ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
2 March 1998 *

In Case T-310/97 R,

Government of the Netherlands Antilles, represented by Pierre Vincent François Bos and Marco Marinus Slotboom, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Council of the European Union, represented by Jürgen Huber and Guus Houttuin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Thomas van Rijn, Legal Adviser, and Xavier Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: English.

and

Italian Republic, represented by Umberto Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, assisted by Francesca Quadri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

interveners,

APPLICATION for interim measures in the form of an order of the President of the Court of First Instance suspending the operation, in part and subject to certain conditions, of Council Decision 97/803/EC of 24 November 1997 amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community (OJ 1997 L 329, p. 50),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal background, facts and procedure

1 The Netherlands Antilles form part of the overseas countries and territories ('OCTs') associated with the Community. Article 3(r) of the EC Treaty states the association of the OCTs in order to increase trade and promote jointly economic

and social development to be one of the objectives of the Treaty. The association of the OCTs with the Community is governed by Part Four of the EC Treaty and by Council Decision 91/482/EEC of 25 July 1991 (OJ 1991 L 263, p. 1, 'the OCT Decision'), which was adopted pursuant to the second paragraph of Article 136 of the Treaty.

2 The OCT Decision is applicable, by virtue of Article 240(1) thereof, for a period of 10 years from 1 March 1990. Under Article 240(3)(a) and (b), before the end of the first five years, the Council, acting unanimously on a proposal from the Commission, is to establish, where necessary, in addition to the Community's financial assistance for the second five years, any amendments to the OCT Decision desired by the relevant authorities of the OCTs or proposed by the Commission either in the light of its own experience or as a result of amendments under negotiation between the Community and the African, Caribbean and Pacific (ACP) States.

3 As stated in the order in Case T-179/97 R *Netherlands Antilles* v *Council* [1997] ECR II-1297, at paragraph 3, the Community produces a surplus of semi-long grain, or Japonica, rice. There is a deficit, however, in Indica rice, which accounts for only 20% of Community production. In that context, the Council has adopted a number of measures to promote the cultivation of Indica rice by Community producers.

4 Undertakings established in the OCTs compete with undertakings established in non-member countries or ACP countries as regards imports of Indica rice into the Community. Imports of rice from ACP countries are subject to a tariff quota of 125 000 tonnes on which the customs duty is 50%. In excess of that quota, customs duty is levied at 100%, as it is for imports from other non-member countries.

5 After harvesting, rice is husked and then polished in several stages. Brown rice, from which the husk has been removed, is processed into semi-milled rice by removal of some or all of the outer layers of the pericarp. Milled rice, which has been fully processed, is obtained by removal of the whole of the pericarp.

6 Article 6(2) of Annex II to the OCT Decision, which concerns, *inter alia*, the definition of the concept of 'originating products', provides that when products wholly obtained in the ACP States undergo working or processing in the OCTs, they are to be considered as having been wholly obtained in the OCTs.

7 As a result, the processing of brown rice originating in ACP countries into semi-milled rice in the Netherlands Antilles is sufficient for it to be regarded as originating in the Netherlands Antilles under the rules laid down in Annex II to the OCT Decision. On the basis of that rule of cumulation of origins, rice processed in that way may therefore be imported into the Community free of customs duty.

8 Article 133(1) of the Treaty provides that customs duties on imports into the Member States of goods originating in the OCTs are to be completely abolished in conformity with the abolition of customs duties between Member States in accordance with the Treaty. Article 101(1) of the OCT Decision provides that products originating in the OCTs are to be imported into the Community free of customs duties and charges having equivalent effect. Under Article 102 thereof, the Community is not to apply to imports of products originating in the OCTs any quantitative restrictions or measures having equivalent effect.

9 By way of derogation from the principles set out in those articles, Article 109(1) of the OCT Decision empowers the Commission to take the necessary safeguard measures 'if as a result of the application of [that] 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, 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'.

10 The Commission and the Council have adopted a number of safeguard measures under Article 109 of the OCT Decision. In Decision 93/127/EEC of 25 February 1993 (OJ 1993 L 50, p. 27), amended by Decision 93/211/EEC of 13 April 1993 (OJ 1993 L 90, p. 36), the Commission introduced and then relaxed a minimum price for imports of rice originating in the Netherlands Antilles. The Council subsequently adopted Regulations (EC) No 304/97 of 17 February 1997 and No 1036/97 of 2 June 1997 introducing safeguard measures in respect of imports of rice originating in the OCTs (OJ 1997 L 51, p. 1, and L 151, p. 8, respectively). Those two regulations laid down a tariff quota limiting imports of rice originating in OCTs other than Montserrat and the Turks and Caicos Islands to 36 728 tonnes from 1 January to 30 April 1997 and to 56 180 tonnes from 1 May to 30 November 1997.

11 In addition, pursuant to Article 240(3) of the OCT Decision, the Commission sent the Council a communication on the mid-term review of the association of the OCTs with the Community (COM(94) 538 final of 21 December 1994), recommending various adjustments to that decision which took account, as far as was possible, of the desires expressed by the OCTs and of the experience gained by the Commission over the first five years of implementing the OCT Decision. To deal with the 'clash between two Community policies — OCT development and maintenance of guarantees given to producers under the common market organisations —', the Commission proposed the creation of machinery enabling it to set reference prices for imports. It reserved the right, however, to supplement that machinery by amendments, where necessary, to the OCT rules of origin in respect of ACP/OCT cumulation and the minimal working required to obtain OCT origin.

12 On 16 February 1996, the Commission submitted to the Council a proposal for a decision amending at mid-term the OCT Decision (OJ 1996 C 139, p. 1). In the sixth and seventh recitals in the preamble of that proposal, the Commission stated that free access for all products originating in the OCTs and the maintenance of cumulation for ACP and OCT originating products had given rise to the risk of conflict between two Community policy objectives, namely the development of the OCTs and the common agricultural policy. It proposed that fresh disruption on the Community markets for certain products subject to a common organisation of the market should be prevented by, in particular, the exclusion of cumulation for agricultural products, coupled with greater flexibility as regards derogations.

13 Transcending the differing considerations as to whether the rule on cumulation of origins should be abolished or alternative solutions, such as maintaining that rule but adding a minimum price system, should be adopted, the Council amended the OCT Decision on the basis of Article 240(3) by adopting, on 24 November 1997, Decision 97/803/EC amending at mid-term Decision 91/482 (OJ 1997 L 329, p. 50).

14 In that decision, the Council again points out the risk of conflict between the objectives of the development of the OCTs and of the common agricultural policy arising out of the maintenance of the cumulation of ACP and OCT origins referred to in Article 6 of Annex II to the OCT Decision (see paragraphs 6 and 7 above). In the seventh recital in the preamble, it stresses that 'fresh disruption should be avoided by taking measures to create a framework conducive to regular trade flows and at the same time compatible with the common agricultural policy'. To that end, it inserts the new Articles 108a and 108b into the OCT Decision, allowing cumulation of ACP and OCT origins for rice and sugar respectively, within a certain tariff quota.

15 For rice, in accordance with Article 108a(1), that quota is to be 160 000 tonnes, including the tariff quota for rice originating in the ACP States provided for in the fourth Lomé Convention. An initial issue of import licences for a quantity of 35 000 tonnes is to be made to the OCTs in January each year. Further imports

may be made up to the total limit of 160 000 tonnes in so far as the ACP States do not actually use their direct export possibilities under the quota provided for in the Lomé Convention. Under Article 108a(2), the Commission is empowered to increase the total quota of 160 000 tonnes by 20 000 tonnes if it finds that such an increase will not disrupt the Community market.

16 For sugar, Article 108b allows cumulation of ACP and OCT origins for an annual quantity of 3 000 tonnes.

17 For the purposes of implementing the cumulation rules set out above, milling or semi-milling operations for rice, and forming lumps or colouring for sugar, are to be considered as sufficient to confer the status of OCT-originating products, according to Articles 108a(4) and 108b respectively.

18 By application lodged at the Registry of the Court of First Instance on 9 December 1997, the Government of the Netherlands Antilles brought an action under the fourth paragraph of Article 173 of the Treaty seeking the annulment of Decision 97/803 (cited above, hereinafter 'the contested decision') amending the OCT Decision.

19 By separate document lodged at the Court Registry on 10 December 1997, it further sought suspension, under Articles 185 and 186 of the Treaty, of the application of Article 1(31) and (32) of the contested decision, inserting Articles 108a and 108b respectively, in respect of rice and sugar which is worked or processed in the Netherlands Antilles, subject to the condition that the Netherlands Antilles preserve and/or introduce minimum export prices for the products referred to in those paragraphs at a level equal to or higher than the intervention prices within the Community.

20 By applications lodged at the Court Registry on 16 and 30 January 1998 respectively, the Commission and the Italian Republic sought leave to intervene in these proceedings in support of the form of order sought by the Council. By orders of 27 January and 5 February 1998, the President of the Court of First Instance granted them leave to intervene in the interlocutory proceedings.

21 Oral argument was heard from the parties on 11 February 1998.

Law

22 Under Articles 185 and 186 of the Treaty, taken together with Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court of First Instance may, if it considers that circumstances so require, prescribe any necessary interim measures in any cases before it.

23 Article 104(1) of the Rules of Procedure provides that an application to suspend the operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. Article 104(2) provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. The measures sought must be provisional in that they must not prejudge the decision on the substance (see Case T-179/97 R *Netherlands Antilles*, cited above, paragraph 18).

Admissibility of the application for interim measures

Arguments of the parties

24 The Council submits that the main application is manifestly inadmissible. It does not, the Council claims, reveal grounds for concluding that there is a certain probability that it is admissible. Since, moreover, its interim application may have the effect of depriving a legislative provision of its effect in whole or in part, the Government of the Netherlands Antilles should prove in a particularly clear fashion that it is directly and individually concerned by that provision (Case 44/75 R *Könecke* v *Commission* [1975] ECR 637, paragraph 3).

25 In fact, however, the applicant is not directly concerned by the contested decision. Its legal position is not affected by Articles 108a and 108b, inserted by that decision. Only the undertakings operating in the sectors in issue are directly concerned.

26 Nor is the applicant individually concerned. It has not adduced any evidence that its situation is different from that of any other OCT in which rice mills have been or can be established. Rice processing is a relatively simple industrial process, and the construction of present or future rice mills is therefore not limited to specific OCTs.

27 The Commission, intervening in support of the Council's observations on this point, emphasises that rice mills also exist in OCTs other than the Netherlands Antilles, namely Aruba, Montserrat and the Turks and Caicos Islands. Processing

of sugar sufficient to obtain cumulated origin is also, it adds, a simple industrial process. There are sugar-processing installations also in Aruba. Other rice mills or sugar installations could easily be set up in other OCTs.

28 Finally, on the basis of the indivisibility of Member State responsibility, the Council submits that the Netherlands Antilles, as constituent parts of the Kingdom of the Netherlands, have no *locus standi*. For all those reasons, it claims, the present application for interim measures is inadmissible.

29 The applicant submits, in its main application, that it is directly concerned by the contested decision, since the application of that decision is automatic and leaves no room for any discretion. It is also individually concerned, since the Netherlands Antilles form part of the closed group of OCTs listed in Annex IV to the Treaty.

Findings of the President

30 According to settled case-law, the issue of the admissibility of the main action should not, in principle, be examined in proceedings relating to an application for interim measures. It should be reserved for the examination of the main application, unless it is apparent at first sight that the latter is manifestly inadmissible, so as not to prejudge the Court's decision on the substance of the case (see Case T-179/97 R *Netherlands Antilles*, cited above, paragraph 17).

31 In the present case, the Council and the Commission allege that the main application is manifestly inadmissible because the criteria for admissibility set out in the fourth paragraph of Article 173 of the Treaty are not satisfied.

32 The argument that the Netherlands Antilles are manifestly not directly concerned by Articles 108a and 108b cannot, however, be accepted prima facie, since the application of the tariff quotas introduced by those articles does not obviously leave any margin of discretion to the Member States concerned.

33 In support of their claim that the applicant is not individually concerned by Articles 108a and 108b, the Council and the Commission submit, essentially, that those articles are provisions of a general and abstract nature affecting all the OCTs without distinction and that the responsibility of the Member States is indivisible.

34 Here, it must first be borne in mind that, in order to ascertain whether the applicant is individually concerned by Articles 108a and 108b introducing the contested tariff quotas, it must at first sight be determined whether, in the scheme of the Treaty and of the association of the OCTs with the Community, the Council was obliged when adopting those tariff quotas to take their effect on the economy of, *inter alia*, the Netherlands Antilles into consideration, inasmuch as they limit the application of the very favourable system operating under the rules governing cumulated ACP and OCT origin introduced by the OCT Decision (see, in particular, Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 70 to 77).

35 On that aspect, it is sufficient to note at the present stage that Articles 108a and 108b modify the trading arrangements applicable to the OCTs in the context of their association with the European Community as laid down in the OCT Decision, which, pursuant to Article 240(3) thereof authorising the Council to review it at mid-term, is thus amended by the contested decision.

36 Article 240(3) expressly provides that the Council, acting unanimously on a proposal from the Commission, may introduce, where necessary, amongst a number of other possible amendments, those notified to the Commission by the relevant

authorities of the OCTs not later than 10 months before expiry of the first five-year period. In fact, the relevant authorities of the Netherlands Antilles informed the Commission of their desired amendments or additions in their memorandum notified to the Commission on around 1 May 1994, then at meetings held in the context of Commission/Member State/OCT partnership, according to the Commission's communication on the mid-term review of the association of the OCTs with the Community of 21 December 1994 and the fourth recital in the preamble to the contested decision.

37 The Government of the Netherlands Antilles cannot, therefore, prima facie be considered manifestly to lack *locus standi* to bring an action in this case under the fourth paragraph of Article 173 of the Treaty. The question of the admissibility of its application for annulment requires more thorough analysis by the Court hearing the main action.

38 The present application for interim measures must therefore be held to be admissible.

Substance

Urgency and balance of interests

— Arguments of the parties

39 The applicant submits that the contested decision deprives the Netherlands Antilles of the trade arrangements set out in Article 100 et seq. of the OCT Decision, which should apply, under Article 240, until 1 March 2000. That decision hinders the economic and social development of the Netherlands Antilles projected on the

basis of those provisions. The damage caused cannot be made good by financial compensation.

40 That submission is based in particular on the report on the impact of the trade arrangement contained in the OCT Decision on the economies of the Netherlands Antilles and Aruba and on the common agricultural policy, drawn up in April 1997 by the Netherlands Economic Institute at the request of the Netherlands Government (Attachment 3 to the application for interim measures).

41 That report confirms, the applicant claims, that those arrangements, if maintained, can continue to make an increasing contribution to the economic development of the Netherlands Antilles. Since the adoption of the OCT Decision, 12 companies have been established there and were operational in 1996, particularly in the rice and sugar sectors. Two more companies have subsequently become operational. The impact of the trade arrangements introduced by the OCT Decision, expressed as a percentage of the GDP of the Netherlands Antilles, increased from 0.4% in 1992 to 1.2% in 1996. According to the estimate of the Netherlands Economic Institute, the arrangements, if maintained, should allow the contribution to the GDP of the sectors concerned to increase progressively from 2.2% in 1997 to 3.1% in the year 2000. At the hearing of the parties, the applicant stressed that those figures were considerable and showed that the rice and sugar sectors make a significant contribution to the economy of the Netherlands Antilles.

42 The contested decision also impairs social development in the Netherlands Antilles. With a stagnating tourist sector, there are limited employment opportunities on the main island, Curaçao, particularly for young, low-skilled people. The unemployment rate in the 15 to 24 age range increased from 28% in 1994 to 31% in 1995, leading to increased social problems linked in particular to drug abuse, crime and social decay. The abovementioned report also shows, however, that by 1996 the trade arrangement contained in the OCT Decision had contributed to the

creation of 559 jobs in the Netherlands Antilles. In that year, there remained 8 568 unemployed, a rate of 12.4%. If maintained, those trade arrangements would contribute, according to the report, to the creation of 311 more jobs in the Netherlands Antilles, thus bringing the unemployment rate down from 12.4% to 12%.

43 The contested decision thus puts an end to those positive effects of the trade arrangements by limiting access to the Community market for the OCTs. The new Article 108a in the OCT Decision in fact limits the total quantity of rice which may be exported annually from the OCTs to the Community under the cumulation rule to 35 000 tonnes. Only if and to the extent that the ACP States do not actually use their direct export possibilities under their rice quotas will the OCTs be allowed to export beyond the 35 000 tonnes limit, up to the 160 000 tonnes total limit. Since, the applicant asserts, rice mills in the Netherlands Antilles exported 217 000 tonnes of rice to the Community in 1995-1996, it is clear that Article 108a will lead to the closure of most if not all of those mills. Article 108b, introduced by the contested decision, which sets an absolute limit of 3 000 tonnes to the amount of sugar which can be exported from the OCTs to the Community under the cumulation rule, would lead to the closure of all the sugar companies in the Netherlands Antilles since, according to the abovementioned report, that limit is below the break-even level for a single sugar factory in the OCTs.

44 As regards the balance of interests, the applicant submits that its interest in obtaining the relief sought must prevail, since it would increase trade and promote economic and social development in the OCTs in accordance with Articles 3(r) and 131 of the Treaty whilst paying due respect to the objectives of the common agricultural policy. The suspension in question is sought subject to the condition that the Netherlands Antilles preserve or introduce minimum export prices at a level equal to or higher than the intervention prices within the Community, thus preventing imports of rice and sugar from the Netherlands Antilles from disrupting the Community market in those products. The Netherlands Antilles have already established a minimum export price for rice and are in the process of setting up an equivalent system for sugar.

45 The applicant further notes that agriculture at present accounts for approximately 2.5% of the Community's GDP, whereas the contested decision deprives the Netherlands Antilles of a 3.1% increase in GDP by the year 2000.

46 The Council challenges all of those arguments. It points out that it is for the applicant to prove that serious and irreparable consequences would ensue if the interim measure sought were not granted.

47 In the present case, the effects of Community measures restricting cumulation of ACP and OCT origins have already been examined by the President of the Court of First Instance in Case T-179/97 R *Netherlands Antilles*, cited above, and by the President of the Court of Justice in Case C-110/97 R *Netherlands* v *Council* [1997] ECR I-1795, concerning safeguard measures in the form of tariff quotas laid down for imports of rice from the OCTs on the basis of average imports between 1992 and 1995. Article 108a of the OCT Decision, inserted by the contested decision, allows in reality the cumulation of origins up to a comparable annual limit, namely 160 000 tonnes. It empowers the Commission, moreover, to increase that quota.

48 The damage caused, according to the applicant, by the effects of the contested decision on the economic and social situation of the Netherlands Antilles is thus uncertain and contingent and, in any event, not sufficiently serious to justify granting the interim measure sought. In particular, the allegation that there would be no drop of 0.4% in the unemployment rate — which 'could' be the result of maintaining the trade arrangements established by the OCT Decision, according to the Netherlands Economic Institute report — cannot be regarded as relating to serious harm.

49 It appears, moreover, from the report that trading and processing activities developed on the basis of the cumulation of origins rule are not among the cornerstones of the economy of the Netherlands Antilles. Nor has the applicant adduced any evidence that the effects of the contested decision could not be mitigated by government measures favouring other sectors of the economy. Finally, the harm alleged by the applicant could be made good by financial compensation and would not, even if it proved to be serious, be irreversible.

50 The Commission endorses the Council's arguments. It asserts that the applicant has failed to show what proportion of the economic and social development of the Netherlands Antilles is directly attributable to the activities of the rice and sugar sectors.

51 In addition, failing any indication as to the gravity of the effects of the contested provisions concerning rice and sugar on the whole of the Netherlands Antilles economy, it concludes that the present application for interim measures is brought by the Government of the Netherlands Antilles on behalf of the operators affected by those provisions. Unlike Member States, which are entitled to bring proceedings under the second paragraph of Article 173 and under Article 185 of the Treaty on behalf of a sector of their economies, non-privileged applicants — such as the Government of the Netherlands Antilles — must show that they are liable to suffer direct and individual harm (Case T-179/97 R *Netherlands Antilles*, cited above, paragraph 37).

52 As regards the balance of interests, the Council submits that, although the system of minimum prices for exports to the Community proposed by the applicant — a system limited, moreover, to a single OCT — might possibly help to avoid serious disturbances to the Community market, it would not be enough to arrive at the degree of control introduced by Article 108a. In addition, when weighing up the balance of interests, account should be taken not only of the irreversible nature of

the suspension sought but also of the broad margin of discretion which the Council enjoys in applying Article 240(3) of the OCT Decision. In the present case, the need to prevent further disruption on the Community market for rice or sugar and the need not to prejudge the Court's decision on the main action should prevail over the risk of purely financial loss suffered by the Netherlands Antilles.

53 The Italian Republic, intervening in support of the form of order sought by the Council, submitted at the hearing of the parties that when weighing up the interests involved account should also be taken of the interest of Indica rice producers in Italy, who lose LIT 46 000 per tonne of rice as a result of the fact that the market price is currently 93% of the intervention price. The total loss suffered in that way over the first few months of the marketing year which began on 1 September 1997 amounts to LIT 2 700 million.

— Findings of the President

54 It has consistently been held that the judge hearing an application for interim measures must first examine whether the possible annulment of the contested measure by the Court would make it possible to reverse the situation that would be brought about by the immediate implementation of that measure and conversely whether suspension of its operation would be such as to prevent it from being fully effective in the event of the main application's being dismissed (see, in particular, Joined Cases 76/89, 77/89 and 91/89 R *RTE and Others* v *Commission* [1989] ECR 1141, paragraph 15, and Case T-179/97 R *Netherlands Antilles*, cited above, paragraph 30).

55 In the present case, Articles 108a and 108b, introducing annual tariff quotas for exports of rice and sugar to the Community, modify the OCT Decision, which, until it was amended by the contested decision, did not provide for any limitation on the application of the rule on cumulation of ACP and OCT origins as regards those two products. It is made explicitly clear in the seventh recital in the preamble to that decision that the Council inserted those new articles into the OCT

Decision in order to avert the risk of conflict between two Treaty objectives, namely the development of the OCTs and the common agricultural policy. The introduction pursuant to the OCT Decision of free access for all products originating in the OCTs and the cumulation of ACP and OCT origins had given rise to serious disruption on the Community market leading on a number of occasions to the adoption of safeguard measures for certain products. In that context, the purpose of the contested tariff quotas is, in the words of that seventh recital, to avoid 'fresh disruption ... by taking measures to create a framework conducive to regular trade flows and at the same time compatible with the common agricultural policy'. At the hearing of the parties, the applicant emphasised that, at the end of the period of application of two successive safeguard measures over the first 11 months of 1997, the economic situation had not changed and the risk of conflict had become more serious, so that it was necessary to adopt a long-term solution.

56 Prima facie, it thus appears that the tariff quotas in issue were introduced in order to maintain Community imports of rice and sugar originating in the OCTs within limits compatible with the equilibrium of the Community market. More specifically, their apparent aim is to limit low-priced imports of those products into the Community, in order to allow the marketing of Community production and to avoid, in the case of rice, a situation in which Community rice producers, who have been encouraged to produce Indica rice by means of a temporary area subsidy, sell large amounts into intervention or revert to producing Japonica rice, of which there is already a surplus in the Community, as was stated in the order in Case T-179/97 R *Netherlands Antilles*, cited above, paragraph 32.

57 That would be the case in particular if the market price in the Community were to remain appreciably below the intervention price set for rice in the Community. In that regard, the Italian Government stated at the hearing of the parties that the market price for Indica rice in the Community was currently 93% of the intervention price, giving rise to losses of LIT 46 000 per tonne of rice and total losses of LIT 2 700 million over the first few months of the marketing year which began on 1 September 1997.

58 It further appears, in the same order of ideas, from the observations made by the Council and the Commission, in particular at the hearing, that the opportunities for developing exports of rice and sugar from the OCTs to the Community are, on the face of it, considerable. It seems to be common ground that processing in the OCTs of rice or sugar from ACP countries, enabling those products to benefit from OCT origin, is a relatively simple industrial process not requiring costly plant. On the face of it, in the absence of any quantitative limit, that circumstance thus favours the development of rice or sugar exports from the Netherlands Antilles to the Community, thus entailing the risk of aggravating the imbalance on the market for Indica rice in the Community, to the detriment of Community producers.

59 It is true that the applicant makes its request in the present interlocutory proceedings for suspension of operation of Articles 108a and 108b conditional upon its preserving or introducing minimum export prices at a level equal to or higher than the intervention prices within the Community, in order to avoid disruption on the Community markets for rice and sugar.

60 The Council objects, however, in the first place, that the replacement of the tariff quotas introduced by the contested decision by a minimum export price would not make it possible to stem the massive flow into the Community of imports of Indica rice from the Netherlands Antilles. It refers, without being contradicted on this point by the applicant, to the difficulties involved in ensuring that minimum prices are applied and the danger that they will be circumvented.

61 Thus, contrary to what the applicant maintains, there is no guarantee that a minimum price, if laid down to replace the contested tariff quotas, would make it possible to avert further disruption on the Community markets for sugar and rice and would not, during the course of the main proceedings, produce certain definitive effects likely to deprive the contested decision of its effectiveness.

62 The Council has also referred, at the hearing of the parties, to the difficulty involved in setting a minimum import price in such a way as to ensure Community preference whilst still protecting the interests of the OCTs. That price is all the more difficult to set in that it is not normal practice to separate the processing operations which give the products Netherlands Antilles origin, it being therefore necessary to construct a price which is not disadvantageous either to the Antillean processors concerned or to the Community producers. In addition, at that hearing, the Council argued that the judge hearing an interim application had no jurisdiction to order the introduction of a system of minimum prices as a temporary substitute for the contested tariff quotas. In its view, to grant the measures sought would be tantamount to considering that it had made a wrong political choice by deciding to have recourse to the system of tariff quotas. The Court hearing the main action cannot make such a finding, still less the judge hearing an interim application.

63 On that point, it must first of all be noted that the jurisdiction of the judge hearing an application for interim measures to order suspension of the application of an act of the Council and to prescribe any interim measures necessary to prevent the occurrence of serious and irreversible harm is explicitly laid down in Articles 185 and 186 of the Treaty.

64 However, even without regard to the not inconsiderable difficulties involved in determining a minimum price for imports of rice into the Community in such a way as to ensure Community preference whilst still protecting the interests of the OCTs, it must be stressed that, other than in a situation of obvious urgency, the judge hearing an application for interim measures may not, without running the risk of encroaching upon the Council's power of assessment, override that institution's assessment as to the choice of the most appropriate measure to prevent disruption on the Community markets for rice and sugar, whilst still taking account of the requirements imposed by the association of the OCTs with the Community, in accordance with Article 3(r) of the Treaty (see Case T-179/97 R *Netherlands Antilles*, cited above, paragraph 35).

65 In the present case, therefore, when assessing the balance of interests, account must be taken not only of the risk that the Community's interests may be irreversibly affected if the interim measure sought is granted (see paragraphs 56 to 61 above) but also of the Council's power of assessment when reconciling different objectives, in this case those of the common agricultural policy and the association of the OCTs with the Community. The applicant's request cannot, therefore, be granted unless the urgency of the measures sought appears undeniable (see Case T-179/96 R *Antonissen* v *Council and Commission* [1997] ECR II-425, paragraph 22, and Case T-179/97 R *Netherlands Antilles*, cited above, paragraph 36).

66 The effects of the contested decision on the applicant's position must therefore be examined, bearing in mind that it has consistently been held that damage of a financial nature is not in principle considered to be serious and irreparable unless, in the event of the applicant's being successful in the main action, it could not be wholly made good. That may be so in particular if the damage, even when it occurs, cannot be quantified (see Cases C-51/90 R and C-59/90 R *Comos-Tank and Others* v *Commission* [1990] ECR I-2167, paragraph 24).

67 In the present case, more particularly with regard to the seriousness of the damage alleged in the rice sector, it must be noted that the applicant bases its argument in support of its allegations on the assumption that Article 108a in fact has the effect of limiting rice exports to the Community to 35 000 tonnes per year (see paragraph 41 above).

68 That assumption cannot prima facie be accepted. It is clear from Article 108a that the annual tariff quota for rice which may be exported to the Community at a zero rate of duty is 160 000 tonnes. The fact that that quota includes the tariff quota of rice originating in the ACP States does not contradict that analysis, since the latter quota is subject to customs duty at the rate of 50% in the case of direct exports to the Community. It is thus clearly in the interest of the ACP countries to give

preference to exports via the OCTs up to the limit of the 160 000-tonne quota defined in Article 108a. That finding is corroborated by the answers given by the Council and the Commission, and not challenged by the applicant, to the questions concerning previous practice put by the President at the hearing of the parties. It appears that in 1997 only 50 000 tonnes of ACP rice were exported directly to the Community, whilst exports via the OCTs were limited to 114 338 tonnes between 1 January and 30 November 1997 under the safeguard measures which applied during that period. Direct exports were much lower still in previous years, when no limit was placed on zero-rated exports via the OCTs. Those answers appear to confirm that, contrary to what the applicant alleged at the hearing, the ACP States are in practice able to favour exports via the OCTs in order to benefit from that exemption from duty. The applicant has not put forward any plausible argument capable of casting doubt on that possibility.

69 It must further be noted that, according to the information supplied by the applicant, 217 000 tonnes of rice were exported to the Community in 1995-1996. The imposition of an annual tariff quota of 160 000 tonnes thus entails only a reduction of the order of 22% in comparison with rice exports during the years prior to the application of safeguard measures. Furthermore, the experience of the safeguard measures introduced in 1997 — which, between 1 January and 30 November 1997, imposed quantitative limits on exports at least as stringent as the tariff quotas introduced by the contested decision — does not appear, according to the documents before the Court and the information given by the applicant, to have led to the closure of a large proportion of the rice mills established in the Netherlands Antilles.

70 For all those reasons, the applicant's assertion that immediate application of Article 108a is likely to lead to the closure of most of the rice mills in the Netherlands Antilles does not appear to be grounded.

71 With regard to the sugar sector, the applicant merely asserts that the setting of an annual tariff quota of 3 000 tonnes will lead to the closure of all the undertakings engaged in sugar processing, but does not adduce any evidence as to the place occupied by such activities in the Netherlands Antilles economy. In response to the questions put by the President at the hearing of the parties, it merely reiterated that in 1996 the rice and sugar processing sectors together accounted for 1.2% of the GDP of the Netherlands Antilles. It appears, however, from the report of the Netherlands Economic Institute, on which the applicant relies, that the sugar processing undertakings which are developing in the Netherlands Antilles on the basis of the cumulated ACP and OCT origin rule are still in a start-up phase. According to that report, the two undertakings established in that sector in the Netherlands Antilles, whose annual production capacity amounts to 45 000 tonnes, exported only 3 500 tonnes in 1996. On the basis of those figures, the application of Article 108b would thus only entail a reduction in exports of the order of 14% in comparison with 1996.

72 The aspects examined above therefore do not show, at this stage of the examination, that the damage which the applicant is liable to suffer in the event of immediate application of Article 108b is undeniably serious.

73 Nor is it possible to accept the applicant's argument that, in substance, the immediate application of Articles 108a and 108b would hinder the economic development of the Netherlands Antilles as sought by the Treaty and the OCT Decision.

74 The applicant claims in particular that the application of those articles prevents the contribution of trade with the Community to the GDP of the Netherlands Antilles from increasing from 2.2% in 1997 to 2.9% in 1998 and 3.1% in the year 2000, as predicted in the Netherlands Economic Institute's report, and, according to the same report, prevents its unemployment rate from being brought down from 12.4% to 12%.

75 That argument fails, however, to take account of the fact that the contested tariff quotas impose a reduction only in exports to the Community, of the order of 22% for rice and 14% for sugar, in comparison with the quantities exported in 1995 and 1996, as has just been established. The figures advanced are, moreover, mere forecasts as to the development of rice and sugar exports to the Community in the coming years. In any event, the applicant has not adduced any specific evidence from which it might be assumed that the damage which it is likely to suffer during the course of the main proceedings could be irreversible and that, were the contested decision to be annulled, the rice and sugar sectors would not prosper again.

76 The applicant has therefore not established the existence of a risk of serious and irreparable harm.

77 Consequently, having regard to the Council's power of assessment when reconciling different Treaty objectives and to the risk of serious harm which the Community is liable to suffer in the implementation of the common agricultural policy, the condition relating to the existence of urgency cannot be found to be satisfied in the present case.

Prima facie case

— Arguments of the parties

78 In the application for interim measures, the applicant puts forward a single plea in law, alleging the Council's lack of competence *ratione temporis*. Under Article 240(3) of the OCT Decision, which provides: 'before the end of the first five years, the Council ... shall ... establish ... where necessary, any amendments proposed by the Commission', the Council was empowered to effect a mid-term review of the OCT Decision only before 1 March 1995. Article 240(3)(b) concerns, moreover, only an option open to the Council and does not in any way oblige it to effect a

mid-term review of the OCT Decision. To carry out such a review after the expiry of the time-limit laid down in Article 240 thus runs counter to the principle of legal certainty. In support of its argument, the applicant refers to the judgment in Case C-430/92 *Netherlands* v *Commission* [1994] ECR I-5197.

79 The Council considers that it had the power to adopt the contested decision. It challenges the interpretation of Article 240(3) put forward by the applicant. The purpose of the five-year period provided for therein is to allow the review of the OCT Decision to take account of the review of the Community's financial assistance, which had been set for five years, and to be aligned with that of the fourth Lomé Convention, in order for the OCTs to benefit from the improvements resulting from the latter.

— Findings of the President

80 Prima facie, Article 240(3) explicitly confers on the Council an optional power to review the OCT Decision at mid-term, as the applicant accepts.

81 Prima facie, within the scheme of the association of the OCTs to the Community introduced by the OCT Decision, Article 240(3) empowers the Council to review that decision 'before the end of the first five years', in order to take account of the experience acquired by the Commission and the relevant authorities of the OCTs, of the amendments to the Lomé Convention under negotiation between the Community and the ACP States and of the review of the Community's financial assistance.

82 The time-limit provided for in Article 240 therefore appears to be intended to allow, if necessary, some of the provisions of the OCT Decision to be adjusted in response to developments or new needs. It seems to have been chosen because it represents, in principle, the most suitable moment for effecting any adaptations or amendments of that kind. Prima facie, therefore, it must be interpreted as constituting no more than a guideline.

83 In particular, within the scheme of the OCT Decision, it would be prima facie contrary to the very purpose of Article 240(3) to rule out any possibility of review after the expiry of the first five-year period mentioned in that article where such review could not be effected within the time-limit indicated but nevertheless meets certain of the needs for which the possibility of mid-term review was specifically envisaged in the OCT Decision.

84 More generally, that interpretation appears to be in agreement with well-established case-law (see, *inter alia*, Case 148/77 *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787, paragraph 10). In this case, contrary to what the applicant has asserted, the five-year period in question does not, prima facie, have the same legal effect as the time-limit of 60 working days within which, under Article 30(8) of Annex II to the OCT Decision, the Community authorities must take a decision on a request for a derogation from the rules on origin, which was the provision in issue in Case C-430/92 *Netherlands* v *Commission*, cited above. Unlike Article 240(3) of the OCT Decision, Article 30(8) of Annex II thereto grants Member States or OCTs certain procedural rights by specifically laying down a time-limit within which their requests for derogations must be examined, on the expiry of which, if a decision is not taken, 'the request shall be considered as accepted'.

85 The single plea in law put forward by the applicant in the context of the interlocutory proceedings does not, therefore, appear prima facie to be well founded.

86 Consequently, the application for interim measures must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 2 March 1998.

H. Jung — A. Saggio

Registrar — President