvest producers deliberately withheld apples from the market or, at any rate, that they withheld excessive quantities ignoring market requirements. As regards the plaintiff's observation that only stocks kept in cold stores may be properly taken into account and that an appreciable proportion of produce unsuitable for intervention measures was stockpiled we have been told by the Commission with quotations from reference books that the storage of certain kinds of apples is possible until May, even outside cold stores, so that it was possible for them to be taken into account in an assessment of the market situation in April. Secondly, not only is it obvious that stockpiling, which is very expensive is economic only in relation to marketable goods. It must also be borne in mind, as far as the intervention stores are concerned, that responsibility for the intervention measures and the quality checks to be carried out in that connexion lies with the Member States and that accordingly when adopting the measures which it has to take the Commission may assume that the figures supplied by the Member States are correct provided there are no serious reasons to doubt them. However, the plaintiff has not been able to point to any such reasons with regard to the period with which we are concerned and it is difficult to discern any in the special report of the Court of Auditors, referred to by the plaintiff, on various measures affecting the management of the European Agricultural Guidance and Guarantee Fund, Guarantee Section (Financial Year 1978) (Official Journal 1980, C 258, p. 1); the report contains only very general criticisms about the proper application of intervention measures, controls by Member States and the furnishing of information to the Commission by the Member States, although it does also mention repeated attempts of the Commission to tighten controls.

What was said about the *price situation* existing on the common market in spring 1979 is also impressive. Apparently in April 1979 market prices in the Federal Republic of Germany were between 16.46 and 19.84 units of account, in Belgium between 13.90 and 16.39 units of account and in the Netherlands between 14.86 and 20.26 units of account so that they did not reach the basic price of 21.26 units of account which is determined in accordance with Article 16 of Regulation No 1035/72 on the basis of the trend of the arithmetic mean of prices recorded on the representative Community markets. It is also worth noting that in March 1979 prices in five of seven Member States were still nowhere near the level prevailing in March of the 1976/77 marketing year in which there was a comparable harvest.

That is clear from the tables which were submitted by the Commission on 30 October 1980 in response to an inquiry from the Court. Moreover, the price trend in spring 1979 (February to April) in most Member States (France, Federal Republic of Germany, Italy, Ireland and Denmark) was clearly downward, as may also be seen from the outline supplied by the Commission.

Not least what has become known about the extent of the *withdrawals from the market* effected at the time in question must give cause for thought; according to the common organization of the market (Articles 15, 15a and 19), withdrawals may take place only if the prices recorded on the market fall far below the basic price. On 1 March 1979 those withdrawals amounted to 90 000 tonnes, whilst the corresponding figures for 1978 and 1977 are 2 450 and 115 000 tonnes respectively; on 1 April 1979 they already amounted to 143 512 tonnes and reached 378 974 tonnes in the whole of the 1978/79 marketing year. It is also worth noting that in 1976/77 they totalled 167 189 tonnes and in 1975/76, in the spring of which there were clearly the same stocks as in spring 1979, as much as 840 000 tonnes.

All those circumstances undoubtedly lead to the conclusion that in the spring of 1979 there existed an extraordinarily critical situation on the common market in dessert apples.

(b) That conclusion gives rise to the question whether the volume of imports to be expected might lead to an appreciable deterioration of the situation and whether the import reductions envisaged by the Commission to avert that threat seem appropriate.

The plaintiff has basically objected that a negative answer to that question is inescapable because, owing to the kinds, qualities and prices in question, imported and home-produced apples may be viewed as interchangeable only to a limited extent and because all previous experience shows that in the spring and early summer it must even be expected that imported apples will promote the sale of domestic produce and have a beneficial effect on the price situation. That contention, however, is difficult to accept. It is hard to imagine that, in a situation characterized by great difficulties in disposing of domestic produce and by falling prices on the common market, consumers who are no longer attracted by domestic produce should be prepared, when freshly-harvested apples are imported, to buy not only those apples but stored domestic produce, too, and at a higher price. As far as the question of interchangeability is concerned reference may be made not only to the affirmative finding by the special GATT group which had to deal with Chile's complaint and about which the Commission informed the Court. The case-law on this subject (judgment in Joined Cases 41 to 44/70 [1971] ECR 411 et seq., especially paragraphs 47 to 54) is quite plain as well. I need only recall two observations made in that judgment:

"Yet, irrespective of the prices of these products there is still a danger that because they can be substituted for domestic products they may attract part of the internal demand and thus cause even greater quantities to flow in to the intervention agencies."

"It is true that the products coming from third countries during this period"

(spring) "were manifestly superior both as to quality and price to the domestic products, but on the other hand the quality of the latter products was not so inferior that interchange of the two categories was in no circumstances possible."

If that approach is adopted in this case, too, it must be remembered that according to the Commission's inquiries the imports envisaged would have amounted to 380 000 tonnes. That would have represented an increase even as against the previous year in which there had been a particularly small domestic harvest; it would have been a very considerable increase in comparison with imports in 1977 (249 000 tonnes), a year in which the harvest was of comparable size. What is more, imports had never reached that magnitude in any other previous year. It is therefore difficult to criticize the Commission for believing that such a volume of imports would create the risk of a disturbance, and in view of the situation described there can be no question of an error of judgment if the Commission was attempting to achieve a reduction of imports to roughly 310 000 tonnes. We should not therefore accept the plaintiff's view that the only issue was whether an additional quantity of 8 000 tonnes of apples to be imported from Chile would have created the risk of a disturbance. Quite irrespective of the fact that at the time when the disputed measures were adopted there was still no reliable information about contracts of carriage for some 5 000 tonnes and that it could not be assumed, either, that Chile would restrict itself to 55 000 tonnes (because no agreement on that compromise figure had been reached), the risk of a disturbance must more correctly be seen to exist in an additional volume of imports comprising some 70 000 tonnes altogether.

The curtailment of imports which the Commission consequently believed to be correct, and properly so in my view, was, as we know, achieved in relation to other exporting countries on the basis of voluntary restriction agreements. The plaintiff may be critical of that course of action and doubt its legality but consideration of that issue may in my opinion remain open since the voluntary restriction agreements did not constitute a legal pre-condition in the sense of being a legal basis for the protective measures adopted against Chile. The only important point is that those steps were in fact effective; they did reduce the risk of a disturbance so that it was possible for the adoption of unilateral protective measures to be restricted to Chile. A decision not to adopt protective measures against Chile would on the other hand have run the risk that the other exporting countries would not have kept to their voluntary restriction agreements so that it would have been necessary to provide for an actual increase in imports of not just some 8 000 tonnes but, as the Commission feared, of some 70 000 tonnes.

As regards the further issue of the fair, proportionate reduction of all the exports envisaged, I see no reason for criticism here either. The Commission's approach was to take as a basis the average imports during the three previous years, although in the case of 1976 when, unlike other countries, Chile clearly did not keep to a voluntary restriction agreement, agreed imports and not actual imports were taken into account. A specific percentage reduction was then made. As the Commission told

us, using that method it arrived at the lowest percentage reduction in the case of Chile so that there cannot basically be any question of that country's being put at a disadvantage.

When the plaintiff says however that there was reason to give Chile a greater proportion of the volume of imports envisaged in view of the fact that Chile did not start exporting until a late stage and the fact that in spring 1979 it was to be expected that the exporting countries who had signed voluntary restriction agreements would not exhaust the quotas provided, I would beg to differ. I cannot in fact discern the considerations which would have provided compelling reasons for so proceeding. Secondly, in my view it does not seem permissible to draw inferences with regard to the year which concerns us here from the conduct of certain States in the southern hemisphere (Argentina, Australia, New Zealand) in the marketing year 1979/80 when obviously greater amounts were announced for import than were actually imported. The only important point is simply that, according to the unchallenged statements of the Commission, in 1979 the quotas specified in the voluntary restriction agreements were actually used up and the plaintiff has not been able to demonstrate that this occurred — by means of additional purchases from other countries — merely out of fear that during negotiations for future voluntary restriction agreements the Community might otherwise rely on the fact that the 1979 quotas had not been exhausted.

(c) If, therefore, the foregoing considerations can leave no doubt as to the justification of the protective measure adopted by the Commission and if there can, in particular, be no question of the Commission regulations being invalid on the grounds of inadequate examination or erroneous appraisal of the facts with respect to Article 29 of Regulation No 1035/72 and Regulation No 2707/72, that result is not affected by two further arguments partly stemming from the actions for damages.

One of those arguments concerns the fact that Commission Regulation No 687/79 was amended twice. That fact really does not lead to the conclusion that the measure complained of is invalid for having been enacted on the basis of inadequate information. There was no such uncertainty as far as the appraisal of the situation on the domestic market and the volume of imports to be expected is concerned. That may have been the case as far as concerns details about the arrival of the goods in the Community, for which the Commission was dependent on information from Chile. When this information became available, however, there was no alternative in view of the principle of proportionality clearly expressed in Article 3 of Regulation No 2707/72 but to adjust the measure originally adopted to meet the changed circumstances.

The other argument rests on a comparison with 1979/80 and the fact that in that year, despite an apple harvest of 6 869 000 tonnes and withdrawals from the market totalling 480 186 tonnes, protective measures were not taken against imports which reached a volume of 370 000 tonnes. To draw conclusions from that comparison about the correctness of the exercise of discretion in spring 1979 and the legality

of the measures based thereon seems to me to be misguided because for one thing the conduct of the Community institutions in 1980 might also have been affected by the proceedings pending under GATT which might possibly have occasioned special restraint; it should not be overlooked either that the position in 1980 was more favourable than in 1979 in so far as a rise in prices was recorded in February and March and basic prices were exceeded in the countries with the largest stocks (see the statement of Commissioner Gundelach, Official Journal C 190 of 28 July 1980, p. 12). Moreover sale prices of the exporting countries were clearly higher than in the previous year and, in comparison with the actual imports in the previous year, it was possible to speak of only a moderate increase in imports.

4. The next matter requiring examination is whether the Commission regulations are invalid for offending against the principle of the protection of legitimate expectation, which is the view taken by the plaintiff in the main action.

The plaintiff has claimed that that principle fundamentally precludes interference with existing contracts; if they are not to be regarded as having been interfered with, provision should at least be made for transitional measures. Further to that submission the plaintiff also expresses the view that the measures could have been taken much earlier. Export contracts had in fact already been made in October and November and the Commission knew that; the Commission also had estimates at that time about the size of the domestic harvest and it was pursuing inquiries in the exporting countries. So it could have given notice as early as the end of 1978 that protective measures were a possibility but it did not even mention them at the sitting of the Consultative Committee in February 1979.

In my view that argument of the plaintiff cannot be accepted either.

As the Commission has rightly pointed out, the very fact that effective protective measures would often not be conceivable and the protection clause laid down in the common organization of the market would accordingly be robbed of much of its value militates against the assumption that the principle of the protection of legitimate expectation can have, in a legal context such as this, the scope claimed by the plaintiff. One must consider not only the risk of the back-dating of contracts which might undermine the measures to a large extent, but it must also be borne in mind that the protection clause can be used only if there is a clear picture — which, however, requires concluded contracts — and it should not be forgotten either that export contracts are made very early on (in October and November), in other words, at a time when it is difficult to predict a critical situation on the common market.

In any event there is no support to be found in previously decided cases for the correctness of such a far-reaching argument as propounded by the plaintiff. In so far as case-law has dealt with that principle it tends rather to confirm the Commission's view whereby the principle of the protection of legitimate expectation requires at most that goods already in transit should be taken into account, as Article XIII of GATT also

provides. I am thinking here of the judgments in Case 68/77 *IFG-Interkontinentale Fleischhandelsgesellschaft mbH & Co KG* v *Commission* [1978] ECR 353 et seq., judgment of 14 February 1978, and Case 84/78 *Angelo Tomadini* v *Amministrazione delle Finanze dello Stato* [1979] ECR 1801 et seq., judgment of 16 May 1979; the first concerned the adoption of protective measures in the case of disturbances on the market, the second monetary compensation. All we learn from them in fact is that the principle of the protection of legitimate expectation precludes the amendment of rules not containing special transitional provisions if traders relying on contracts which have already been made have entered into special legal relationships with the authorities for external trade (applications for import licences, obligations to carry out specific import transactions), but only if the grant of such protection is not contrary to overriding public interests. In principle, therefore, it is necessary to concur in essentials with the Commission's view, not least in view of the requirement on which the judgment in Case 84/78 also laid stress, that market rules should be constantly adjusted to the changed economic situation, and in a case such as this it must be described as reasonable for importers who are familiar with the mechanisms of the market organization and can be expected to watch it closely to protect themselves against the risks of protective measures by inserting appropriate clauses in the contracts which they make.

In addition to that, as far as the alleged late enactment of the protective measures is concerned, it seems not only questionable whether the invalidity of the measures may be accepted on that ground at all, assuming that the conditions required for their adoption do exist; that may well be a consideration which more properly belongs to an action alleging public liability. The point here is that the Commission made its first inquiries of the exporting countries not in October, as the plaintiff maintains, but that the first contacts were made only in January and in particular the Commission's statement that it did not receive the information about the internal market required to enact the protective measures (marketing, intervention and price trends) in a reliable form until March could not be disproved either. So the Commission is hardly open to the reproach that it should have adopted the measures earlier or at any rate have given notice of them, quite irrespective of the fact that even if the protective measures had been announced or adopted at the beginning of 1979 it would have been too late for the plaintiff as it had already concluded its import contracts in November and December of the previous year, that is to say at a time when a definite forecast about the development of the market in the Community was certainly still not possible.

5. The plaintiff in the main action has claimed that a further ground of invalidity is the breach of the prohibition of discrimination.

The allegation is not that protective measures were adopted only in relation to Chile or about how the reduction of Chilean exports was calculated in relation to non-member countries which had entered into voluntary restriction agreements which, as said before, cannot in fact be objected to. Rather the plaintiff discerns a failure to observe Article 40 of the EEC Treaty regarding the principle of equal treatment of

consumers, among whom are to be included importers, in the fact that transitional rules were adopted in Regulations Nos 797/79 and 1152/79 only in respect of certain imports and that the plaintiff was excluded from those transitional arrangements despite its application for the grant of an exemption.

I explained at the outset how the two additional Commission regulations came to be enacted. In view of the forecasts on which the Commission relied concerning the maximum quantities of apples which could be imported without disturbance they were necessary so as to observe the principle of proportionality as laid down in Article 3 (2) of Regulation No 2707/72. It can hardly be objected that when the first supplementary regulation was adopted (23 April 1979), that is some time after the plaintiff had approached the Commission by telex and after it had cancelled its purchase and affreightment contracts, attention was paid only to goods already at sea and the plaintiff's import arrangements were left out of consideration. That approach was the appropriate one under Article 3 (3) of Regulation No 2707/72, since it does of course require account to be taken of the special position of products in transit to the Community. Moreover it is clear that on an objective view the plaintiff was in that respect in a different position from that of the importers favoured by Regulation No 2707/72.

As it later turned out that the volume of imports viewed as permissible had still not been attained, it must also be considered proper that goods which had already arrived in the Community and which had obviously been loaded by some importers at their own risk after the adoption of the first protective regulation were dealt with first. At any rate in my opinion that circumstance and the fact that the Commission decided not to distribute the remaining import quantity among all importers do not amount to a form of discrimination consisting in an abuse of discretion and in grossly unequal treatment which, over and above the assumption that the regulation is invalid, could also found a claim for public liability, which is now the only conceivable legal consequence for the plaintiff.

6. Finally, it is still necessary to consider whether there is anything in the plaintiff's allegation that Articles 39 and 110 of the EEC Treaty and provisions of GATT have been infringed.

It has been submitted that Article 37 of Regulation No 1035/72 requires that when it is applied appropriate account should also be taken of the aims set out in Articles 39 and 110 of the Treaty. The plaintiff contends however that there clearly can be no question of the aims of Article 39 being endangered by the import transactions planned in the spring of 1979; on the other hand the import reductions required by the disputed regulations must be regarded as an infringement of Article 110 of the EEC Treaty in which may be discerned a duty to open the market and which furthermore represents the specific application of obligations under GATT to which, according to case-law, the Community is bound.

As to those points, it is clear to me from all that we have learned, first, that the plaintiff's contention that the imports planned in the spring of 1979 could not have endangered the aims of Article 39 is

not tenable. In my view the Commission correctly considered that there was such a danger, since it was after all to be feared that imports would lead to a decline in the sales of domestic produce and to a further fall in the prices prevailing, thereby directly affecting the aim set out in Article 39 (b).

Secondly, as far as any allegation of a failure to observe Article 110 of the EEC Treaty is concerned, it is necessary to agree with the Commission that Article 110 outlines only a programme or at any rate cannot be treated as a provision which might serve as a yardstick for whether a Community regulation is valid or not. In my view nothing further needs to be said on that point. The same is true so far as the plaintiff relies in a very general way on commitments of GATT which are to the like effect. I would remind the Court here of the decided cases in which the General Agreement has been repeatedly described in general terms (with special emphasis being placed on Articles XIX, XXII and XXIII) and which have reached the conclusion that neither Article II nor Article XI of GATT gives rights to private individuals, which is the precondition for assessing validity on the basis of GATT (judgments in Joined Cases 21 to 24/72 *International Fruit Company NV and Others* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219, judgment of 12 December 1972; Case 9/73 *Carl Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135, judgment of 24 October 1973).

In so far as further objections concerning observance of the provision on the non-discriminatory application of quantitative restrictions (Article XIII) have emerged in these proceedings, upon complaint by Chile recorded by a special GATT group in a report of November 1980 the Commission was able to point out on one point — improperly taking as a reference the year 1976 in which Chile did not keep to a voluntary restriction agreement — that the adoption of another approach, taking the year 1975 as a basis for instance, would not have led to any other result in the reduction of the volume of imports as far as Chile was concerned. As regards the other point recorded in that report, that insufficient consideration was given to the fact that as a newcomer to the field of apple exports Chile had some ground to make up, it is important to consider not only that this point is clearly a relatively novel consideration; it should not be forgotten either, as far as both objections are concerned, that where other contracting parties do not agree to quantitative restrictions GATT makes provision only for a consultative procedure in accordance with Article XXIII. However, as in the two judgments just cited, that justifies the conclusion that Article XIII of GATT is not a provision which creates rights for private individuals either and that a Community regulation cannot be held invalid on the strength of it.

7. In conclusion I can accordingly only propose that a reply should be sent to the Hessisches Finanzgericht to the effect that no factors have emerged in the proceedings which would lead to the conclusion that Regulations Nos 687/79, 797/79 and 1152/79 are void.