OPINION OF ADVOCATE GENERAL ALBER

delivered on 28 April 1998 *

A — Introduction

1. In this case the Court has to determine an appeal against a judgment of the Court of First Instance. [1] In essence, the question arising is whether it is lawful to take safeguard measures against the importation of rice from the overseas countries and territories ('OCT') into the Community. Such a possibility is provided for in Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community [2] ('the OCT Decision').

2. In 1993 the Council exercised this power by adopting two decisions. The appellants, which are the applicants in the original action ('the applicants'), now seek the annulment of these decisions and also claim compensation for damage. In their opinion, there is no valid legal basis for the decisions which, furthermore, they maintain are contrary to the aims of association.

3. Part Four of the EC Treaty, 'Association of the Overseas Countries and Territories', provides for a special status for the OCT (Articles 131 to 136a). The preamble to the Treaty itself refers to the development of their prosperity and Article 3(r) states that the activities of the Community are to include the association of the OCT in order to increase trade and promote jointly economic and social development. Article 132 provides as follows:

'Association shall have the following objectives:

1. Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty.

...'

What is ultimately meant under this system is the free movement of goods.

4. Article 136 provides that an Implementing Convention annexed to the Treaty is to give effect to those provisions for an initial period of five years after the entry into force of the

* Original language: German.

1 — Judgment of 14 September 1995 in Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* [1995] ECR II-2305.

2 — OJ 1991 L 263, p. 1.

Treaty. Before the said Convention expires, the Council, pursuant to Article 136, paragraph 2, is to 'lay down provisions for a further period, on the basis of the experience acquired and of the principles set out in this Treaty'. Since 1964 the Council has adopted six decisions on the basis of that provision, the last being the abovementioned OCT Decision of 25 July 1991 which, unlike the previous decisions, applies for ten years and not five.

5. The decision gave full effect for the first time to the Treaty provision that the Member States are to apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaty. This means that, as from 1991, all products (that is to say, including agricultural products which fulfil the conditions of the OCT Decision) can be exported to the Community duty-free and without quantitative restrictions.

6. However, the liberalisation of trade with the OCT may lead to problems, particularly in the case of agricultural products which are covered by a common market organisation with intervention machinery and the fixing of uniform prices. These effects are intensified if, in addition, concessions are granted to non-member countries. Where such products (e. g. rice) originating from an ACP State or a non-member country are processed in an OCT, they can be imported into the Community without agricultural levies even though their price is determined by the world market price. If there is a fear that imports may lead to disruption of the market, imports from the OCT may be restricted under Article 109 of the OCT Decision, but this in turn may conflict with the aims of development for the OCT.

Article 109 of the OCT decision reads as follows:

'1. If, as a result of the application of this Decision, [3] serious disturbances occur in a sector of the economy of the Community or of one or more of its Member States, or their external financial stability is jeopardised, or if difficulties arise which may result in a deterioration in a sector of the Community's activity or in a region of the Community, the Commission may, in accordance with the procedure specified in Annex IV, take, or authorise the Member State concerned to take, the necessary safeguard measures.'

B — Facts

7. The applicants are three undertakings in the Netherlands Antilles engaged in the processing and marketing of rice. The rice which

3 — Footnote relating exclusively to the German version.

they process there is from Surinam and Guyana.

8. The action which they brought before the Court of First Instance was occasioned by safeguard measures taken by the Commission on the basis of Article 109 of the OCT Decision.

9. By a first decision dated 25 February 1993 'introducing safeguard measures in respect of rice originating in the Netherlands Antilles', [4] the Commission had laid down the following provisions:

'Article 1

(1) Semi-milled rice falling within CN codes 1006 30 21 to 1006 30 48 originating in the Netherlands Antilles may be released for free circulation in the Community free of import duties, provided the customs value is not less than a minimum price equivalent to 120% of the levy applying to semi-milled rice in accordance with Council Regulation (EEC) No 1418/76. [5]

(2) The minimum price obtained pursuant to paragraph 1 shall not be less than an absolute minimum price (a 'floor price') equivalent to ECU 546 per tonne of semi-milled rice. The absolute minimum price shall be increased each month by ECU 3.5 per tonne from 1 March 1993.

(3) ...

...

Article 5

This Decision is addressed to all the Member States.'

10. Because of an improvement in the market, the minimum price was increased by a second decision dated 13 April 1993. [6] The customs

4 — Commission Decision 93/127/EEC of 25 February 1993 introducing safeguard measures in respect of rice originating in the Netherlands Antilles, OJ 1993 L 50, p. 27.

5 — Council Regulation (EEC) No 1418/76 of 21 June 1976 on the common organisation of the market in rice, OJ 1976 L 166, p. 1.

6 — Commission Decision 93/211/EEC of 13 April 1993 modifying Decision 93/127/EEC introducing safeguard measures in respect of rice originating in the Netherlands Antilles (OJ 1993 L 90, p. 36).

value was now not to be less than a minimum price of ECU 550 per tonne.

11. Originally, in May 1993, six undertakings brought an action against both decisions before the Court of Justice. In addition to the annulment of the decisions, they sought compensation from the Community for the damage they had suffered. The action was referred by order to the Court of First Instance. The French Republic and the Italian Republic were granted leave to intervene in support of the Commission.

12. By judgment of 14 September 1995 [7] the Court of First Instance annulled Article 1(1) of the first of the Commission's decisions and dismissed the remainder of the applications.

13. The Court of First Instance considered that 'by placing ACP rice and American rice in a more favourable competitive position on the Community market than Antillean rice, Article 1(1) of the decision of 25 February 1993 goes beyond what was strictly necessary to remedy the difficulties caused for the marketing of Community rice by imports of Antillean rice.' [8]

14. On 13 December 1995 three of the six original applicants lodged an appeal against this judgment, claiming that the Court of Justice should:

1. Set aside the contested judgment in so far as the relief sought by the applicants were not granted in full;

2. Grant in full the relief already sought by the applicants before the Court of First Instance, namely:

2.1 Annul in their entirety Commission Decision 93/127/EEC of 25 February 1993 introducing safeguard measures in respect of rice originating in the Netherlands Antilles and Commission Decision 93/211/EEC of 13 April 1993 modifying Decision 93/127/EEC introducing safeguard measures in respect of rice originating in the Netherlands Antilles;

2.2 Order the Community to make good the damage suffered by the applicants as a result of those decisions;

2.3 Order the Commission to pay the costs of the appeal and of the proceedings before the Court of First Instance.

7 — Cited in footnote 1.

8 — Paragraph 143 of the judgment.

3. Give judgment itself in accordance with Article 54 of the Statute of the Court of Justice or, in the alternative, refer the case back to the Court of First Instance for judgment.

The Commission contended that the Court should:

— dismiss the appeal;

— order the applicants to pay the costs of the proceedings.

The Council asked the Court:

— to dismiss the appeal or, in the alternative, to dismiss the first ground of appeal, and

— to order the applicants to pay the costs.

The form of order sought by the Italian Republic was worded as follows:

— to set aside the judgment of the Court of First Instance in so far as it dismisses the objection that the applications are inadmissible and, consequently, to allow the objection;

— in the alternative, to dismiss the appeal in its entirety;

— to order the applicants to pay the costs.

At the hearing the French Republic, whose written pleading had to be rejected as inadmissible by reason of the expiry of the relevant time-limit, in substance supported the form of order sought by Commission.

C — Admissibility

15. As it had already done before the Court of First Instance, the Italian Republic, as intervener, raises the objection that the action is inadmissible on the ground that the appli-

cants are not directly and individually concerned.

16. The applicants agree with the finding by the Court of First Instance that the action was admissible and, moreover, contend that, as an intervener, the Italian Republic is wholly precluded from raising the objection of inadmissibility as it has not been raised by the party which it supports.

17. Persons, such as the applicants in this case, other than those to whom a decision is addressed are individually concerned only 'if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the persons addressed'. [9] Consequently the applicants would have to be differentiated from all other persons also concerned by the contested decisions and not merely concerned in their objective capacity as undertakings in the business of processing and marketing rice, just like any other undertaking in that sector.

18. To determine this question, the Court of First Instance drew a parallel with the *Piraiki-Patraiki* judgment. [10] In that case the Court of Justice concluded, from Article 130(3) of the Act of Accession of the Hellenic Republic, that when the Commission adopts safeguard measures, it must, in so far as the circumstances of the case permit, inquire into the negative effects which its decision might have on the economy of the Member State in question and also on the undertakings concerned. [11] The undertakings in question were therefore deemed to be individually concerned. The Court of First Instance has now found that, as the terms of Article 109(2) of the OCT Decision were substantially the same as those of the abovementioned provision, the Commission had the same obligation. [12] This reasoning stands up to legal examination because, as the Court of First Instance observed, the two provisions are similar not only in their wording but also in their purpose, namely, to define the level at which the Community may adopt safeguard measures. [13]

19. Nor does the *Buralux* judgment [14] stand in the way of that finding. Admittedly, as the Italian Republic argues, in that case the Court of Justice did not accept that the applicants were individually concerned, partly because the decision in question was not addressed to only *one* Member State, as in the *Piraiki-Patraiki* case, but to *all* the Member States. In

9 — See the judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

10 — Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207.

11 — Ibid., paragraph 28.

12 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraphs 68 and 70.

13 — Ibid., paragraph 70.

14 — See the judgment in Case C-209/94 P, *Buralux and Others* [1996] ECR I-615.

the present case the decisions were likewise addressed to all the Member States.

20. However, the Court of First Instance correctly observed that the number of Member States in which the safeguard measure applies is not what matters. [15]

21. It is true that Article 173, paragraph 4, of the EC Treaty refers to 'a decision addressed to another person', but the scope of protection for an individual cannot depend on whether the contested decision is addressed to one or to several Member States. The sole deciding factor is that the person concerned is differentiated in a specific manner in relation to the category of all the other persons concerned. It is not the purpose of the fourth paragraph of Article 173 to give any person who may be in any way concerned the right to take steps against an act which produces legal effect, but only those persons whose position merits protection. Therefore, as the Court of First Instance observed, what matters is 'the protection enjoyed under Community law by the country or territory, and by the undertakings concerned', [16] against which the safeguard measure is taken.

22. In this connection it must be observed that the *Buralux* case involved a regulation the sole purpose of which, according to the Court of Justice, was to establish the framework within which the Member States could introduce restrictions. The Court of Justice concluded from this that the legal effects which that regulation might produce concerned categories of persons envisaged generally and in the abstract. [17] The present case, in contrast, concerns a clearly circumscribed measure — the fixing of a minimum price, and solely for rice from the Netherlands Antilles — which is why the categories of persons concerned are not envisaged merely generally and in the abstract. Moreover, although these decisions are addressed to all the Member States, they relate only to rice from the Netherlands Antilles.

23. It follows that the Court of First Instance was justified in applying the *Piraiki-Patraiki* judgment to the present case even though here the decisions are addressed to all the Member States.

24. With regard to the question whether the applicants are in fact undertakings in a position which merits protection, the Court of First Instance found that at least two of them (Ter Beek and ERB) had shipments of rice in transit to the Community when the first deci-

15 — See the *Antillean Rice Mills* judgment cited in footnote 1, paragraph 77.

16 — See footnote 15.

17 — See the *Buralux and Others* judgment, cited in footnote 14, paragraph 26.

sion was adopted. [18] As a finding of fact, this cannot be reviewed by the Court of Justice. [19]

25. The Court of First Instance added that the Commission, which had an implied obligation under Article 109 of the OCT Decision to ascertain the negative effects of its decision, was aware of the situation of these two undertakings when the decision was adopted. [20] Therefore the Court of First Instance correctly concluded that the two undertakings were individually concerned because they were in a position which differentiated them from other persons concerned. There is no need to consider whether the other applicants were individually affected because joint applications are concerned. [21]

26. Consequently the Court of First Instance was right in finding that the action was admissible. It is therefore unnecessary to decide whether an intervener can raise an objection of inadmissibility where the party whom it supports is alleged not to have done so. According to the case-law of the Court of Justice, Italy could in any case have raised the issue of inadmissibility. [22]

18 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraph 75.

19 — See Article 51(1) of EC Statute of the Court of Justice.

20 — See footnote 18.

21 — See the judgment in Case C-313/90 *CIRFS a. o.* [1993] ECR I-1125, paragraph 31, and the *Antillean Rice Mills* judgment, cited in footnote 1, paragraph 79.

22 — See the judgment in Case C-244/91 P *Pincherle* [1993] ECR I-6965, paragraph 16; the order in Case C-245/95 P *NTN Corporation* [1996] ECR I-553, paragraph 7, and Article 49(2) and (3) of the EC Statute of the Court of Justice.

D — Substance

27. The applicants have appealed against the judgment on six grounds in all. These relate to breach and/or misapplication of Part Four of the Treaty concerning the association of overseas countries and territories, and/or of the OCT Decision by the Court of First Instance. In the applicants' opinion, the Council should not have included a general safeguard clause in its decision. Moreover, in the second decision the Commission went further than was necessary. Finally, the applicants claim that the Court of First Instance was wrong in finding that there was no liability on the part of the Community.

First ground of appeal

Arguments of the parties

28. In this connection the applicants challenge the judgment of the Court of First Instance in so far as it was held that the Council was entitled, on the basis of the second paragraph of Article 136 of the Treaty, to include safeguard clauses in the OCT Decision authorising restrictions on the freedom to import agricultural products originating in the OCT.

29. In the applicants' opinion, the Court of First Instance was wrong in stating that Article 109 of the OCT Decision completed a system which for the first time gave free access to the Community for agricultural products. What Article 109 in fact does is to extend the general safeguard clauses which had the same object and the same scope and were contained in previous Council decisions. Therefore the Court's conclusion was based on an imprecise view of the antecedents of Article 109.

30. The applicants add that the Court's judgment is based on an erroneous assessment of the Council's powers under the second paragraph of Article 136 of the Treaty, which provides that 'the Council shall, acting unanimously, lay down provisions for a further period, on the basis of the experience acquired and of the principles set out in this Treaty'. The applicants consider that the Court of First Instance did not show adequate reasons why this provision should refer to *all the principles set out in the Treaty*. That interpretation is not self-evident. It should rather be considered that only the *principles of Part Four of the Treaty* are meant, the part which governs the association of the overseas countries and territories. The applicants put forward, as their reason for this view, the fact that the preamble to the Council's Decision refers only to the principles of Part Four of the Treaty.

31. Even if the second paragraph of Article 136 refers to all the principles of the Treaty, the Council could still not derogate, in a decision adopted pursuant to that provision, from the principle of the free movement of goods between the Community and the OCT in the interest of the common agricultural policy. This would amount to an infringement of Articles 132(1) and 133(1) of the Treaty. The Council can derogate from them only if it is expressly empowered to do so in the second paragraph of Article 136. This was not the case here. Consequently, rules which are contrary to the said provisions of Part Four of the Treaty could be introduced only by way of an amendment of the Treaty.

32. In support of their view, the applicants refer to the 'Protocol on the Importation into the European Economic Community of Petroleum Products Refined in the Netherlands Antilles' and the 'Protocol on Special Arrangements for Greenland'. According to the applicants, these show that rules derogating from Part Four cannot be based solely on the second paragraph of Article 136.

33. The applicants complain further that the Court of First Instance did not deal with the question whether Articles 132(1) and 133(1) of the Treaty have direct effect.

34. In their opinion, Article 109 of the OCT Decision was unnecessary because there were

sufficient alternative ways of regulating the relationship between the OCT and the Community. On this point the applicants refer to the common market organisations and Articles 36 and 115 of the Treaty.

35. The Commission considers that the applicants have misconstrued the judgment. So far as the relationship between the OCT and the Community is concerned, the Commission does not deny that here there is a special relationship which cannot be compared with those between the Community and other associated countries. However, there is no internal market between the two. Furthermore, the purpose of association is not to give preferential treatment to the OCT, as the applicants claim, but only to promote their development. Consequently they do not have the status of Member States.

36. In the Commission's opinion, the Council must, in the context of the second paragraph of Article 136, take account of all the principles of the Treaty. This is clear from the wording of the provision.

37. With regard to Articles 132 and 133, these cannot be interpreted as precluding a safeguard clause which limits imports only as an exceptional measure, and only partially and temporarily.

38. In addition, the Commission and the Council refer to the Council's wide discretion under the second paragraph of Article 136. According to them, it follows that the Court of Justice can only consider whether the Council's measures were manifestly inappropriate for attaining the objective pursued. They both take the view that the Council did not exceed its discretion in this respect. On the contrary, according to the Council, the second paragraph of Article 136 itself constitutes the legal basis for a limitation on the free movement of goods.

39. As regards Articles 132 and 133 of the Treaty, the Council adds that the question of the direct effect of these provisions was not raised at first instance and therefore it cannot be examined here.

40. The Council also submits that Article 115, which the applicants seek to rely on as a means of regulation, cannot apply here because it relates to the common commercial policy and not the association of the OCT.

41. So far as the 'Protocol on Special Arrangements for Greenland' is concerned, the Commission contends that the special arrangements in question relate to Article 136a of the EC Treaty. They provide no basis for concluding that a restriction on the free movement of goods between the OCT and the Community has to be provided for *in the Treaty itself*. That is a matter which it is for

the Council to decide in the exercise of its discretion under Article 136.

42. On the 'Protocol on the Importation into the European Economic Community of Petroleum Products Refined in the Netherlands Antilles' the Council observes that this Protocol dates from 1962. The first OCT decision was not adopted until 1964. At that date the ratification of the Protocol was so far advanced that the legal construction required in 1962 was retained more or less automatically.

Appraisal

43. In essence the applicants' criticism here is directed at the safeguard clause in Article 109 of the OCT Decision, which in turn is based on Article 136 of the EC Treaty. As regards the applicants' objection that the Court of First Instance wrongly proceeded on the basis that Article 109 introduced a safeguard clause for the first time for reasons connected with the common agricultural policy, it should be said that this is not apparent from the text of the judgment. In paragraph 94 of the judgment the Court explains that the 1970 implementing decision contained a safeguard clause. It adds that imports of agricultural products from the OCT had always been subject to special arrangements and that it was not until the OCT Decision was adopted in 1991 that they were placed on the same footing as other products. The Court of First Instance then goes on to say: 'the OCT Decision therefore represented an important step forward in enacting for the first time as a principle that there should be free access to the Community for agricultural products originating in the OTC, even if it also made that access subject, necessarily also for the first time, to a general safeguard clause ...'.

44. From all this, it is quite clear that, in the opinion of the Court of First Instance, the general safeguard clause which already existed was applied for the first time to agricultural products, after they were placed on the same footing as other products. It is certainly not apparent, as the applicants claim, that Article 109 of the OCT Decision introduced a safeguard clause for the first time, and in connection with the extension of the rules to agricultural products.

45. The applicants consider that a general safeguard clause is contrary to Article 132(1). That would indeed be the case if the free movement of goods, as it exists between the Member States, applied to trade with the OCT without restriction. However, as regards the rule in Article 132(1) to the effect that trade with the OCT is to be put on the same footing as trade between Member States, what is concerned — as is clear from the introductory sentence of that provision — [23] is not yet

23 — That sentence reads: 'Association shall have the following objectives:'.

an actual situation but an objective pursued through association.

46. Here reference must be made to the *Road Air* judgment, [24] in which the Court of Justice held that 'association of the OCT with the Community is to be achieved by a dynamic and progressive process which may necessitate the adoption of a number of measures in order to attain all the objectives mentioned in Article 132 of the Treaty, having regard to the experience acquired through the Council's previous decisions'. [25] It follows that the free movement of goods does not come into being, as between the Community and the OCT, solely by virtue of Article 132. That article mentions it only as an objective to be attained, if necessary by the adoption of several provisions.

47. It also follows from this that, although the OCT are associated countries and territories which have special relations with the Community, what they precisely are not is part of the European Community. The Court of First Instance said as much in the judgment contested here: 'although the OCT admittedly enjoy a more favourable status that do other countries associated with the Community, they are none the less not members of it.' [26] This implies that they must not be treated less favourably than other (associated) States. However, this cannot be said of relations with the Community. It cannot therefore be considered that the free movement of goods between the Community and the OCT is already embodied, without restriction, in Article 132 of the Treaty.

48. For this reason it is also impossible to concur with the applicants when they infer from the *Road Air* judgment that the second paragraph of Article 136 envisages only *the principles of Part Four of the Treaty*. In that judgment the Court of Justice observed that, in the light of the objectives of Article 132, 'the second paragraph of Article 136 must be interpreted as providing not for a single "further period" for which the Council is empowered to adopt provisions needed in order to attain the *objectives of association* ...'. [27] The applicants conclude from this that the second paragraph of Article 136 refers only the *objectives of Part Four of the Treaty*.

49. That view cannot be accepted. It is indeed the case that the Council has to take account of the objectives of Article 132 when adopting decisions pursuant to the second paragraph of Article 136. Those objectives are, of course, the reason for adopting such decisions. At the same time, the Council must take account of the results aimed at and *the principles of the Treaty*. There is nothing in the wording of the second paragraph of Article 136 to show why it should refer only to the objectives of association and not the general principles of the Treaty.

24 — See the judgment in Case C-310/95 [1997] ECR I-2229.

25 — Ibid., paragraph 40.

26 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraph 91.

27 — See the *Road Air* judgment, cited in footnote 24, paragraph 41. Emphasis added.

50. In support of their submission, the applicants mention the third recital in the preamble to the OCT Decision which, according to them, refers only to the principles of Part Four of the Treaty, with the consequence that the second paragraph of Article 136 (which forms the legal basis for that decision) refers to the principles of Part Four only. This argument cannot be accepted. The third recital in the preamble states that 'having regard to the special relationship between the OCT, which is based on the provisions of the Treaty, in particular, Part Four, it is necessary to improve its provisions by ...'. However, this refers only generally to the provisions of the Treaty governing association. It cannot be concluded from this that it is unnecessary, in the context of association and the Council decisions relating to it, to take account of other principles of the Treaty, that is to say, including the agricultural policy.

51. An indication might be given by the 13th recital, which states that the different arrangements for the completion of the internal market are not applicable to the OCT. Here the Council only considers it expedient to examine ways of extending them, either without restriction or partially, to the OCT. A further indication that the free of movement of goods between the OCT and the Community is not 'normal' is afforded by the fourth recital, which confirms that the OCT will still be able to make different arrangements for the benefit of the population or sectors of the domestic economy, taking account of their development needs and the need to promote their industrial development.

52. This cannot mean that the OCT are to be given an additional advantage, because it is clear from the second paragraph of Article 131 of the Treaty that the purpose of association is to promote the economic and social development of the OCT, and not to give them preferential treatment.

53. It follows that the movement of goods between the OCT and the Community is not (yet) unrestricted, which is why the general principles of the Treaty, including agricultural policy, must be taken into account in the gradual attainment of objectives when the Council adopts OCT decisions on the basis of the second paragraph of Article 136. This may very well lead to restrictions on the movement of goods.

54. Therefore, if Article 132(1) can be regarded as merely setting out the aims of association, the direct effect which the applicants attribute to Article 132(1) could only relate to the obligation to attain the objective which it sets out. In no case could it be inferred that free movement of goods between the OCT and the Community already exists.

55. Even if there were a direct effect, the possibility could not be ruled out that in exceptional cases provision could be made for a restriction, and thus a safeguard clause. The applicants themselves, when they refer to

Articles 36 and 115 of the EC Treaty and to the common organisation of markets, do not rule out that it should be possible to take action.

56. As regards the applicants' reference to the protocols, the fact that, in those particular cases, protocols were signed is not a ground for concluding that a safeguard clause is not possible in the context of the second paragraph of Article 136. As we have seen, such a safeguard clause does not require an amendment to the Treaty because a clause of that kind does not infringe the principles of Part Four merely by reason of its existence (the free movement of goods has not yet been achieved, but is only one of the objectives of association).

57. In this connection it must also be observed that, in the OCT Decision, the Council authorises safeguard measures only to a limited extent. Article 109(2) provides as follows:

'For the purpose of implementing paragraph 1, priority shall be given to such measures as would least disturb the functioning of the association and the Community. These measures shall not exceed the limit of what is strictly necessary to remedy the difficulties that have arisen.'

Second ground of appeal

Arguments of the parties

58. The applicants' second ground of appeal relates to the finding of the Court of First Instance that the Commission was entitled to find that difficulties had arisen which might result in a deterioration in the Indica rice-growing sector in the Community.

59. They contend that the Court ought to have established whether there was a causal connection between the fall in the price of Community paddy rice and the increase in imports of Antillean semi-milled rice. According to the applicants, this is required by Article 109(1) of the OCT Decision.

60. They claim that the fact that the Commission tried, in its first decision, to prove a causal connection also shows that such a connection must exist.

61. However, the imports from the Netherlands Antilles had no negative effects on the Community market since they merely took the place of imports of rice from Surinam and Guyana. To that extent, according to the

applicants, the volume of rice imports did not increase.

62. Finally, the applicants claim that it is impossible to understand the Commission's reasoning regarding the different prices and its comparison of prices.

63. On the other hand, the Commission considers that it is clear from the wording of Article 109(1) of the OCT Decision [28] that a causal connection is required only for the first situation mentioned in that provision. (This arises where, as a result of the application of the Decision, serious disturbances occur in a sector of the economy of the Community or of one or more of its Member States or their external financial stability is jeopardised). For the second eventuality — if difficulties arise which may result in a deterioration in a sector of the Community's activity or in a region of the Community — no such causal connection is required. It would also be difficult to prove a connection because the market may be influenced by many factors.

64. However, the Commission does not deny that there must be some connection between the economic difficulties and the imports in question. However, the Court of First Instance established that necessary connection.

28 — See paragraph 6 above.

65. In the applicants' opinion, the considerations cannot be based on only the second hypothesis in Article 109(1) because the Commission itself based its decision on the first hypothesis.

Appraisal

66. I must agree with the Commission's submission that it is clear from the wording of Article 109 of the OCT Decision that a causal connection is not required in relation to the second eventuality. Paragraph 1 mentions two different situations, each of which begins with the word 'if', but only the first includes the phrase 'if, *as a result of the application of this Decision* ...'. It follows that the difficulties referred to in the second case do not have to be caused by the application of the Decision.

67. On the other hand, I agree with the applicants' submission that, if there were no connection at all between the imports and the price of Community products, safeguard measures would be entirely pointless. It must surely be possible to eliminate or mitigate the difficulties by means of safeguard measures. Otherwise, such measures would be disproportionate and would be contrary to the second sentence of Article 109(2) of the OCT Decision.

68. Therefore the connection must be such that a reduction in imports may in some way produce an effect on prices in the Community. However, this does not mean that the difficulties must be caused by the application of the Decision, that is to say, by the imports.

69. Secondly, the Court of First Instance correctly observes that within the field of application of Article 109 of the OCT Decision the Commission enjoys a broad discretion not merely as regards the existence of the conditions justifying the adoption of a safeguard measure, but also as to whether a safeguard measure should be adopted or not. [29] The Court of First Instance infers this from the wording of Article 109(1) to the effect that the Commission 'may' take or may authorise the Member State concerned to take safeguard measures if certain conditions are fulfilled. [30] The Court then adds that 'if one of the conditions is met, however, the Commission is not required to adopt a safeguard measure but merely to decide in that regard'. [31] Consequently the Council has conferred upon the Commission the discretion which it enjoys under Article 109 of the OCT Decision. [32]

70. Thus the Court of Justice has also held, in the context of Article 155 of the Treaty, that the Council may be led in the sphere of the common agricultural policy to confer on the Commission wide discretionary powers and powers to take action because it (the Commission) alone is able continuously and attentively to follow trends on agricultural markets and to act with urgency as the situation requires. The Court concluded from this — and from the context of the Treaty in which it must be placed — that the term 'implementation' in Article 155, referring to the implementation by the Commission of the rules laid down by the Council, must be given a wide interpretation. [33] For this reason also the Commission may be considered to have a broad discretion in the present case because here the fixing of a minimum price likewise requires the assessment of agricultural markets. It follows that the Court of First Instance has to confine itself to considering whether in exercising that discretion the Commission committed a manifest error or misused its powers or whether it clearly exceeded its powers. [34]

71. It is hard to see in what respect the Court of First Instance went wrong in its examination of this matter. First, it examined the Commission's claim that there had been an appreciable fall in the price of Community paddy rice which, like Antillean semi-milled rice, can be used as a raw material by Community producers of milled rice. Finally, the Court of First Instance observed that the

29 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraph 122.

30 — Ibid., paragraph 120.

31 — Ibid., paragraph 121.

32 — See the order of the President of the Court of First Instance in Case T-179/97 R *Government of the Netherlands Antilles* v *Council* [1997] ECR II-1297, paragraph 35.

33 — See the judgment in Case 23/75 *Rey Soda* [1975] ECR 1279, paragraphs 10-14.

34 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraph 122.

applicants had not disputed the actual fact that prices had fallen. [35] As a factual finding, this cannot be reviewed by the Court of Justice. The Court of First Instance went on to examine the question whether the price of Community Indica paddy rice could also be said to have fallen. [36] In view of the simultaneous considerable rise in imports from the Antilles, which was said by the Court of First Instance not to be disputed by the applicants, [37] the Court stated that the Commission was entitled to find that difficulties had arisen which might result in a deterioration in the Indica rice-growing sector in the Community and that safeguard measures could therefore be implemented. [38]

72. The Court of First Instance went on to consider whether the Commission had committed a manifest error of assessment in its comparison of prices. This involved the question of the stage of processing at which prices should be compared. According to the Court, the applicants had not succeeded in refuting the Commission's calculations as they had merely alleged that the processing costs and additional costs were too high, but had failed to substantiate these allegations. [39] The Court also noted that the applicants had not challenged the Commission's finding that Antillean rice was offered at an appreciably lower price than that at which Community rice could be offered at the relevant stage of processing, namely semi-milled. [40]

35 — Ibid., paragraph 124.
36 — Ibid., paragraph 126.
37 — Ibid., paragraph 127.
38 — Ibid., paragraph 128.
39 — Ibid., paragraph 130.
40 — Ibid., paragraph 129.

73. Consequently the Court reached the conclusion that 'the Commission therefore rightly found that there was a considerable difference between the price for Community rice and that for Antillean rice, which might have caused the collapse in the price of Community rice between September 1992 and January 1993'. [41] In this way a connection, to that extent, between the imports and the fall in the price of Community rice was also established.

74. It follows that the Court of First Instance did consider whether the Commission committed a manifest error of assessment when examining the relationship between the imports and the fall in the price of Community rice. As I have shown, a causal connection is not necessary. As there was no manifest error of assessment, the second ground of appeal must also fail.

Third ground of appeal

Arguments of the parties

75. The applicants claim that the Court of First Instance misconstrued Article 109(2) of the OCT Decision by finding that the minimum price fixed by the Commission in the

41 — Ibid., paragraph 131.

second decision had not gone beyond what was strictly necessary for the purposes of that provision. The applicants consider that, in the context of safeguard measures, it was not necessary to place Antillean rice in an unfavourable competitive position in relation to Community rice. If they, the undertakings in question, had been able to offer rice at the same price as Community rice, they would have been able to import more than the 8 400 tonnes which were in fact imported. In addition, it must not be forgotten that 16 000 tonnes of rice had to put into store because it could not be sold.

76. The Commission contends that the principle of proportionality does not give the OCT the right to offer their rice at the same price as Community rice. The OCT are not members of the Community.

77. The Commission further submits that the difference in price between rice imported from the Antilles and Community rice ought to have encouraged Community producers to trust that the price of Indica rice would rise, so that they would not return to growing a surplus of Japonica rice.

78. The Commission observes that the statement by the Court of First Instance that the Commission did not go beyond what was strictly necessary is a factual finding which cannot be reviewed in an appeal.

Appraisal

79. The Commission is correct in pointing out that the determination of the prices to be compared and the comparison itself are factual findings. The same applies to the matter of the volume of imports from the Antilles. Consequently these points cannot be reviewed in the appeal.

80. What is open to review is the fundamental question whether a safeguard measure is disproportionate if, as here, rice from the Netherlands Antilles does not receive the same treatment as Community rice, but is placed at a disadvantage by comparison with it. On this point, it must be remembered that the Commission's second decision was a safeguard measure which was in principle lawful. However, it is of the essence of such a measure that certain products are treated unfavourably by comparison with *Community products*. In any case, it cannot be accepted in principle that such a safeguard measure may not impose unfavourable rules on Antillean rice.

81. As I have already said, the determination of prices by the Court of First Instance is a factual finding and cannot be reviewed. Moreover, there does not appear to have been the slightest error of assessment by the Court of First Instance. Thus, it concluded, from the fact that the price of Antillean rice was not higher than that of rice from ACP countries or the United States and that imports into the Community continued, that Antillean rice was not placed in an unfavourable position in relation to that from other countries, in this case, the ACP States and America. [42] Only unfavourable treatment as compared with non-member countries would have been contrary to Article 109 of the OCT Decision and to the special status of the OCT. Therefore the third ground of appeal is also unfounded.

Fourth ground of appeal

Arguments of the parties

82. The applicants challenge the judgment of the Court of First Instance in so far as it was held in that judgment that a claim for damages on the basis of Article 215 of the EC Treaty must fulfil special conditions because the first Commission decision is of the nature of a legislative measure. The Court stated that, in such a case, the Community can incur liability only for a sufficiently serious breach of a superior rule of law for the protection of the individual. (According to the case-law of the Court of Justice, the non-contractual liability of the Community on the basis of Article 215 depends as a rule on the unlawfulness of the acts alleged against the institutions, the fact of damage and a causal connection between the wrongful act and the damage complained of). [43]

83. The applicants dispute this, contending the decision in question did not have the character of a legislative measure. Alternatively, they contend that, even if it did, this characterisation falls away in relation to them and could not lead to more stringent conditions for non-contractual liability, because they were individually concerned by the decision. In the further alternative, they add that, even if the decision were a legislative measure *erga omnes*, the more stringent conditions for liability could not apply if the decision is challenged by those whom it affects individually.

84. The Commission argues that the question whether or not a legal act is legislative depends on its nature, not its form. However, that is not affected by whether a party is individually concerned or not. A claim for damages under Article 215 of the EC Treaty is an

42 — Ibid., paragraphs 149 to 151.

43 — See the judgments in Joined Cases 197/80, 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle* [1981] ECR 3211, paragraph 18, and Case 4/69 *Lütticke* [1971] ECR 325, paragraph 10.

independent form of action, the requirements for which must be examined separately, but the question of whether a party is individually concerned is not one of them.

85. In this connection the applicants cite several judgments of the Court of Justice in which it considers only the normal requirements of Article 215 in relation to decisions. [44] The Commission, on the other hand, cites one judgment which examined anti-dumping decisions by reference to the special requirements in relation to Article 215. [45]

Appraisal

86. In its judgment in *Bayerische HNL and Others* v *Council and Commission* [46] the Court of Justice, referring to the principles existing in the various Member-States, found that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy. 'This restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to enact adopt legislative measures in the public interest, which may adversely affect the interests of individuals. ... In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers'. [47]

87. As the Court of First Instance, in the *Antillean Rice Mills* judgment, took account of the fact that the Commission has a broad discretion here, [48] it is impossible to see how it can be said to have misconstrued Article 215 of the EC Treaty when referring, in its examination of the matter, to more stringent requirements.

88. The applicants' alternative grounds of appeal cannot succeed here either. As the Commission correctly observed, the fact that individuals are concerned does not alter the nature of the decision as a legislative measure.

44 — See the judgments in Case 59/84 *Tezi* [1986] ECR 887, paragraph 70; Case 253/84 *GAEC de la Ségaude* [1987] ECR 123, paragraph 9; and Case C-55/90 *Cato* [1992] ECR I-2533, paragraph 18.

45 — See the judgment in Case C-122/86 *Epicheiriseon* [1989] ECR 3959, paragraph 2 of the operative part of the judgment.

46 — See the judgment in Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 [1978] ECR 1209.

47 — Ibid., paragraphs 5 and 6.

48 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraph 177, 189 et seq..

Moreover, it follows from the *Bayerische HNL* judgment that individuals may be required to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure. [49] The fact that a party is individually concerned cannot of itself be a criterion for a claim for compensation. Therefore the fourth ground of appeal must also fail.

Fifth ground of appeal

Arguments of the parties

89. The applicants challenge the judgment of the Court of First Instance in so far as it was held in that judgment that the Commission, when adopting the first decision, did not manifestly, and to a serious extent, exceed the limits of its discretion and that accordingly the Commission was not in serious breach of any superior principle of law, in the event the principle of proportionality. The applicants contend that the Court of First Instance cannot confine itself to the issue of whether the Commission exceeded its powers.

90. The applicants add that, leaving aside this question, the Court's conclusion is also mistaken because it proceeds from the observation that the Commission, when adopting the first decision, referred in good faith to the price fixed by the competent authorities of the Netherlands Antilles. However, the existence of an Antillean government measure could not have discharged the Commission from its obligation to take account of the negative effects of its decision, particularly for the applicants. This was not affected by the fact that the Commission acted in good faith because good faith does not preclude liability under Article 215 of the EC Treaty.

91. Finally, the applicants observe that the Commission has a broad discretion in the context of Article 109 of the OCT Decision and therefore its decision can be reviewed only to a limited extent. If such limited review had shown a breach of Community law, it would necessarily be a sufficiently serious breach to fulfil the special conditions of Article 215 to which the Court of First Instance refers.

92. The Commission submits, as against this, that the two criteria mentioned in paragraph 194 of the judgment [50] are to be regarded as synonymous. So far as the applicants' second point (that the Court of First Instance was mistaken in finding that there was not a sufficiently serious breach) is concerned, the

49 — See the *HNL* judgment, cited in footnote 46, paragraph 6.

50 — See paragraph 89 above.

Commission contends that this is a factual finding which cannot be reviewed on appeal.

93. The fact that the minimum price was fixed at too low a level can be no more than a technical mistake and therefore it cannot be a sufficiently serious breach.

94. If the applicants' argument that any breach whatever of Article 109 of the OCT Decision must always be considered sufficiently serious were to be accepted, this criterion, which is applied only where the Commission has a broad discretion, would lose its force altogether.

Appraisal

95. The applicants base their argument that the Court of First Instance ought to have examined the question of a sufficiently serious breach of Community law on the case-law of the Court of Justice. [51] However, it is not clear from the judgments cited how the two criteria (manifest and serious abuse of discretion and a sufficiently serious breach of a superior principle of law for the protection of individuals) are related.

96. They are connected by the conjunctions 'or' [52] or 'neither ... nor'. [53] This indicates, rather, that the two criteria should be examined independently of each other. However, the *Roquette Frères* judgment is clearer. There the Court of Justice held that the Community's non-contractual liability cannot be incurred through the adoption of a legislative measure involving a choice of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. The Court then added that 'in a legislative context characterised by a wide margin of discretion, which is essential for the implementation of the common agricultural policy, such liability can therefore be incurred only if the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers'. [54]

97. As the Commission's decision in the present case related at least in part to the common agricultural policy and as the Commission unquestionably has a broad discretion in this area, the examination by the Court of First Instance in paragraph 194 of its judgment would have been sufficient even if it had

51 — See the judgments in Case 20/88 *Roquette Frères* [1989] ECR 1553; Joined Cases 194/83 to 206/83 *Asteris* [1985] ECR 2815, and Case 50/86 *Grands Moulins de Paris* [1987] 4833.

52 — See the *Asteris* judgment cited in footnote 51, paragraph 23.

53 — See the *Grands Moulins de Paris* judgment cited in footnote 51, paragraph 22.

54 — See the *Roquette Frères* judgment, cited in footnote 51, paragraph 23.

related only to the disregard of the limits on the Commission's discretion. Furthermore, the Commission has a broad discretion in the context of Article 109 of the OCT Decision also. [55]

98. On the question of how far the Court's decision that the Commission did not *manifestly and gravely* disregard the limits of its discretion may be reviewed, I must agree with the applicants that it cannot escape review altogether. It contains more than mere factual findings, for example, the question of the Commission's good faith.

99. In this connection it is also necessary to examine the applicants' argument that a breach found in the course of a limited review is necessarily sufficiently serious. As the Court of First Instance itself observed, in cases where the Commission has a broad discretion, the Court must confine itself to considering whether the exercise of that discretion contains a manifest error or constitutes a misuse of powers or whether the Commission clearly exceeded the bounds of its discretion. [56]

100. On the other hand, as we have seen, non-contractual liability arises in the present connection only if the Commission manifestly *and seriously* exceeds the limits of its powers. It follows that it is not sufficient that the limits of the Commission's discretion are manifestly exceeded in order for non-contractual liability to arise. The automatic effect for which the applicants contend and which means that, whenever the Court of First Instance finds that the Commission, notwithstanding its broad discretion, is in breach of Article 109 of the OCT Decision, that breach is always sufficiently serious would, as the Commission correctly points out, in the present case deprive the test for establishing non-contractual liability of its substance. Moreover, it is clear also from the *Roquette Frères* judgment cited by the applicants themselves that, even where the Commission or the institution in question has a broad discretion, non-contractual liability of the Community does not automatically arise where a breach is found in the form of a calculation error. [57]

101. The present case did not, admittedly, directly concern a calculation error. However, as the Court of First Instance points out, the Commission, when adopting the first decision, referred in good faith to the price fixed by the Antillean authorities. [58] It is impossible to see how, in doing so, the Commission manifestly and seriously exceeded its discretion. Therefore it does not appear that there was any error on the part of the Court of First Instance either. The fact that, in prin-

55 — See paragraph 69 et seq. above.

56 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraph 122.

57 — See the *Roquette Frères* judgment, cited in footnote 51, paragraph 26.

58 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraphs 191 and 194.

ciple, the Commission must take account of the negative effects of its decision makes no difference. Consequently the fifth ground of appeal is unfounded.

Sixth ground of appeal

Arguments of the parties

102. The applicants challenge the judgment of the Court of First Instance in so far as it was held that, even if the applicants had suffered a certain amount of damage as a result of the first decision, that damage was in no way unforeseeable, so that they could have taken precautions against it. In the applicants' submission, the fact that a breach of Community law was foreseeable cannot exempt the Community from liability. Furthermore, the conclusion reached by the Court of First Instance that the damage to the applicants did not exceed the economic risks inherent in the sector in question cannot be justified solely by the fact that the storage of the rice necessitated by the safeguard measures was not unusually long.

103. According to the Commission, on the other hand, the Court of First Instance examined the issue of damage and whether it exceeded the limits of what an individual might be expected to accept, according to the case law of the Court of Justice. The Court of First Instance considered the question of foreseeability only to provide additional support for its conclusion.

Appraisal

104. As already mentioned, according to the case-law of the Court of Justice, individuals may properly be expected, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure. [59] The Court of First Instance examined the nature of the damage suffered by the applicants. On this point it observed that they had explained that cargoes of rice were sold either while they were still at sea or after they arrived at a Community port. In the latter case, the rice was placed in a warehouse until it was delivered to a buyer. Such warehousing was thus normal, even in the absence of any safeguard measure taken by the Community. On the basis of the documents, the Court reached the conclusion that the periods of warehousing and possible resultant delay in selling the rice were not necessarily made longer as a result of the first decision. [60] This alone shows that the Court was correct in finding that the damage did not exceed what an individual could properly be expected to accept in sectors coming within the ambit of economic policy. As the Commission correctly noted, the Court's other observations

59 — See the *HNL* judgment cited in footnote 46, paragraph 6.

60 — See the *Antillean Rice Mills* judgment, cited in footnote 1, paragraph 204.

concerning, for example, the foreseeability of the damage, may support this conclusion, but they are not necessary for it. In any case, it is clear that the foreseeability of the damage was not the only ground on which the Court of First Instance found that there was no non-contractual liability on the part of the Community, as the applicants contend. Therefore the sixth ground of appeal must fail.

105. Although this ground of appeal as a whole must be dismissed in its entirety, I would none the less make it clear, in conclusion, that safeguard measures can jeopardise investments in the OCT, make it difficult to estimate costs, and undermine confidence. Whether safeguard measures which, whilst being legally permissible, are economically and politically advisable is not a question which can be reviewed by the courts because their power of review is limited to whether the measures are lawful and, because of the broad discretion involved, they will be unlawful only in the case of serious breaches of Community law. Whether the objectives of one part of the Treaty (agricultural policy) and those of another (association of the OCT) can be coordinated harmoniously with each other and, if so, how this can best be achieved are matters for politics and the legislature.

Costs

106. Under Article 122(1) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under the first sentence of Article 69(2) the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first sentence of Article 69(4) provides that the Member States which intervene in the proceedings are to bear their own costs.

E — Conclusion

107. I therefore propose that the Court should:

(1) dismiss the appeal;

(2) order the applicants to pay the costs of the proceedings, with the exception of the costs of the French Republic and the Italian Republic;

(3) order the French Republic and the Italian Republic to bear their own costs.