abovementioned provision is precisely to limit those risks with regard to goods in transit.

4. A claim for interest relating to the non-contractual liability of the Community under the second paragraph of Article 215 of the Treaty must be considered in the light of the principles common to the legal systems of the Member States to which that provision refers. According to those principles a claim for interest is, as a general rule, permissible.

REPORT FOR THE HEARING
delivered in Case C-152/88 *

I — Facts and procedure

1. In 1988 the Commission took a number of protective measures with regard to imports into the Community of Ten of dessert apples originating in non-member countries. The following table shows the trends, according to the documents before the Court, of dessert apple production in the Community of Ten, quantities bought into intervention and imports from non-member countries:

Marketing year (1 July to 30 June)	1982/83	1983/84	1984/85	1985/86	1986/87
Production (in tonnes)	8 564 300	6 186 500	7 355 000	6 331 000	7 368 100
Intervention	1 146 932	125 297	660 901	150 794	340 529
Imports from non-member countries	378 541	515 223	497 930	517 232	524 900
— Imports originating in the Southern Hemisphere	286 376	387 712	404 520	450 966	491 500

2. On 3 February 1988 the Commission adopted Regulation (EEC) No 346/88 introducing special surveillance of imports of dessert apples from third countries (Official Journal 1988, L 34, p. 21). Under that regulation the release for free circulation within the Community of Ten of dessert apples was made subject, for the period until 1 September 1988, to the presentation of an import licence issued against the lodging of security of ECU 1.5 per 100 kg net.

* Language of the case: English.

3. Under Article 3(3) of the regulation, import licences were to be 'issued on the fifth working day following the day on which the application is lodged unless [protective] measures are taken within that time'.

The period of validity of import licences, initially one month, was increased to 40 days by Commission Regulation (EEC) No 871/88 of 30 March 1988 amending Regulation No 346/88 (Official Journal 1988, L 87, p. 73).

4. The Commission considered that applications for import licences for dessert apples originating in Chile exceeded the traditional quantity of imports of such products originating in that country and that the continuation of such imports could lead to serious disturbance of the market such as to jeopardize the objectives of Article 39 of the Treaty and in particular to cause serious injury to Community producers; it therefore adopted Regulation (EEC) No 962/88 of 12 April 1988 suspending the issue of import licences for dessert apples originating in Chile (Official Journal 1988, L 95, p. 10), which came into force on the following day.

5. By Regulation (EEC) No 984/88 of 14 April 1988 (Official Journal 1988, L 98, p. 37), which came into force on 15 April 1988, the Commission altered the period of suspension, which had initially been from 15 to 22 April 1988, to 18 to 29 April 1988, stating that that alteration was necessary for reasons of management and in order to enable an in-depth review of the overall situation of the market in dessert apples to be carried out.

6. Under Article 1(2) of Regulation No 962/88, applications for import licences pending on 18 April 1988 were to be rejected.

7. With regard to goods in transit the last recital in the preamble to the regulation states that

'since the period of validity of import licences has been fixed so as to cover amply the dispatch of dessert apples to the Community and to permit the operators to obtain import licences before the ships depart, no account should be taken of other than those for which import licences have been issued'.

8. By Regulation (EEC) No 1040/88 of 20 April 1988, the Commission fixed the quantities of imports of dessert apples originating in particular in the five apple-producing countries of the Southern Hemisphere for the period ending on 31 August 1988, and provided that the issue of import licences for dessert apples was suspended where the quantities in respect of which import licences were applied for exceeded those quantities. The last recital in the preamble to that regulation stated that in respect of Chile quantities in import licences applied for exceeded the allocated reference quantity (142 131 tonnes) and that the issue of import licences for dessert apples from that country should accordingly continue to be suspended until the end of the 1988 importing year, that is to say until 31 August 1988.

9. Regulations Nos 962/88, 984/88 and 1040/88 were adopted on the basis *inter alia* of Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables (Official Journal, English Special Edition 1972 (II), p. 437), in particular Article 29(2). According to that article, as amended by Council Regulation (EEC) No 2454/72 of 21 November 1972 (Official Journal, English Special Edition 1972 (November), p. 60)

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

...

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.

2. If the situation mentioned in paragraph 1 arises, the Commission shall, at the request of a Member State or on its own initiative, decide upon the necessary measures; the measures shall be communicated to the Member States and shall be immediately applicable.'

10. With regard to the measures which may be taken pursuant to that provision, Article 3 of Council Regulation (EEC) No 2707/72 of 19 December 1972 laying down the conditions for applying protective measures for fruit and vegetables (Official Journal, English Special Edition 1972 (28 to 30 December), p. 3) provides that:

'1. The measures which may be taken ... are:

(i) 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;

(ii) ...

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.

...'

11. Sofrimport SARL, a company incorporated under French law, is an importer and wholesaler of fresh fruit and imports into the Community, *inter alia* dessert apples originating in Chile.

12. On 31 March 1988 Sofrimport shipped from San Antonio a cargo of 89 514 cartons

of dessert apples, originating in Chile, for import into the Community. Prior to the arrival, on 20 April 1988, of the vessel transporting that cargo at the port of Marseilles, it lodged an application on 12 April 1988 with the French intervention agency, Oniflhor, for import licences for those consignments. On 18 April 1988 Oniflhor refused to issue the licences on the ground that following the entry into force of Regulation No 962/88 it could no longer grant the application.

13. By an application lodged at the Court Registry on 26 May 1988 Sofrimport brought these proceedings. On the same day, it submitted an application pursuant to Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure for interim measures concerning the importation into the Community of the abovementioned cargo of dessert apples originating in Chile.

14. By an order of 10 June 1988 the President of the Court suspended the application of Commission Regulations Nos 962/88, 984/88 and 1040/88 with respect to the 89 514 cartons of dessert apples originating in Chile, which at the time were stored in transit in the port of Marseilles by Sofrimport.

15. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General the Court decided to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

16. Sofrimport claims that the Court should:

(i) declare Regulations Nos 962/88, 984/88 and 1040/88 void;

(ii) order the European Economic Community to fully compensate all damages suffered by the applicant as a result of the illegal decisions laid down in the regulations referred to above and to assess damages in the amount of FF 2 821 959.10 or at least at an amount the Court deems appropriate, with interest at the rate of 9.5% per annum as from the date of submission of the reply;

(iii) take any further measures the Court may deem necessary or appropriate;

(iv) order the Commission to pay the costs.

17. The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — *Action for annulment*

1. *Admissibility*

18. Sofrimport argues that both Regulations Nos 962/88 and 984/88 suspending the issue of import licences for dessert apples originating in Chile and Regulation No 1040/88 extending the period of suspension until the end of the 1988 importing year are of individual and direct concern to it.

29. When those measures were adopted, the number of pending applications for import licences, including that made by the applicant on 12 April 1988, was fixed and was known to the Commission. They are therefore of individual concern to the applicant. Moreover, the regulations directly affect the legal position of the applicant since the competent authorities of the Member States had no discretion with regard to the issue of import licences.

2. *Substance*

(a) *Lack of power to take protective measures under Article 29(2) of Regulation No 1035/72*

20. Sofrimport argues that the Commission had no power to take protective measures under Article 29(2) of Regulation No 1035/72 since there were no serious disturbances as referred to in the first indent of Article 29(1). The statements made in the preamble to Regulation No 1040/88 as justification for the introduction of import quotas are factually incorrect. In particular, there was no link between the increase in imports and the level of withdrawals and stocks.

21. The total level of withdrawals in the marketing year 1987/88 was not exceptionally high, since the level of withdrawals has been substantial in absolute terms for a number of years. This phenomenon is a structural feature of the market and cannot as such be advanced as a 'threat of serious disturbance by reason of imports'.

22. Community producers sold their apples in 1987/88 at prices no lower than those of the previous marketing years. However, there is a chronic exception for a well-established class of Italian and French producers in particular, who produce low-quality apples solely for sale into intervention. That is true in particular of the variety 'Golden Delicious', which accounted for 38.52% of the total quantity of withdrawals in the Community for the 1986/87 marketing year (approximately 131 171 tonnes) and 65.55% for 1984/85 (433 220 tonnes). Almost the entire difference between the withdrawals in the 1984/85 and in 1986/87 is accounted for by apples of that variety, which confirms that the Community market for apples as such is not experiencing difficulties.

23. Furthermore, the buying-in price and the average price paid by producers' organizations have remained stable since the 1985/86 marketing year, and there is no indication that the figures for 1987/88 will be substantially different from those of the previous marketing year. The market value of withdrawn apples, which are of poor quality and practically unmarketable, should be assessed at less than ECU 15.12 or even 11.91 per 100 kg. Apples imported from non-member countries, on the other hand, almost all belong to 'luxury' varieties such as 'Granny Smith' and 'Red Delicious', and their average market price (first sale into the

Community) between March and June of 1987 and of 1988 was between ECU 49.74 and 65.20 per 100 kg exclusive of import duty of 6 to 14%.

24. In view of those differences in quality and price, the view that the fact that the total quantity of apples withdrawn was higher in 1987/88 than in 1986/87 was caused by an increase in imports of apples from non-member countries cannot be sustained. In disregarding the structural anomalies in the apples sector, of which it was well aware, the Commission gravely and manifestly misjudged the factual and economic context in which it took the protective measures in question. In addition, the Commission abused its powers by relying on the imperfections of its own policy with regard to apples, which could not cope with the chronic problems of weak varieties.

25. Sofrimport adds in the alternative that intervention levels were much higher in 1982/83 and 1984/85, but the Commission did not feel the need to resort to protective measures. That the Commission's conclusions are incorrect is clear from the fact that in 1987/88 the level of intervention was double that in 1986/87 even though production and imports from non-member countries were lower than in 1986/87.

27. It is apparent from the Commission's arguments that for a number of years it has applied disguised quantitative restrictions on imports of apples from non-member countries. It adopted the protective measures in question solely in order to ensure observance of the maximum quantities it had fixed, and thus acted contrary to Article 29 of Regulation No 1035/72. Finally, the statement of the reasons for the three regulations is inadequate, since the reasons put forward in the preambles are false and misleading.

27. The Commission considers that the conditions laid down in Article 29 of Regulation No 1035/72 for the adoption of protective measures were satisfied. As a result of imports, the Community market for apples was threatened with serious disturbances which might have endangered the objectives of Article 39 of the Treaty. As early as 1987 it became clear to the Commission that steps would have to be taken to stem the flow of imports of dessert apples from the five Southern Hemisphere countries, and it therefore informed those countries of the maximum quantities which it considered that the Community could absorb. Although imports from Chile considerably exceeded the figure indicated, total imports in that year did not reach the maximum quantities communicated by the Commission, and it therefore refrained from adopting protective measures.

28. According to forecasts supplied to the Commission by the five Southern Hemisphere countries for 1988, imports from those countries were to reach 617 000 tonnes, an increase of 26% on 1987 and 36% on 1986. At the same time, Community apple production remained essentially stable, apart from fluctuations due to good and bad harvests, while the level of intervention practically doubled in two successive years. The Commission states

that the Community harvest in 1987/88 was 6 482 000 tonnes and that 591 000 tonnes of apples were bought into intervention. The Commission refers in this respect to the judgment of 5 May 1981 in Case 112/80 *Dürbeck* v *Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095, in which the Court upheld similar protective measures on imports of Chilean apples which were adopted in much less dramatic circumstances, since the imports in question at that time amounted only to 380 000 tonnes and the quantities withdrawn amounted to 143 512 tonnes.

29. The Commission also points out that the quantities admitted under Regulation No 1040/88 were actually higher than those imported in 1986/87, since before the entry into force of Regulation No 346/88 about 50 000 tonnes had already been imported into the Community. The principle of proportionality was thus observed.

30. With regard to the difference between varieties of apples, the Commission states that it is dessert apples as a whole that constitute the 'product' for the purposes of Article 29(1) of Regulation No 1035/72. Neither the old Common Customs Tariff nor the new Combined Nomenclature makes any distinction between the different varieties of apple. Indeed, the different qualities of apple are largely interchangeable.

(b) *Reasons for the import suspension and its extent*

31. Sofrimport argues that Article 29 of Regulation No 1035/72 does not authorize protective measures in order to enable a review of the overall situation of the market for apples to be carried out, the reason set out in the preambles to Regulations Nos 962/88 and 984/88, but only in order to counter market disturbances caused by imports. By suspending imports from Chile the Commission thus abused its powers.

32. Moreover, a total — though 'temporary' — halt to imports is a superfluous and disproportionate means of reviewing the market, since the Commission had already introduced a system of import licences and must therefore have been fully aware of the most recent import flows.

33. In addition, the limitation of the import suspension to apples originating in Chile is contrary to the general prohibition of discrimination and to Articles I and XIII: 1 of the General Agreement on Tariffs and Trade.

34. Finally, the Commission had already fixed 'silent' quotas for apples originating in non-member countries well before 20 April 1988 and suspended the issue of licences for apples originating in Chile with effect from the date on which the target was reached. The Commission must, however, have known at that time that the suspension would be continued for the remainder of the marketing season and it intentionally misled the businesses concerned by suspending the issue of import certificates only for a short period. The application of disguised quotas, in particular retroactive quotas, is in itself a breach of the second paragraph of Article XI: 2 of the GATT. Indeed, Chile has filed a complaint against

the Community under the GATT, which is presently pending before a GATT panel.

35. The Commission asserts that it is clear from the penultimate recital in the preamble to Regulation No 962/88 that the primary purpose of that regulation was to counter a threat of a 'serious disturbance to the market such as to jeopardize the objectives of Article 39 of the EEC Treaty and in particular to cause injury to Community producers'. The second half of that recital, which refers to the need for a review of the market situation, was included principally in order to explain the length of the suspension. That threat still existed when Regulation No 984/88 was adopted, as is implicit in the preamble to that regulation.

36. Moreover, it is clear from the preamble to Regulation No 962/88 that the conditions for the adoption of additional protective measures already existed at the time. It was not possible, however, to adopt final measures before conducting a review of the market situation and extensive consultations and discussions within the Commission.

37. As regards the alleged discrimination, the Commission explains that imports of Chilean apples were stopped first because they were the first to arrive. When imports from Chile reached critical levels, it was self-evident that an overall review of the situation had to be carried out with a view to imposing maximum quantities on all the exporting nations. Imports from all the other countries, apart from Australia, have now also been suspended.

38. As regards the reference to the provisions of the GATT, the Commission points out that the Court has repeatedly held that those provisions are not directly applicable.

(c) *Position of goods in transit*

39. Sofrimport argues that by failing to take into account the situation of goods already shipped (see in particular the last recital in the preamble to Regulation No 962/88), the Commission infringed Article 3(3) of Regulation No 2707/72. The obligation to take into account the particular situation of goods in transit towards the Community must be interpreted as implying the obligation to exclude from the scope of the protective measure products shipped before the publication of those measures (see judgment of the Court of 5 May 1981, cited above, in particular at p. 1119). That interpretation is confirmed by the wording of international agreements on the matter, in particular Article XIII: 3 (b) of the GATT and the 'Standard practices for the administration of import and export restrictions and exchange controls' adopted by the GATT contracting parties on 30 November 1950 (GATT/CP.5/30/Rev. 1), which are binding on the Community.

40. The mere fact that the Commission first established a licensing system which provided for the possibility of protective measures does not mean that in taking such measures it would no longer be under an obligation to take into account the position of goods in transit. Neither Regulation No 346/88 nor Regulation No 871/88 makes

any reference to goods in transit. The legislation in question thus placed no obligation on the traders concerned to apply for import licences before vessels sailed. Traders were entitled to assume, particularly in view of the clear wording of Article 3(3) of Regulation No 2707/72, that they would be exempt from any protective measures once their ship had sailed.

41. Moreover, the measures adopted by national authorities in the implementation of Regulation No 346/88 virtually precluded the possibility of obtaining import licences before the ship sailed. For example, Oniflhor required applications for licences to be accompanied by a pro forma invoice, to be issued by the shipper after the ship had been loaded.

42. The Commission's view to the effect that Sofrimport should have applied for an import licence on 25 March 1988 at the latest is unreasonable, since at that time it could not yet be established with precision which quantities and qualities would be shipped and what their destination would be, inasmuch as the destination might vary according to consumer preferences throughout the Community. In addition, on 25 March 1988 the period of validity of import licences was still 30 days, which was not long enough to ensure that transport from Chile to Marseilles would be covered. The applicant states that it lodged its applications as soon as possible and had no speculative intention such as that alleged by the Commission. It is also incorrect to assert that most importers whose apples were on board ship had applied for import licences before the ships sailed.

43. Finally, Sofrimport emphasizes that it does not challenge the legality of the mechanism of Article 3(3) as such but its application in the present circumstances. The judgments of the Court relied on by the Commission are not relevant in this case since they concern not the situation of goods in transit but the advance fixing of export refunds.

44. The Commission states that it complied with its obligation under Article 3(3) of Regulation No 2707/72 to take account of the special position of products in transit when adopting the contested regulations. That provision does not mean that goods in transit must be admitted to the Community in all cases. The special position of such goods may be taken into account equally well in other ways, for instance where the admission of such goods may undermine the effectiveness of protective measures.

45. The Commission did in fact take account of the special position of goods in transit by adopting Regulation No 346/88. It is apparent from the fifth recital in the preamble and from Article 3(3) of that regulation that the Commission's objective was a twofold one: to obtain up-to-date information on the volume of apple imports and to put traders on notice that imports might be suspended if they reached a critical level. A system which contains a provision such as

Article 3(3) of Regulation No 346/88 is sufficient to comply with the obligation to take account of the special position of products in transit, particularly inasmuch as it provides for a special 40-day period in order to take account of the travelling time from the most distant countries.

46. The judgment of the Court of 27 October 1983 in Case 276/82 *De Beste Boter* v *Produktschap voor Zuivel* [1983] ECR 3331, concerning a provision whose wording is the same, *mutatis mutandis*, as that of Article 3(3) of Regulation No 346/88, supports the Commission's view that that article put importers on notice that within five working days of an application being lodged the Commission might take action to ensure that licences were not issued (see also the judgment of 7 July 1988 in Case 55/87 *Moksel* v *BALM* [1988] ECR 3845). In view of that wording there could be no legitimate expectation on the part of the importers concerned (see the judgment of the Court of 31 May 1988 in Case 253/86 *Sociedade Agro-Pecuária Vicente Nobre* v *Council* [1988] ECR 2725, paragraph 22).

47. Furthermore, representatives of the exporting countries and of importers remained in close contact with the Commission officials concerned throughout. Among the organizations in issue are the two Community-wide trade associations, Eucofel and CIMO, representing virtually all fruit importers, which warned their members in good time that a suspension of imports was likely.

48. The Commission concedes that the wording of the final recital in the preamble to Regulation No 962/88 is unfortunate. However, it is quite clear from the objective of the regulation that the Commission had considered that no further account should be taken of goods in transit.

49. Finally, the restrictions imposed by the French authorities with regard to submission of a pro forma invoice are in no way attributable to the Commission and thus have no bearing on the validity of the regulations in issue. Indeed, the Commission informed the French authorities that in its view that restriction was unlawful.

(d) *The Commission's lack of power to establish a quota system*

50. Sofrimport argues that the Commission had no power to establish, by virtue of Regulation No 1040/88, a *de facto* quota system for imports of apples from non-member countries; under Article 113 of the Treaty such a decision is a matter exclusively for the Council. It is apparent in particular from Article 22 of Regulation No 1035/72 that in the absence of Community provisions to the contrary or of exceptions decided upon by the Council the Commission had no power to apply quantitative restrictions or measures having equivalent effect. There was no such delegation in this case, since Regulation No 2707/72 does not allow for the adoption of import quotas as protective measures. Quotas are not mentioned in Article 3(1) of that regulation, which contains an exhaustive list of

the measures the Commission may take as protective measures.

51. Furthermore, the negotiation of voluntary export restrictions or the application of disguised quotas by the Commission cannot be regarded as protective measures as envisaged by Regulation No 2707/72, which presupposes that the measures to be taken by the Commission constitute legal measures as provided for in Article 189 of the Treaty, published in accordance with Community law.

52. The Commission submits that Article 29 of Regulation No 1035/72 constitutes a contrary Community provision under which it is possible, pursuant to Article 22(1) of that regulation, to derogate from the prohibition on quantitative restrictions or measures of equivalent effect contained in the latter article.

53. It goes on to emphasize that Article 3(1) of Regulation No 2707/72 expressly provides for the suspension of imports. The Commission must therefore *a fortiori* have the power to adopt other less restrictive measures. In that respect the Commission refers to the judgment of 13 May 1971 in Joined Cases 41 to 44/70 *International Fruit Company* v *Commission* [1971] ECR 411, in which the Court held with regard to provisions virtually identical to those at issue in this case that if the Commission was entitled to take protective measures leading to a complete suspension of imports it was *a fortiori* entitled to adopt less restrictive measures (see also the judgments of 12 April 1984 in Case 345/82 *Wünsche* v *Germany* [1984] ECR 1995 and of 11 February 1988 in Case 77/86 *The Queen* v *HM Customs and Excise, ex parte: The National Dried Fruit Trade Association* [1988] ECR 757, paragraph 26).

B — *Action for damages*

54. Sofrimport argues that by adopting Regulations Nos 962/88, 984/88 and 1040/88, which are manifestly unlawful and must therefore be annulled, the Commission caused the applicants substantial losses.

55. With regard to the conditions governing the non-contractual liability of the Community, Sofrimport submits that the 'HNL' doctrine (see judgment of the Court of 25 May 1978 in Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209, at p. 1224) does not apply in this case. That doctrine is confined to liability in connection with legislative measures which are the result of choices of economic policy. The refusal to issue import licences does not constitute a legislative measure but a decision directly affecting a group of individually concerned traders. Furthermore, that doctrine does not cover situations in which the legislature has no discretion, as in this case, where the Commission had no discretion with regard to the situation of goods in transit.

56. Even if the HNL doctrine did apply in this case, the Community would be liable for the damages suffered by Sofrimport. The Commission gravely and manifestly disregarded the limits on the exercise of its powers, in particular by introducing a discriminatory and disproportionate import ban based on incorrect grounds and by failing to take account of the position of goods in transit. It thus committed a serious breach of superior rules of law. The loss resulting from that breach cannot be

regarded as part of the normal risks inherent in the economic activities in which the applicant is engaged, in view *inter alia* of the clear wording of Article 29 of Regulation No 1035/72 and the fact that the legal provision which was infringed explicitly provided for the protection of traders' interests with regard to goods in transit. Finally, the contested measures affect the legal position of a small and well-defined group of traders whose apples were in transit from Chile when the protective measures were published.

57. With regard to the assessment of damages, Sofrimport takes the view that it is necessary to compare the conditions under which it would have marketed the goods concerned in the absence of import restrictions and the conditions under which it was in fact able to market them. With a view to mitigating its damages, before the end of May 1988 it sold 38 548 cartons in transit for an average price of FF 67.18 per carton. That price was particularly low in view of the fact that the transit market was flooded with apples which could no longer be sold in the Community. Following the order of the President of the Court of 10 June 1988 it was able to sell the remaining 50 966 cartons on the Community market for an average price of FF 81.66 per carton. Since it would normally have been able to sell the whole of the cargo within four or five weeks after its arrival in Marseilles and in May 1988 the selling price on the Community market for identical apples from Chile was FF 103 per carton, the applicant suffered a loss in the amount of FF 2 468 220.

58. To that figure should be added storage costs for the period from June to August 1988 (FF 159 787.60), the cost of transport to customs warehouses (FF 161 000) and the cost of selecting and repacking apples after a long period of storage (FF 32 951.50), which it would not have been obliged to pay in the absence of the illegal protective measures. In addition, Sofrimport seeks interest at the rate of 9.5% per annum, the statutory rate of interest under French law.

59. The Commission denies that the conditions for establishing non-contractual liability on the part of the Community have been met. The contested regulations are legislative measures which involve choices of economic policy, so that the Community can be liable in damages only in the circumstances set out in the judgment of 25 May 1978 *HNL* v *Council and Commission*, cited above, a test which applies, moreover, to all legislation.

60. In any event, the contested measures did not exceed the Commission's powers at all, let alone gravely and manifestly. Furthermore, the applicant did not suffer damage exceeding the normal risks inherent in the economic activities in issue. After the adoption of Regulation No 346/88, the normal risk inherent in shipping apples to the Community without applying for an import licence in due time was that importation would be suspended. The applicant would have suffered no loss if it had submitted such an application in due time. It chose to delay lodging its application in order to remain free to sell its apples elsewhere in Europe without being required to lodge the security provided for by Regulation No 346/88.

61. Finally, the Commission denies that the applicant suffered nearly FF 3 million worth of damage or that it was unable to limit its losses by selling all the apples immediately after the order of 10 June 1988. With regard to the interest claimed by the applicant, the Commission notes that the Court's practice has been to award 6% from the date of judgment.

IV — Replies to the questions put by the Court

62. The Court asked the Commission to state how it informed the importers concerned of the likelihood of a suspension of imports.

63. The Commission replies that Regulation No 346/88 necessarily implied that a suspension of imports was likely and no other formal information to that effect was therefore necessary. Both from that regulation and from their informal contacts with Commission officials the two associations representing nearly all the fruit importers in the Community were well aware of the likelihood and warned their members of it in good time.

64. The Court also asked the Commission to inform the Court of similar cases involving protective measures in which it took account of goods in transit only by adopting beforehand a system of import licences and to state whether other imports of dessert apples, in transit at the time when the contested regulations were adopted, were caught by the measures in question.

65. In reply to that question, the Commission refers to a similar system in the area of products processed from fruit and vegetables, introduced by Commission Regulation (EEC) No 2229/85 of 2 August 1985 on protective measures applicable to certain morello cherries (Official Journal 1985, L 205, p. 36). It points out that Article 2(2) of Council Regulation (EEC) No 521/77 of 14 March 1977 laying down detailed rules for applying protective measures in the market in products processed from fruit and vegetables (Official Journal 1977, L 73, p. 28) corresponds to Article 3(3) of Council Regulation No 2707/72 in that it provides that protective measures must 'take account of the special situation of products which are already on their way to the Community'.

66. With regard to the second part of the question, the Commission states that it receives no information on goods from third countries that have not been admitted to the Community.

M. Zuleeg
Judge-Rapporteur